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IOWA INDUSTRIAL COMMISSIONER REPORT

Decisions on Selected Cases

July 1, 1983 — June 30, 1984

ROBERT C. LANDESS
Industrial Commissioner

Published by
STATE OF IOWA
Des Moines, Iowa

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*All decisions are final agency decisions unless otherwise indicated.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS ADAMS,	:	
Claimant,	:	
vs.	:	
	:	File No. 643405
HYGRADE FOOD PRODUCTS CORPORATION,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
NATIONAL UNION FIRE INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Defendants appeal from a review-reopening decision wherein claimant was awarded 100 weeks of permanent partial disability benefits in addition to 50 weeks of permanent partial disability and 20.429 weeks of healing period benefits previously paid.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Mary Walsh and Robert Travis; claimant's exhibits 1 and 2; defendants' exhibit A; the evidentiary deposition of Earl M. Mumford; and the briefs and filings of all parties on appeal.

ISSUES

1. Whether competent and sufficient evidence exists to warrant an award of 30 percent industrial disability as a result of the July 17, 1980 accident.

2. Whether the deputy erred by failing to enter sufficient and specific findings of fact regarding physical and industrial limitations which claimant had prior to July 17, 1980, and further, by failing to reflect such findings in his determination of industrial disability.

3. Whether the deputy erred by improperly entering findings of fact with regard to credibility of the witnesses which have no basis within the record.

4. Whether the deputy erred by permitting claimant to meet his burden of proof under an improper standard.

REVIEW OF THE EVIDENCE

Claimant, age 35 at the time of the hearing, is a divorced father of three dependent children. Claimant did not complete the eighth grade and testified that he had been enrolled in special education classes geared toward slow learners. Claimant's work experience prior to joining defendant employer includes laboring for construction companies, operating a boom truck and driving a dump truck. (Transcript, pp. 5-11)

In December of 1974 claimant had complaints of pain in the left groin while walking, which increased when he attempted to lift heavy objects. Claimant was examined by Earl M. Mumford, M.D., an orthopedic surgeon in Storm Lake, who reported on December 12, 1974 as follows:

> Examination - Patient walks with a mild hip limp on the left side. He has flexion to 90 degrees, extension to 180 degrees in the hip. There is some pain with rotation externally and internally which can be accomplished to 20 degrees internal and about 30 degrees external rotation. Abduction is limited to about 25 degrees. There is atrophy of the thigh.
>
> X-ray reveal changes compatible with a Perthes disease but marked shortening of the neck flattening of the femoral head. There are loose bodies present in the interarticular space.
>
> Patient certainly would be a candidate despite his age of 27 for total hip replacement if he realizes that the hip may well wear out before his time, that he still would not be able to do the extremely active things that he desires to do because of chances of loosening up the components and wearing them out prematurely. Advised that he should think about it. If he has difficulty continuing his job or has night pain then he should consider it. Otherwise attempt to live with it. (Mumford Deposition Exhibit 1)

A clinical note recorded by Dr. Mumford on January 11, 1978 states that claimant had had recent complaints of back pain. The pain in claimant's hip had been gradually worsening and he walked with a considerable limp. (Mumford Dep. Ex. 1)

On February 3, 1978 Dr. Mumford performed a total hip arthroplasty on claimant. Claimant was cautioned at that time that there was no guarantee that the hip joint would last a lifetime and that his activities would be restricted to a degree. (Mumford Dep., p. 5) Dr. Mumford was questioned as to the extent of claimant's disability in connection with his Perthes disease and the hip replacement:

> A. It is my opinion that he is much improved or was much improved in 1978 from his surgical procedure. He still had disability, in that he had some limp due to the weakness of his muscles; and with heavy activity still had some discomfort.
>
> I do not know what his disability is at this moment. If he is fortunate enough to have the components remain firm without wearing out or loosening up, his disability is not marked at this time. However, should the components loosen up or wear out, his disability could increase tremendously in the future.
>
> Q. So as to insure as good a continuation of reduced problems as possible, what type of advice and recommendations do you give to a patient with conditions such as Mr. Adams had?
>
> A. The patient was advised to avoid heavy lifting; to avoid jogging or jumping on the extremity.
>
> Q. Should repetative bending or stooping be avoided?
>
> A. If the repetative bending and stooping is done without a big load on the body it could be tolerated.
>
> Q. Okay. What kind of weight restrictions do you think are appropriate, as far as avoidance of heavy lifting?
>
> A. 40 or 50 pounds.
> (Mumford Dep., pp. 5-6)

On cross-examination Dr. Mumford testified as follows:

> Q. Dr. Mumford, as I understand, you last saw Mr. Adams, was it December of '78?
>
> A. It was September of '78.
>
> Q. September of '78. At that time, with the exception of a limp, he didn't seem to be experiencing any problems; is that correct?
>
> A. No. He was doing very adequately, as far as that is concerned, but he still had some weakness of his leg and still did limp.
>
> Q. Was that kind of keeping within your timetable, as far as his recovery would be concerned?
>
> A. Yes.
> (Mumford Dep., p. 10)

Claimant had began working for defendant employer in January of 1977. A short time after starting to work, claimant settled into a position on the night cleanup crew, which cleans out the gutters on slaughter floors. At some point prior to the summer of 1980 claimant began working as a maintenance worker and was primarily responsible for repair and upkeep of plant machinery. Claimant testified that while the job normally required an aptitude for electrical work and proficiency with a welding torch, he was able to get by with just helping other workers when such skills were needed. Claimant denied experiencing any lasting disability or having problems performing his job due to his hip replacement. (Tr., pp. 11-13)

On July 17, 1980, claimant was performing maintenance on a piece of machinery and had to pull a four foot by six foot steel tub from beneath the machine. Claimant recalled that one of the tub's legs fell into a floor drain, causing him to fall also and injuring his back as he landed on the floor. (Tr., pp. 17, 67-68) Claimant was discovered still lying on the floor by another employee and was taken to a hospital emergency room with complaints of back pain. Emergency room records recorded by Dr. Daniels note that claimant had tenderness in the low back and complained of pain in the lumbar spine. (Claimant's Exhibit 1)

Claimant was referred by Dr. Daniels to Albert D. Blenderman, M.D., who first examined claimant on August 4, 1980. Dr. Blenderman recorded the following history and impression after his initial examination of claimant:

> He had no discomfort in either area for two weeks, then started having posterior shoulder pain and low back pain. He saw Doctors Olson and Daniels at that time and was given some pills to take for pain and given some physiotherapy, which relieved the pain in both areas.
>
> He was subsequently allowed to go back to work, since his pain had subsided and on the 17th of July, 1980, the patient did exactly the same thing and [sic] second time. Again, while pulling on a heavy tub he developed moderate discomfort in the posterior right shoulder and the low back. This time he went to the hospital, was given some Tylenol and Codeine for pain and given some further physiotherapy.
>
> The patient states his right shoulder pain has now subsided and he notices only a negligible degree of discomfort infrequently. However, he says he continues to have an aching sensation across the lower back in a band about four inches wide. He does not have any pain radiating into either leg or numbness or tingling in either leg.
>
> ....
>
> On evaluation of the low back the patient has unlimited range of motion of the back, though with full flexion and lateral bending right and left he complains of pain from about the level of L-3 through 5 and radiating across the low back at these levels.
>
> He has no palpable muscle spasm and only minimal muscle discomfort on either side of the midline opposite L-3 through 5, with only mild pain on

palpation in the midline over the same areas, most pronounced at about the level of L-4.

He has a well-healed posterior incision on the left hip from his prior total hip replacement and this incision is nontender. He has no pain on palpation in either sciatic notch.

Straight leg raising on either leg to about 70 degrees intensifies the mild low back pain, but produces no leg pain. Reflexes are normal and skin sensation appears normal on both legs.

His leg lengths are approximately equal on external measurement. He has some wasting of the muscles of the left leg in both the thigh and calf, probably as a result of his long-standing hip problem prior to his surgery.

X-rays of the lumbar spine brought with the patient show a mild scoliosis. On the lateral view it also appears that the patient has a pedicle defect at the level of L-5, but there does not appear to be a forward slip of L-5 on S-1.

Further films were taken in the lateral projection and oblique projection, centering directly over this area.

These further oblique views show a pedicle defect at the level of L-5. This is very definite on the right and probably present on the left, though not quite so distinct.

DIAGNOSIS: CHRONIC LUMBOSACRAL STRAIN, SUPERIMPOSED ON A PRE-EXISTING PEDICLE DEPECT AT THE LEVEL OF L-5.

Treatment: I would suggest application of a canvas low back support, which would be a little lighter weight than the heavier chairback brace and see how the patient gets along. However, his days of doing heavy-duty work are over.

If he persists in doing heavy type of labor, his back pain will return and gradually he will develop a forward slip of L-5 on S-1. Therefore, this man is going to require some retraining or transfer to some other type of job at Hy-Grade where he will not have to be doing heavy lifting, constant bending and stooping or overuse of the back.

The patient is to wear his back brace throughout the day, but need not wear it at night unless so desired. He is to see me for reevaluation in three weeks.

In addition to the back support, a hot tub soak three times daily for 20 minutes is advised.

The patient is to remain off work until I see him for re-evaluation. (Cl. Ex. 1, pp. 1-3)

Claimant was released by Dr. Blenderman to return to light duty work in October of 1980. Claimant did attempt to work at a packing job in the employer's plant, putting pork chops in 10 pound packages and stacking them on a pallet. He testified that he could endure the work for only a couple of hours due to back pain caused from having to bend over. (Transcript., pp. 22-23; Cl. Ex. 1, p. 6) Claimant also returned to work for one day in November, but was unable to tolerate his assigned job of cleaning railings while standing on a ladder. (Cl. Ex. 1, p. 7)

Claimant was last examined by Dr. Blenderman on December 9, 1980, at which time he recorded the following clinical note:

It appears that no further orthopedic care is necessary. The patient has been told he could try to return to work, if desired; though he may have too much discomfort to continue this type of work that involves heavy lifting.

He tells me that he has an appointment to go to Fort Dodge this weekend for some skill's testing, to see what he would be best trained to do in the future.

It appears that the patient has a minimal disability solely related to his workman's [sic] compensation injury. This minimal disability should not be greater than a 10 percent disability of the back, though in actuality, he has a larger disability rating because of the pedicle defect at the level of L-5. However, no more than 10 percent of his present problems are due to the work-related incident.

I have scheduled no further appointments to see him.
(Cl. Ex. 1, p. 9)

Claimant testified that he returned to work in December of 1980, and remained employed by defendant employer until July 1, 1981. Upon returning to work he was assigned to a position in the rendering department and was also required to clean off trucks with a garden hose. Claimant testified that while he was able to tolerate the inside work, the garden hose which he used to clean trucks was about 150 feet long, and aggravated his back as he moved it. (Tr., pp. 24-26)

Claimant had began working part-time as a cleaning person at Ivanhoe's, a tavern, in March of 1981, and went to work there full time as a bartender in July of 1981. Claimant testified that while he had been earning $11.50 an hour while working for defendant employer, he felt it to be in his best interests to take the advice of Dr. Blenderman and Dr. Daniels to find employment of a less physical nature. Claimant earned $3.75 an hour at Ivanhoe's. (Tr., pp. 28-30)

Claimant quit his job at Ivanhoe's in February of 1982 when his hours were cut severly. He testified that he has been unable to find gainful employment since that time despite enlisting the services of Job Service of Iowa. Claimant states that his current physical limitations due to back pain precludes him from lifting heavy objects. He further indicated that activities such as driving, shoveling, and mowing cause new episodes of back pain. (Tr., pp. 31-34)

Claimant testified that defendant employer's plant closed permanently in October of 1981, but that he and other plant employees knew of the forthcoming closing prior to July of 1981. He noted that by quitting his job in July of 1981 instead of remaining employed until the plant's closing, he forewent severence pay to which he knew he would otherwise have been entitled to. (Tr., pp. 60-64)

A claim activity report filed January 25, 1982 indicates that claimant has been paid twenty weeks and three days of healing period benefits covering the period of July 18, 1980 through December 9, 1980 (excluding November 10, 1980) and fifty weeks of permanent partial disability benefits.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 17, 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 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).

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. * * * *

ANALYSIS

The first issue on appeal is whether competent and sufficient evidence exists to warrant an award of 30 percent industrial disability as a result of the July 17, 1980 accident. This issue will be considered herein concurrently with the second issue on appeal, whether the deputy erroneously failed to make and consider findings regarding claimant's preexisting physical and industrial limitations.

The evidence contained in the record indicates that prior to the July 17, 1980 accident claimant was sufficiently able to perform his job assignments at defendant employer's plant. Following the accident, claimant was severly restricted with regard to the jobs which he could perform, due to lifting restrictions and his inability to bend over or climb ladders for extended periods of time. Although the record does indicate that claimant had a total hip replacement in 1978, no evidence has been presented to indicate that his level of job performance had been affected subsequent to that operation. While Dr. Blenderman has assigned a functional impairment rating to claimant of 10 percent as a result of his back condition, claimant's prospects for future employment are further hampered by his limited education and lack of employment skills. Claimant has spent most of his adult life working as a laborer or a truck driver, neither area of which represents a realistic area of employability due to the physical limitations. No error is found with the deputy's determination that claimant has sustained an industrial disability of 30 percent.

The third issue on appeal is whether the deputy erred by improperly entering findings of fact with regard to credibility of the witnesses which have no basis in the record. Defendants

argue that the deputy erred by indicating in the review-reopening decision that claimant's credibility was bolstered by his actions concerning his resignation from defendant employer's plant. Claimant's testimony that he knowingly denied himself severence pay which he would have received had he remained employed until the plant's closing remains unrefuted. As the credibility to be assigned a witness' testimony is an issue in any proceeding, it is the deputy's duty to determine the weight to be given to that testimony. That the deputy found claimant's actions to bolster his testimony's credibility is not unreasonable, and no error is found.

The final issue on appeal is whether the deputy erred by permitting claimant to meet his burden of proof under an improper standard. Defendants specifically attack the deputy's statement that claimant had sustained his burden of proof by producing supportive medical evidence concerning the time lost from gainful employment. Careful review of the deputy's decision reveals that the statement complained of was made in recognition that healing period benefits already paid to claimant were proper. The deputy then proceeded in orderly fashion to a discussion of whether claimant had, in fact, sustained a permanent disability which was causally related to his injury of July 17, 1980. No error is found.

FINDINGS OF FACT

1. Claimant worked as a maintenance worker for Hygrade Food Products Corporation.

2. Claimant underwent a total hip arthroplasty on February 3, 1978.

3. Claimant has a preexisting pedicle defect at his L-5 level.

4. Claimant injured his back in an industrial accident on July 17, 1980.

5. Claimant was able to perform all of his assigned work duties prior to July 17, 1980.

6. Claimant remained off work through December 9, 1980.

7. Claimant worked for Hygrade from December 10, 1980 through July 1, 1981.

8. Claimant left his employment due to back pain and upon his doctor's advice to find work of a lighter nature.

9. Claimant found work as a bartender at an hourly rate approximately one-third of what he earned at Hygrade.

10. Claimant lost his bartending job due to a cutback in hours.

11. Claimant is 35 years old.

12. Claimant quit school during eighth grade, and had been enrolled in special education classes.

13. Claimant has a functional disability of ten percent as a result of his back problems.

14. Claimant's work experience is limited to heavy labor and truck driving jobs.

15. Claimant is presently unable to work in a job in the meat packing industry.

16. Claimant has already received healing period benefits of 20.429 weeks and permanent partial disability benefits of 50 weeks.

CONCLUSIONS OF LAW

Claimant has sustained his burden of proving an industrial disability of 30 percent to the body as a whole.

Claimant has sustained the burden of proving that his disability is causally related to his injury of July 17, 1980.

WHEREFORE, the deputy's decision filed February 4, 1983 is affirmed.

THEREFORE, it is ordered:

That defendants pay unto claimant an additional one hundred (100) weeks permanent partial disability at the agreed weekly rate of two hundred eighty-three and 67/100 dollars ($283.67) together with statutory interest of ten percent (10%) to begin with the date of the review-reopening decision.

That accrued benefits are payable in a lump sum.

That defendants provide the claimant with such reasonable medical care as may be necessary to treat the injury by appointing an agreed upon orthopedic surgeon in the Ottumwa, Iowa, area.

Costs of this action are charged to defendants pursuant to Rule 500-4.33.

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

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN ADELMUND, JR.,	:	
Claimant,	:	
vs.	:	
VIKING PUMP DIVISION - HOUDAILLE INDUSTRIES, INC.,	:	File No. 632465
Employer,	:	A P P E A L
and	:	D E C I S I O N
LIBERTY MUTUAL INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision wherein claimant was awarded 175 weeks of permanent partial disability benefits. Claimant has filed a cross-appeal in this matter.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Dorothy Angeline Adelmund, Ernest Bisbee, Vernon Lindaman, Heinie Walbaum, and Earl Muir; claimant's exhibits 1 through 11; defendants' exhibits A through C; the depositions of Thomas A. Bairnson, M.D., James Cafaro, M.D., and Michael L. Deters, M.D.; and the briefs and filings of all parties on appeal.

ISSUES

Defendants appeal on the basis that an award of 35 percent industrial disability due to the employment related aggravation of claimant's obstructive lung disease is excessive.

Claimant cross-appeals on the basis that claimant is actually entitled to an award of permanent total disability as a result of his obstructive lung disease.

REVIEW OF THE EVIDENCE

Claimant, who was 56 years old at the time of the hearing, has a sixth grade education. Claimant testified that he worked off and on for defendant employer for a total of 34 years. He started out as a chipper and grinder and was responsible for removing excess edges from molding seams of iron products. One method of performing the job of chipper and grinder made use of sand to blast off the excess edges, meaning that claimant worked in an environment with a high level of dust and smoke during his eight to ten years in that department. Claimant later transferred to the plant's iron foundry. While he held a number of positions during his 25 years in the foundry, claimant testified each required that he operate in an environment of smoke, steam, and fumes. He explained that melted iron was heated to 2750 degrees and then poured into molds, causing most of the foundry to become steam and smoke filled. Claimant was also responsible for cleaning the interior of the foundry furnaces. He recalled that the cleaning work was such a dirty job that a mask and respirator could not prevent inhalation of dust particles. Claimant testified that he was exposed to coal dust and asbestos on a number of occasions during the years he worked for defendant employer. (Transcript, pp. 9-53)

Claimant recalled an incident occurring in 1975 when he inhaled smoke from a burning bag of sulfur while at work. He indicated that he was off work for three days following the incident and that he has had problems breathing since that incident. Claimant also testified that he had spit up black or grey colored phlegm since the time he began working in the foundry. Claimant has not worked since September 18, 1979 due to breathing difficulties. He testified that he has felt much better since leaving work. (Tr., pp. 53-55, 123-125)

Claimant admitted that he had smoked one pack of cigarettes per day from age 16 to approximately December of 1980. He denied ever telling a doctor that he had previously smoked two to three packs daily. (Tr., pp. 120-121, 15--153)

Dorothy Adelmund, claimant's wife, testified that she first noticed that claimant was having difficulty with breathing about five or six years prior to the November 1981 arbitration hearing. She stated that claimant had usually smoked about a pack of cigarettes daily before he quit altogether. She recalled that claimant's clothes were extremely dirty when he returned from work and would leave dirt on the floor where they had been thrown. Mrs. Adelmund noted that claimant presently has difficulty even walking due to his shortness of breath, and that he no longer is able to work in the garden or do lawn work. (Tr., pp. 203-235)

Ernest Bisbee, Vernon Lindaman and Heinie Walbaum all testified on claimant's behalf as to the work environment in defendant employer's plant. Each witness verified claimant's testimony that the foundry environment was dusty, smokey, and steamy. (Tr., pp. 235-293)

Thomas A. Bairnson, M.D., who operates a family practice, testified that he first saw claimant on September 6, 1979 for shortness of breath and a chronic cough. The history recorded by Dr. Bairnson indicated that claimant worked in a foundry and had smoked one pack of cigarettes per day for many years. The doctor ordered pulmonary testing from which he concluded that claimant suffered from obstructive emphysema. He testified that both claimant's history of smoking and the environment in which claimant had worked would contribute to cause emphysema, but refused to state an opinion as to the degree to which either had contributed to the disease. Dr. Blenderman merely stated that

his findings with regard to claimant were consistent with a 25 percent to 35 percent impairment of respiratory function as outlined in the AMA Guide for Evaluation of Permanent Impairment. (Bairnson Deposition, pp. 4-26)

James Cafaro, M.D., a pulmonary medicine specialist, examined claimant on a referral from Dr. Bairnson on September 24, 1979. Dr. Cafaro recalled that claimant had complaints of exertional dyspnea, or shortness of breath while doing any activity. Dr. Cafaro testified that the history taken of claimant revealed that he had worked in an iron foundry for over 20 years and had experienced shortness of breath for three years, wheezed with any exertion, and often coughed yellow sputum. The doctor understood claimant to smoke one pack of cigarettes daily at the time of the examination whereas he had previously smoked two or three packs daily. (Cafaro Dep., pp. 4-7)

Dr. Cafaro found no outward signs of abnormalities during his examination of claimant. Upon reviewing the pulmonary function tests run by Dr. Bairnson, however, Dr. Cafaro concluded that claimant suffers from moderate obstructive lung disease. The doctor believed claimant's lung disease to be primarly related to cigarette smoking, but refused to exclude the possibility of chronic bronchitis due to his work environment. (Cafaro Dep., pp. 6-8) Dr. Cafaro was questioned as to the degree of claimant's lung disease which might be attributable to his work environment:

> A. Well, there's no way to be absolutely sure how much was caused by each of these, but at least in studies, which a large number of people are examined that have industrial exposure and smoke or don't smoke, it's usually felt that the amount of obstructive lung disease that can be attributed to the types of exposure that he had are probably small compared to the effect of cigarette smoke on his lung function. (Cafaro Dep., pp. 9-10)

Dr. Cafaro was also questioned as to claimant's prognosis:

> Q. All right. Based upon what knowledge you have of this patient, what would you expect for his prognosis?
>
> A. Is he still smoking?
>
> Q. Well, let me ask you this: Let's assume for the moment that he has stopped smoking altogether. What would you expect for a prognosis for his condition?
>
> A. I would expect he probably would have some improvement in his chronic cough, and perhaps a little improvement in his dyspnea over a period of four to six months, but over a prolonged period of time he should expect that his dyspnea probably is going to gradually get worse.
>
> Q. All right. And if this man did in fact continue to smoke a pack a day, approximately a pack a day, what would you anticipate would be his prognosis under those circumstances?
>
> A. I would expect that he would have a more rapid deterioration of his function and increase in his symptoms with time. (Cafaro Dep., p. 12)

On cross-examination Dr. Cafaro stated that he believed claimant to suffer from both emphysema and chronic bronchitis. He indicated that claimant's work environment may have aggravated a lung condition caused by cigarette smoking, but refused to conclude that it had caused further permanent impairment without a better understanding of the conditions as they had existed. Dr. Cafaro indicated that his opinions would remain consistent whether claimant has smoked one or three packs of cigarettes per day. (Cafaro Dep., pp. 15-28)

Dr. Cafaro advised claimant to stop smoking and prescribed bronchodilators to improve his pulmonary function. Claimant failed to attend two additional appointments arranged by the insurance carrier with Dr. Caforo. (Cafaro Dep., pp. 10-12)

Michael Deters, M.D., testified that he examined claimant for respiratory status of lung disease. He stated that his examination of claimant focused specifically on respiratory function, with findings indicative of severe chronic obstructive lung disease. The history recorded by Dr. Deters indicated that claimant smoked one pack of cigarettes per day, and had began to experience shortness of breath and wheezing upon exertion over the previous four to six years. Dr. Deters was aware that claimant worked at a foundry and often cleaned furnaces, and that claimant had been exposed to sulfur dioxide and asbestos during his years of employment. (Deters Dep., pp. 4-7, 15-16)

Dr. Deters testified that claimant became short of breath with audible wheezing when asked to walk down a 50 to 60 foot hallway. He also observed that claimant had difficulty climbing stairs and had to rest several times while redressing. Dr. Deters stated that the records of Dr. Cafaro and Mayo Clinic (which analyzed the pulmonary tests run by Dr. Bairnson) were consistent with his own diagnosis in indicating that claimant suffers from obstructive lung disease. (Deters Dep., pp. 8-18)

Dr. Deters testified that claimant's working conditions were synergistic with or aggravators of underlying lung disease. He further testified that tobacco and cigarette smoking is the primary cause of obstructive lung disease, and that when a patient gets such disease there are permanent changes which quitting smoking will not reverse. Dr. Deters indicated that dust, cold, and humidity would all have an aggravating effect on claimant's lung disease. (Deters Dep., pp. 22-24, 32) He was questioned as to the effect that working at the iron foundry had upon claimant's lung disease:

> Q. So are you telling me that his underlying lung disease was aggravated by the foundry?
>
> A. Yes, I feel that it was.
>
> Q. To what degree, or are you --
>
> A. I really can't say.
>
> Q. Now that he is out of the foundry, is he any worse for being in there; are you saying that, or is the underlying lung disease that's causing his present problem?
>
> A. That I really can't say either, how much of one or the other. There is no way you have of measuring what percent of one may have aggravated the other. He still has his chronic obstructive lung disease, and how much of the foundry work over this cumulative period of time made it that much worse or aggravated it.
>
> Q. Are you saying it did to some degree?
>
> A. Uh-huh.
> (Deters Dep., pp. 45-46)

The following ensued when Dr. Deters was asked about the degree of disability caused by claimant's obstructive lung disease:

> Q. All right. And, Doctor, did you make an estimate of disability based solely upon this severe chronic obstructive lung disease that is suffered by Mr. Adelmund regarding that condition?
>
> A. Yes.
>
> Q. Would you indicate what estimate of disability you have made?
>
> A. Oh, 50 to 70 percent, or greater than 50 percent anyway.
>
> Q. Now, is this a -- are you taking into consideration the effect on his ability to work, or is this just an impairment rating?
>
> A. It's ability to do anything. It's based on what he can actually physically do.
>
> Q. In the way of walking, such things as that?
>
> A. Right, uh-huh.
>
> Q. But are you placing that as against the job market?
>
> A. Yes.
>
> Q. You're considering that, also?
>
> A. Right.
>
> Q. Have you looked at the AMA Guides?
>
> A. Uh-huh.
>
> Q. And how do they rate people with obstructive lung condition?
>
> A. This would be a Class 4 or greater than 50 percent.
> (Cafaro Dep., pp. 17-18)

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on September 20, 1979 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 20, 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.2 867. See also Musselman, 261 Iowa 352, 154 N.W.2d 128.

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).

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

"[T]o prove causation of an occupational disease, the claimant need only meet the two basic requirements imposed by the statutory definition of occupational disease....First, the disease must be causally related to the exposure to harmful conditions of the field of employment. Secondly, these conditions must be more prevalent in the employment concerned than in everyday life or in other occupations." McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

Iowa Code section 85A.7 provides, in part:

> The provisions of this chapter providing payment of workers' compenstion on account of occupational disease as defined and set out in this chapter, shall be subject to the following limitations and exceptions:
>
> ....
>
> 4. 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.

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, 255 Iowa 1112, 1121, 125 N.W.2d 251,.

ANALYSIS

The greater weight of the evidence indicates that claimant suffers from obstructive lung disease caused primarily by smoking which has been heightened by the environment in which he worked. The ultimate issues on appeal and cross-appeal are the same -- whether the deputy properly determined that claimant is industrially disabled to the extent of 35 percent as a result of the effect his working environment had upon his obstructive lung disease.

Defendants argue that the award of 35 percent industrial disability was excessive in light of claimant's history of smoking and arthritis. While all three doctors who testified by deposition agreed that the current status of claimant's lung disease had evolved as a combination of smoking and his work environment, none of the doctors could determine to what degree each cause had contributed on an individual basis. Both Dr. Cafaro and Dr. Deters indicated that claimant's smoking was the primary cause of his lung disease. Dr. Deters also indicated that most physical changes related to obstructive lung disease are irreversible. The record appears to be void of medical evidence concerning functional impairment to claimant caused by his arthritis. Taking into account all of the criteria used to determine industrial disability, including his lung disease, the deputy first determined claimant to be 90 percent industrially disabled. In light of the absence of any medical testimony purporting to allocate the degree the lung disease caused by claimant's work environment, it was not unreasonable for the deputy to conclude that claimant is as much as 35 percent industrially disabled as a result of the aggravating effect which his work environment had upon his lung disease.

Claimant argues, conversley, that he is entitled to an award for the entire extent of his industrial disability, and further, that he is permanently and totally disabled. As was noted in the deputy's arbitration decision, Iowa Code section 85A.7(4) contemplates an apportionment where a disease not otherwise compensable is aggravated or heightened by conditions of employment. Claimant's obstructive lung disease, therefore, to the degree that it was caused by claimant's smoking habits, is not compensable. Under the evidence presented in this case, it was not unreasonable for the deputy to conclude that only 35 percent of the total finding of 90 percent industrial disability was attributable to work related aggravation or heightening of claimant's obstructive lung disease.

FINDINGS OF FACT

1. Claimant is 56 years old.

2. Claimant has a sixth grade education.

3. Claimant worked 34 years for defendant employer.

4. During the course of his employment, claimant has been exposed to excess levels of dust, smoke, and steam.

5. Claimant smoked one pack of cigarettes per day from age 16 to age 55.

6. Claimant has contracted an obstructive lung disease.

7. Claimant's lung disease is due in part to smoking and in part to his work environment.

8. Claimant is unable to return to work because of his lung disease.

9. Claimant has not found alternative employment.

10. Claimant is 35 percent industrially disabled as a result of lung disease resulting from exposure in his work environment.

CONCLUSION OF LAW

Claimant has sustained the burden of proving an industrial disability of 35 percent as a result of an occupational disease to the extent that it was the result of his work environment.

WHEREFORE, the deputy's decision filed September 30, 1982 is affirmed.

THEREFORE, it is ordered:

That defendants are to pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability benefits starting on September 18, 1979.

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

Costs are charged to defendants pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 31st day of October, 1983.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TERRY L. ALBERTSON and MICHAEL DIDRICKSON, Claimants, vs. I-29 COUNTRY DIESEL Employer, and GREAT WEST CASUALTY, Insurance Carrier, Defendants.	:	FILE NOS. 745347 & 745349 I N T E R I M D E C I S I O N

This ruling involves special appearances filed in each of the above entitled cases, the same having been consolidated for purposes of hearing. Through the special appearances the defendants allege that the Iowa Industrial Commissioner does not have jurisdiction of the subject matter of these cases on the grounds that the claimants were not employed by the defendant, I-29 Country Diesel, or, alternatively, that if claimants were employed by I-29 Country Diesel that their employment was not localized in the State of Iowa.

Hearing was held at the Pottawattamie County Courthouse in Council Bluffs, Iowa on April 13, 1984. The evidence at hearing consisted of the testimony of Lawrence Gene White, Richard Horst, Jr., and Michael Didrickson. Claimants and defendants each introduced exhibits which are part of the record at hearing.

Lawrence Gene White testified that I-29 Country Diesel is a partnership in which the partners are Clarence L. Werner and himself. He stated that the partnership engages in the trucking business and that its primary function is to lease trucks, with drivers, to Werner Enterprises, a corporation owned and controlled by Clarence L. Werner, pursuant to a written agreement which is entitled Contractor Operating Agreement and was admitted into evidence as exhibit C.

White testified that I-29 Country Diesel owns Kenworth tractors which it is purchasing under installment contract from Werner Enterprises but that I-29 owns no trailers. He stated that the business opened with seven tractors but that now it has

42. The business owns a shop building, two pickups and miscellaneous tools and equipment which it uses in performing repair and maintenance work on the trucks. He stated that the shop is located near Bartlett, Iowa which is the only business location maintained by I-29.

White stated that I-29 runs a newspaper ad to solicit drivers. He stated that when someone responds to the ad an application is made and submitted to Werner Enterprises. If the appropriate personnel at Werner Enterprises find the applicant suitable then the applicant undergoes training and testing which is administered by Werner Enterprises' personnel. He stated that upon completion of the orientation, the driver is given a manual.

White stated that once the driver is placed in a truck that he is dispatched through the Werner Enterprises' dispatcher. He stated that the driver cannot decline loads and that Werner Enterprises can discharge the driver. He stated that the actual supervisor for the driver is the dispatcher. The drivers are required to call the dispatcher each day and that they turn their log books into Werner Enterprises. If a driver drives too many hours he can be disciplined by the Werner Enterprises' safety director, Dick Horst. He stated that if a driver has a breakdown while on the road, they are instructed to call I-29, but if there is a accident they are instructed to call Werner Enterprises. White stated that all provisions of exhibit C, the Contractor Operating Agreement, are not honored by the parties and that in particular, Werner Enterprises provides the workers' compensation insurance coverage for the drivers. White stated that I-29 pays the drivers their earnings which are based upon miles traveled. He stated that I-29 withholds taxes as required by the various taxing authorities and pays the employer's contribution of FICA, FUTA and unemployment taxes. He stated that as a practical matter Werner Enterprises, through the process of dispatching, sets the days and hours of work for the drivers. White denied that the operating agreement, exhibit C, states that the drivers are to be considered employees of I-29. White confirmed that I-29 had prepared the originals of claimants' exhibits 1 and 2 which are Terry Albertson's W-2 Form for 1983 and also his Form W-4.

White stated that drivers sometimes bring the tractor back to the I-29 shop at Bartlett, Iowa for servicing. At other times drivers are required to have the tractor at the Werner Enterprises terminal or at home when it is not hauling a load.

White testified that Werner Enterprises holds all operating authorities and that I-29 has none.

White stated that exhibit C is a copy of the lease agreement for the truck which Albertson drove. He stated that all lease agreements are similar except for some of the provisions of the addendums. He also stated that I-29 leases trucks only to Werner Enterprises.

White testified that he was acquainted with Terry Albertson before he applied for a job. He stated that he took Albertson's application and sent it to Werner Enterprises. When it had been approved Albertson was sent to Werner Enterprises for orientation. He stated that Werner Enterprises determined that Albertson was inexperienced and that he was assigned to operate as a second driver in an I-29 truck. White stated that I-29 did not assign loads or check log books.

White testified that Mike Didrickson had previously been employed by Werner Enterprises before being assigned to I-29.

Richard Horst, Jr., testified that he is the safety director for Werner Enterprises and has held such position since April, 1979.

He stated that Werner Enterprises is an irregular route common and contract carrier trucking company. He stated that DOT and ICC require driver files to be maintained and that Werner Enterprises maintains those files on the drivers of I-29 vehicles. He stated that Werner Enterprises presently has 425 vehicles which it either owns or leases.

Horst stated that all drivers are treated the same regardless of whether the truck they operate is owned by Werner Enterprises or leased from a contractor such as I-29. All drivers receive the same orientation on company procedures and all must pass the DOT written and driving tests which are administered by the witness or his assistants. Horst stated that if log book violations are made by I-29 drivers, copies of the violations are noted by Werner Enterprises clerks and copies thereof are sent to I-29. He stated that if the violations continue, the driver is brought to Omaha for counseling by the witness or his assistants and if the problems continue the witness could terminate the driver.

Horst clarified that I-29 drivers were actually hired by I-29 subject to the driver meeting Werner Enterprises' standards. Horst stated that he could not actually discharge I-29 drivers, but that he could prohibit them from driving trucks leased to Werner Enterprises. Horst stated that Werner Enterprises has its own employee drivers who are employees in every sense of the word. He stated that Michael Didrickson had applied for employment with Werner Enterprises but that no trucks were available at that time and that Didrickson was sent to I-29. Horst stated that Albertson and Didrickson had not been on the Werner Enterprises' payroll. Horst stated that Gene White could also discharge I-29 drivers. Horst testified that in his opinion Terry Albertson was a Werner Enterprises employee.

Michael Didrickson testified that he lives in York, Nebraska. He stated that he lived in Iowa a long time ago but has not resided there recently.

ANALYSIS AND APPLICABLE LAW

The allegations of the petitions are that the injuries occurred outside the State of Iowa. In view of such, if subject matter jurisdiction exists it must arise under section 85.71 of the Code of Iowa. There is no indication in the record of this case that Werner Enterprises could have required I-29 to accept a driver. While hiring was subject to what is stated in paragraph three of exhibit C, it appears that White did have hiring authority for I-29. From exhibit C and the testimony in general, it is clear that Werner Enterprises exercised a great deal of control over the day to day activities of drivers. The authority for Werner to do so arises from exhibit C. Without an agreement similar to exhibit C, Werner Enterprises would have no inherent authority to control I-29's trucks and/or drivers.

I-29 acted as an employer for purposes of taxes and unemployment benefits. Although Werner Enterprises provided workers' compensation insurance coverage for the drivers, it is unclear whether it did so at its own expense or under paragraph 25 of exhibit C.

There are indications in the record, such as exhibits F, G, K, O, P, Q and R that claimants were considered to be employees of Werner Enterprises. Exhibits 1, 2, C and E indicate that claimants were employees of I-29. The remaining exhibits provide little guidance on the issue.

It appears that I-29 had the right of selection, subject to the driver meeting Werner's standards, the responsibility for payment of wages, the right to discharge or terminate the relationship, the right to control the work and was the party held responsible as employer by Werner. It also appears that Werner, through the lease agreement, exhibit C, also had the right to discipline the drivers and to prohibit them from operating trucks leased to Werner, which action is tantamount to the right to discharge, and that Werner would be held responsible by the persons to and for whom goods were being delivered. It should be noted that while Werner controlled the day to day activities of the I-29 drivers, it did so only by virtue of the agreement, exhibit C. Directing an employee to submit to the directives of another is one form of exercising control over an employee. Either company could be held to be the employer under the standards of McClure v. Union et al, Counties, 188 N.W.2d 283 (Iowa 1971). Claimants are not, however, parties to exhibit C.

Persons performing work similar to that performed by claimants have been held to be employees of the company which directs the day to day loads and routes. Towers v. Watson Bros. Co., 229 Iowa, 387 (1941). Under similar factual circumstances it has also been held that the driver is an employee of the company which hired and paid him. Elliott v. Wilkinson, 248 Iowa 667 (1957).

Iowa has recognized that a person can have more than one employer. Beck v. Rounds, Iowa App. 332 N.W.2d 109 (1982). When it is considered that Clarence L. Werner plays an important role in both companies and that the companies operate in full cooperation with each other, application of the rule from Beck is further indicated.

FINDINGS OF FACT

I-29 Country Diesel has its principal and only fixed business location in the State of Iowa. Both claimants inquired about their employment at that place of business. It is clear that the contract of hire was made in the State of Iowa. Exhibit I confirms that claimants' employment was not principally located in any particular state. Although defendants contend that the employment was principally located in the State of Nebraska, it appears that claimants actually were present only briefly in the State of Nebraska. The very nature of over-the-road truck driving is that it is generally not localized in any state. No evidence was introduced regarding whether or not the Nebraska workers' compensation law would be applicable to claimants if they were held to be principally employed in Nebraska.

Claimants were paid by I-29 as employees and treated as its employees for purposes of taxes. I-29 allowed Werner Enterprises to control the day to day activities of the drivers but had not surrendered its right to do so itself. I-29 had the right to discharge drivers. I-29 and Werner Enterprises are influenced greatly by Clarence L. Werner and operate in cooperation with each other on a continuing basis. I-29 exercised control over its drivers by requiring them to submit to the directives issued by Werner Enterprises' personnel.

CONCLUSIONS OF LAW

IT IS THEREFORE FOUND AND CONCLUDED that claimants were in fact employees of I-29 Country Diesel at the time of their injuries.

IT IS ALSO FOUND AND CONCLUDED that claimants, and each of them, were working under a contract of hire made in the State of Iowa and that their employment with I-29 Country Diesel was not principally located in any state and that this agency has jurisdiction of both cases under Iowa Code section 85.71(2).

IT IS ALSO FOUND AND CONCLUDED that claimant, Terry L. Albertson, is domiciled in this state and that his employer, I-29 Country Diesel, has a place of business in this state by virtue of which his employment was principally localized in this state and this agency has jurisdiction of his case under Iowa Code section 85.71(1).

ORDER

IT IS THEREFORE ORDERED this agency has subject matter jurisdiction of the above entitled cases and that defendants' special appearance is hereby overruled.

Signed and filed this 25th day of June, 1984.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD K. ANDERSEN, Claimant, vs. IOWA POWER & LIGHT COMPANY, Employer, Self-Insured, Defendant.	File No. 671906 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision wherein claimant was denied permanent partial, healing period and temporary total disability benefits.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, David R. McLaughlin, Craig Fabik, and Mary Nelson; claimant's exhibits 1 through 7; defendant's exhibits A through J; defendant's answers to interrogatories; and the briefs and filings of all parties on appeal.

ISSUE

Whether claimant is entitled to workers' compensation benefits under Chapter 85A, Code of Iowa.

REVIEW OF THE EVIDENCE

Claimant, who was 60 years old at the time of the hearing, has been employed by defendant as an operating shift supervisor for approximately 29 years. Claimant's position put him in complete charge of defendant's Council Bluffs plant during regular eight hour shifts. His primary responsibility was to oversee the operation of defendant's power plant units, hereinafter referred to as Units 1, 2, and 3. Units 1 and 2 were constructed in 1953 and 1958 respectively and are located 50 feet apart within the same building. Unit 3 was constructed in 1978 and is located in a separate building. (Transcript, pp. 9-10, 24-26)

The pipes, generators, and other components which comprise Units 1 and 2 were insulated with a layer of asbestos at the time they were built. The asbestos was generally covered with muslin wrapping and then painted over. Asbestos was not utilized as an insulation material in Unit 3. (Tr., pp. 14-18)

Claimant testified that he came into contact with and inhaled airborn particles of asbestos on many occasions while working for defendant. He explained that when spot repairs were made on insulated components, the layer of asbestos would be stripped off and left laying on the floor until the repairs were finished. Claimant testified that the boilers of Units 1 and 2 underwent a complete overhaul at least every fifth year. He stated that an overhaul commonly took four to eight weeks to perform, during which time asbestos insulation was left laying on the floor where it was stepped on to the point of becoming a fine powder. Claimant recalled that during an overhaul the entire plant would be filled continuously with asbestos particles resembling snow in the air. (Tr., pp. 27-29) The use of asbestos insulation for repairs in Units 1 and 2 was discontinued in 1972 and efforts are presently underway to completely replace asbestos insulation in both of those units. (Tr., pp. 17-18)

Claimant testified that his health had been good prior to going to work for defendant, and that he had never been sick until 1965. Claimant was diagnosed at that time as having bronchitis, and recalled that he had been exposed to asbestos during overhauls to Units 1 and 2 just prior to falling ill. He testified that his health was good from late 1965 until 1979, when he became ill again. Claimant underwent a physical examination in the hospital from July 2 through July 4 of 1979, in part because he had not been feeling well and in part because he had been considering a change of jobs. He was hospitalized from October 10 to October 12 of 1979 after it was discovered that he had spots on his lungs. Claimant testified that Thomas C. Tinstman, M.D., made a diagnosis of asbestosis, and that he was later advised by Randell Hanson, M.D., to avoid environments where asbestos is present. Claimant testified that he was off work several weeks during October and November of 1979, and for all of December of 1979. He worked from January until March of 1980, and then was off until March of 1981. Claimant testified that he was simply unable to get around due to dizziness, chest pain, and shortness of breath. (Tr., pp. 30-34)

After exhausting his accumulated sick pay, claimant returned to work at a new position with defendant in March of 1981. Claimant testified that he returned upon being offered an office technician position which involves the maintenance of coal tonnage and stack capacity. He noted that he earned $22,000 annually at his technician position beginning March of 1979, whereas he had earned $30,000 in 1979. Claimant testified that his breathing has been fine since returning to work in March of 1981, and that he intends to continue working as a technician until he retires at age 62. (Tr., pp. 27, 35-37, 50-51)

On cross-examination claimant admitted that he had never been informed by any physician that his symptoms of dizziness and chest pains were related to asbestosis. Claimant also admitted that he had been a smoker for 40 years. (Tr., pp. 43-44) Claimant testified that he had not wanted anything to do with power plant Unit 3 since it first opened in 1978, and that he had requested on a daily basis that his duties as an operating shift supervisor be limited to Units 1 and 2. (Tr., pp. 46-47)

Craig R. Fabik, the safety and training supervisor at defendant's Council Bluffs plant, testified that measures have been underway since 1980 to reduce the level of asbestos in Unit 1 and 2 to below Iowa OSHA standards, and that areas where asbestos is being removed are now isolated. The witness testified that testing conducted in 1981 revealed that the level of asbestos particles in the plant was below OSHA standards, even during periods when asbestos was being removed in isolated areas of the facilities. (Tr., pp. 55-61)

Thomas C. Tinstman, M.D., an internal and pulmonary medicine specialist, testified that he saw claimant on October 12 and 13, 1979 and again on February 9, 1980. During a deposition taken May 18, 1982 Dr. Tinstman testified as to the results of his examinations of claimant:

> A. My impression was at that time that he had a past history of sinus disease and nasal polyps and that he had asthmatic bronchitis as a result of that historical finding and cigarette smoking and that it was my clinical impression that he was mildly depressed at that time and I thought that might be the result of a medication he was taking for his hypertension. He had an abnormal chest x-ray, which in retrospect had been abnormal for a long period of time. It's my initial impression that that abnormality was pleural plaquing, which is most commonly associated with the presence of asbestos in the pleura. He historically had a history of having worked on generators during his career which were insulated with asbestos. Maybe it wasn't generators but equipment in electrical generator plants which were insulated with asbestos.
>
> Q. Did you come to a diagnosis after your first examination?
>
> A. I just listed them.
>
> Q. That was it?
>
> A. Yes.
>
> Q. Did you ever arrive at a final diagnosis that Mr. Andersen had asbestosis?
>
> A. We performed a computed axial tomography of his chest. Based on that and a review of his chest x-rays, it was my impression and the impression of the Radiologist he had pleural plaquing and linear calcifications that were most consistent with asbestosis and absolute diagnosis would require a biopsy showing asbestos in the pleural plaques. (Tinstman Deposition, pp. 7-8)

Dr. Tinstman testified further:

> Q. And from the history and from your examination and based upon a reasonable medical certainty, did you come to an opinion as to the cause of the asbestosis?
>
> A. It was my impression that it was probably--that the most likely cause was exposure to asbestos in his working environment.
>
> Q. Doctor, what would be the prognosis from your treatment of Mr. Andersen, what could he expect in the future?
>
> A. He is at increased risk of developing malignancies of the pleura. He's at increased risk of developing malignant tumors in a lung but in a cigarette smoker I think it's difficult to associate that with asbestos.
>
> In my experience, it is unlikely based on the lack of radiologic progression, that he will develop any symptoms of shortness of breath from his pleural disease. (Tinstman Dep., p. 9)

Dr. Tinstman indicated that claimant's disease has stabilized. (Tinstman Dep., p. 12) On cross-examination Dr. Tinstman opined as to claimant's disability due to asbestosis:

> Q. My last question is that as I understand your opinion, there is no disability, you're stating there is no functional impairment caused by the pleural plaque?
>
> A. That's my opinion.
> (Tinstman Dep., p. 19)

In a July 25, 1980 letter addressed to claimant, Dr. Tinstman wrote:

> I do not have adequate information from the hospital record available in my office records to comment on your disability. When I reviewed the situation in February 5, 1980, I did communicate with Dr. Barry Kricsfeld regarding this question and a copy of that letter is enclosed.
>
> In summary, I did not feel that you were disabled but felt that you might be eligible for some compensation as a result of probable asbestos related disease.
> (Cl. Ex. 5; Defendant's Ex. A)

Randall Hanson, M.D., a pulmonary medicine specialist, also testified by deposition. Dr. Hanson first examined claimant on March 6, 1980 at defendant's request to determine if claimant was disabled. He concluded that claimant had developed an asbestos related plaque or pleural plaque which was related to his exposure to asbestos in the work environment. Dr. Hanson was questioned as to the effect of the pleural plaque upon claimant:

Q. Is there anything in the future which Ron Andersen, as a result of this condition, could expect?

A. As a general rule, the pleural problems, the plaques and pleural effusions are usually relatively asymptomatic.

The pulmonary fibrosis or scarring process that goes on in the lungs can become progressive with continued exposure to asbestos and in anyone exposed to asbestos, the concern is for the possibility of development of cancer, either of the pleural space in the form of mesothelioma or in the lung in the form of bronchiogenic carcinoma.

There is also abdominal cavity tumors, some other types of tumors, but they are statistically less of a problem than in the chest cavity.

Q. So when we're talking about Ron Andersen's condition, he has no functional disability right at this time; is that correct, or at the time that you saw him?

A. That was my best judgment. Probably secondary to his cigarette smoking, but I felt that this impairment or this abnormality was not related to the asbestos.

Q. But, nevertheless, after your examination, it was your recommendation that he not be allowed to work or be exposed to asbestos; is that also correct?

A. I think my recommendation was that he modify or, if possible, for his work situation to be modified so that he did not have continued asbestos exposure.
(Randall Dep., pp. 9-11)

Dr. Hanson indicated that OSHA guidelines would be acceptable as determinative of whether it would be advisable for claimant to work in an environment containing asbestos. (Hanson Dep., pp. 11-12) In a March 9, 1982 letter addressed to defendant's counsel, Dr. Hanson wrote:

I am responding to your two recent questions regarding Mr. Ronald K. Anderson [sic].

1. Was Mr. Anderson [sic] injuriously exposed to asbestos at the Council Bluffs power plant?

I have reviewed the levels of asbestos found at the Council Bluffs plant in 1981 and find them to be well within the OSHA guidelines. If it is established that Mr. Anderson [sic] was previously exposed to significant asbestos prior to his employment by Iowa Power and if the levels at the Council Bluffs plant have always been within the range found in 1981, I feel it would be extremely unlikely that he was injuriously exposed to asbestos at the Council Bluffs plant.

2. Does the current asbestos level in the Council Bluffs plant constitute significant continued exposure to asbestos?

My answer is that since there is a latent period for asbestos exposure and since the levels in the Council Bluffs plant are quite low, I should not think that continued exposure to the current levels would constitute a significant hazard to the patient. (Def. Ex. D)

APPLICABLE LAW

Iowa Code section 85A.1 provides: "This chapter shall be known and referred to as the 'Iowa Occupational Disease Law'.

Iowa Code section 85A.4 provides:

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.8 provides:

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.

"[T]o 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 causally related to the exposure to harmful conditions of the field of employment.... Secondly, those harmful conditions must be moe prevalent in the employment concerned than in everyday life or in other occupations." McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

ANALYSIS

The sole issue on appeal is whether claimant is entitled to workers' compensation benefits under chapter 85A, Code of Iowa. The testimony contained in the record from Dr. Tinstman and Dr. Hanson clearly indicates that claimant developed a condition of asbestosis as a result of working in the environment of defendant's plant for 29 years. In addition, it appears that the level of asbestos to which claimant was exposed during most of the years he worked for defendant was greater than would be found at most other occupations or in everyday life. As such, claimant has sustained the burden of proving that he suffers from an occupational disease.

The fact that claimant has met the burden of proving an occupational disease as a result of his employment, however, is not sufficient basis for an award of workers' compensation. Claimant must also prove that he is disabled as a result of his occupational disease. Disablement, as defined in Iowa Code section 85A.4 refers to the event or condition where claimant is either incapacitated from performing his work or from earning equal wages in other suitable employment because of the occupational disease. Claimant has failed to demonstrate either.

No evidence whatsoever has been produced to indicate that claimant was, or is, incapacitated from performing his work as an operating shift supervisor due to his condition of asbestosis. Both Dr. Tinstman and Dr. Hanson testified that claimant had no functional impairment due to asbestosis. Dr. Hanson indicated that claimant's condition should remain asymptomatic even if he works in areas where asbestos is present, as long as the level does not raise above OSHA standards. Defendant implemented precautionary measures in 1980 to lower the levels of asbestos in Units 1 and 2 to below OSHA levels, apparently with success. Claimant testified that his symptoms while off work from March of 1980 until March of 1981 where dizziness, chest pains, and shortness of breath. He admitted, however, that no doctor had expressly related his symptoms to his condition of asbestosis. Both Dr. Tinstman and Dr. Hanson suggested that the physical problems claimant was having were related to other problems, specifically cigarette smoking. If claimant, indeed, was incapacitated at any time from performing his work as an operating shift supervisor, such incapacitation appears not to have been due to his condition of asbestosis.

Claimant has also failed to prove that he cannot earn equal wages in other suitable employment. The only evidence offered by claimant concerning a reduction of earning capacity is the discrepancy in his earnings as a technician and as a operating shift supervisor. Taking claimant's testimony as a whole, it is not unreasonable to conclude that the reason for claimant's acceptance of the lower paying technician job was due not to his condition of asbestos, but to dislike of the added responsibility of managing Unit 3 in addition to Units 1 and 2. Unit 3 became operational within a year before the time that claimant first began missing work. Claimant testified that he wanted nothing to do with Unit 3, and asked on a daily basis that his duties as an operating shift supervisor exclude management of that unit. The greater weight of the evidence indicates that claimant's loss of earnings are due to an unwillingness on his part to work with Unit 3 and medical problems unrelated to his condition of asbestosis.

FINDINGS OF FACT

1. Claimant has been an employee of Iowa Power & Light Company for 29 years.

2. Claimant worked as an operating shift supervisor until March of 1980.

3. Claimant came into contact with excessive levels of asbestos on many occasions during the years he has worked for Iowa Power.

4. Claimant is a smoker.

5. Claimant's exposure to asbestos while working for defendant resulted in a condition of asbestosis.

6. Claimant has no functional impairment as a result of his asbestosis.

7. Claimant has physical problems due to his smoking.

8. Iowa Power has taken steps to assure that asbestos levels in its Council Bluffs plant meet OSHA standards.

9. Any incapacity of claimant to perform as an operating shift supervisor was and is due to physical ailments unrelated to asbestosis.

10. Claimant switched jobs to become a technician at a lower rate of pay.

11. Claimant's change of jobs resulted from physical ailments unrelated to his asbestos and because of unwillingness to take on additional responsibilities as an operating shift supervisor.

12. Claimant's earning capacity has not diminished as a result of his asbestosis.

CONCLUSIONS OF LAW

Claimant has sustained the burden of proving that he has an occupational disease as an result of his employment.

Claimant has failed to prove disability as a result of his occupational disease.

WHEREFORE, the deputy's arbitration decision is affirmed.

THEREFORE, claimant is not entitled to any permanent partial, healing period or temporary total disability benefits as a result of his occupational disease.

Defendant is to reimburse claimant fifty-five dollars ($55) for his bill with Dr. Tinstman.

Costs of the arbitration decision are taxed to the defendant. The costs of the appeal are taxed to claimant.

Signed and filed this 19th day of October, 1983.

Appealed to District Court:
Affirmed

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HAZEL MAXINE ANDERSON, Claimant, vs. WOODWARD STATE HOSPITAL-SCHOOL, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	File No. 656346 A P P E A L D E C I S I O N

By order of the industrial commissioner filed January 23, 1984 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 consists of the transcript of the hearing; claimant's exhibits 1 through 13, inclusive; and defendants' exhibits A through J, inclusive, 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 reached by the review-reopening decision.

ISSUES

The hearing deputy ordered defendants to pay permanent partial disability of 30 percent of the body as a whole, or 150 weeks, at the rate of $119.70 per week and to pay for claimant's admission to a pain center.

Defendants state the issue thus: "The Deputy Commissioner's finding that the claimant is permanently and partially disabled is not supported by substantial evidence or by the record when viewed as a whole and is erroneous as a matter of law."

Claimant states the issues thus:

I. The Deputy Commissioner's finding that claimant is permanently and partially disabled is supported by substantial evidence in the record.

II. The Deputy Industrial Commissioner, and the Industrial Commissioner upon this review, may properly consider the harassment and probable termination of Mrs. Anderson in reaching their decision.

III. The Deputy Industrial Commissioner may properly consider what effect future termination by the employer will have on the degree of industrial disability of the employee.

REVIEW OF THE EVIDENCE

The recitation of the evidence in the review-reopening decision is sufficient and under the circumstances adopted and will not be setout herein.

APPLICABLE LAW

The applicable law in the review-reopening decision is adopted and expanded to include the following:

"The incident or activity need not be the sole proximate cause, if the injury is directly traceable to it." Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974); Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971).

"A cause is proximate if it is a substantial factor in bringing about the result." Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

ANALYSIS

Defendants' argument concerning its only brief point can actually be divided into two parts: (1) The question of causal relationship and (2) The extent of industrial disability.

With respect to the issue of causal relationship, the most probative evidence is that of Mark Brodersen, M.D., an orthopedic surgeon, who states in a letter of December 9, 1982: "In my opinion the impairment stated in the report of November 23, 1982, I believe to be causally related to the injury that she sustained at work on January 8, 1980, based on her history. The restrictions given are also as a result of this injury." Otherwise, there is nothing in the record from which one would draw an inference that claimant's low back condition was unconnected to her fall of January 8, 1980. Defendants argue of course that, at the time of the fall, her version of the incident did not mention a back problem. However, the report which she filled out in her own handwriting said as follows: "Maxine Anderson fell while moving beds on waxed floor hit door and bed with arms and back Tuesday afternoon at 2:30...." (emphasis added)

It is true, of course, that claimant is overweight and that her back has a hyperlordosis both of which contribute to her back difficulties. However, the above evidence, as well as much other evidence recited by the hearing deputy, points to the conclusion that the fall was at least a substantial factor in causing claimant's low back impairment.

Defendants argue that claimant, being a high school graduate, "would seem to show an excellent ability to learn and perform in a work environment." (Defendants' brief, 11) Actually, as the review-reopening decision found, claimant has a low intellectual capacity which actually restricts her employability. Otherwise, the review-reopening decision covered the points of industrial disability and analyzed them correctly. That analysis is adopted.

It is clear from the briefs that feelings run high in this case. Claimant has apparently formed the belief that defendants will eventually discharge her, and in that respect, the hearing deputy remarked: "If defendants terminate claimant or keep her for an extended period of time on leave without pay, claimant's industrial disability will have to be increased." Defendants take exception to this remark as being a prejudgment of a case not yet matured. It is clear that the hearing deputy did not include the possible discharge as an element of industrial disability; rather he left it for a future determination, a determination which of course would not be bound by any past decision. The remark is taken to be simply dictum.

Finally, defendants do not appeal the order to send claimant to the Mercy Pain Center in Des Moines. Therefore, the findings with respect to that issue will be retained, as will all the other findings of fact and conclusions of law as well as the order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Finding 1. On January 8, 1980, claimant received an injury arising out of and in the course of her employment with defendant employer.

Finding 2. As a result of that injury claimant aggravated a prior unknown back condition.

Finding 3. As a result of the January 8, 1980 injury, claimant has a functional impairment of 10 percent.

Finding 4. Claimant was 39 years old at the time of the hearing and is a high school graduate.

Finding 5. Claimant has worked on an assembly line at a manufacturing company, sorted corn, helped take care of senior citizens, and worked as a nurse's aide.

Finding 6. Claimant started working for defendant employer in 1976 in the clothing department.

Finding 7. Claimant started working in housekeeping in 1978.

Finding 8. Claimant has returned to the position she had held at the time of her injury but has been having difficulty performing some of the job requirements.

Finding 9. Claimant is highly motivated.

Finding 10. Claimant has low intellectual ability.

Conclusion A. Claimant has met her burden in proving her back problems are causally connected to her injury on January 8, 1980.

Conclusion B. Claimant has met her burden in proving she has a permanent partial disability of 30 percent as a result of her injury.

Finding 11. The evidence indicates that claimant may benefit from treatment at a pain center.

Finding 12. Claimant wishes to go to a pain center.

Finding 13. Defendants realize that claimant may benefit by treatment at a pain center.

Finding 14. Defendants feel that claimant should pay for any treatment at a pain center.

Conclusion C. Claimant has met her burden in proving that treatment at a pain center is reasonable.

THEREFORE, defendants are to pay unto claimant one hundred fifty (150) weeks of permanent partial disability benefits at a rate of one hundred nineteen and 70/100 dollars ($119.70) per week.

Defendants are to be given credit for any permanent partial disability benefits previously paid.

Accrued benefits are to be made in a lump sum together with statutory interest at the rate of ten (10) percent per year from September 19, 1983.

Defendants are to pay for claimant to go to Mercy Pain Center.

Defendants are to reimburse claimant eighty-nine and 50/100 dollars ($89.50) for drugs.

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 at Des Moines, Iowa this 26th day of March, 1984.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEANNE ANDERSON,	:	
Claimant,	:	File No. 722211
vs.	:	
ATKINSON'S FOUR SEASONS,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
UNITED FIRE & CASUALTY COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Leanne Anderson, claimant, against Atkinson's Four Seasons, employer, and United Fire & Casualty Company, insurance carrier, defendants, to recover benefits under the Iowa Workers' Compensation Act for an injury allegedly arising out of and in the course of her employment on February 4, 1981. It came on for hearing on May 17, 1984 at the Cerro Gordo County Courthouse in Mason City, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file shows a first report of injury filed February 14, 1984. No other filings have been made.

At the time of hearing the parties stipulated to a gross wage of $88.43 per week and to a marital status of married with two exemptions. Defendants acknowledged fairness of the medical expenses in claimant's exhibits 1 and 2.

The record in this matter consists of the testimony of claimant, Patricia Sackville, Ed Anderson, Terry Hendricks, Janet Hendricks, and Mike Atkinson; claimant's exhibit 1, a bill from Keith J. Hansen, D.O., and Steven E. Hart, D.O.; claimant's exhibit 2, a bill from Park Clinic; claimant's exhibit 3, a series of medical records; claimant's exhibit 4, a letter from R. Bruce Trimble, M.D., dated May 14, 1984; defendants' exhibit A, a letter and records from N. K. Pandeya, D.O., dated June 13, 1983; and defendants' exhibit B, the deposition of Dr. Pandeya.

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 there is a causal relationship between claimant's injury and any disability she now may have; and whether or not she is entitled to permanent partial disability benefits.

STATEMENT OF THE CASE

Twenty-six year old married claimant, a college graduate with a degree in home economics, who currently is working as a self-employed seamstress, testified to starting work for defendant in November of 1979 as a sales clerk. At that time she worked primarily on the main floor in women's wear. She occasionally worked in the basement departments, and she had no problems in doing so. She was off from May of 1980 until July of 1980. When she returned she worked for minimum wage on a rotating-type schedule. From November to February of 1981 she worked nearly full time.

In September or October of 1980 she was transferred to the basement where she spent from 80 to 85 percent of her time with duties including waiting on customers, doing inventory and stocking shelves. The basement departments included the kitchen and bath shops as well as fabric and notions. In addition to a selling area, the basement contained a stock room and receiving area. There was carpet in some areas of the basement. The floor in the kitchen section, in the stock room and in the receiving area was cement. The company was going to purchase a new furnace to heat the basement. Claimant estimated the basement temperature at between 40 and 45° at the time of hearing. At the time of her deposition her estimate was 45 to 55°. There was carpet in some areas of the basement. The floor in the kitchen section and in the stock room and unloading areas was cement. She wore long underwear, a shirt, sweater and an oversweater or blazer. She wore heavier socks and sometimes boots.

Claimant observed that her feet became cold all the time, constantly itched and burned and were red and swollen. Several of her toes blistered. She noted that all of her joints became cold and stiff.

On February 4, 1981 she told store owner Mike Atkinson that she was no longer able to tolerate the conditions. She asked when the new furnace would be coming. She informed Atkinson that she was going to the doctor because of problems with her feet being cold which she attributed to the chilly conditions in the store's basement. She requested that her medical bills be covered. She also confronted Atkinson about providing a space heater. She recalled that Atkinson had told her that she could work upstairs. He spoke with her the following Monday and asked her to come in the next day at which time her employment was terminated.

She had not sought medical treatment until the time she left her job. She saw Drs. Hansen and Hart in Hampton, who sent her to Dr. Trimble, a specialist, who told her to stay out of the cold.

Claimant asserted that before she went to work for defendant employer she was in good health and had no problems with the cold. She had not sought treatment for cold exposure. She recalled dressing for winter weather and going inside if she got chilly. Activities in which she engaged included snowmobiling, sledding, hunting and ice fishing. She was a drum majorette and participated in outdoor sports. When she was in college, she walked to and from classes. She attended football games with her spouse who is a coach. She denied any occasion during her college years on which her feet were extremely chilled. Claimant recalled injuring her heel in April of 1980 and having surgery on September 18, 1980. She was unsure whether or not Dr. Pandeya who performed the operation had told her she could have a sensitivity to cold, but she thought it was possible in the area of her scar. She asserted that the cold sensitivity is present in her toes and not in her heel where the surgery took place.

Claimant claimed that she continues to have trouble with her feet in that they still get red, burn and itch. Going from a car to a building can produce symptoms. She wears battery operated socks, snowmobile boots and sometimes moon boots to protect her feet. Going from shoes to boots also may cause trouble for her.

She claimed that she is unable to go out as she would like. She recounted the trip to an out-of-town basketball game. She went from her house to a van, made the trip, and went from the van to the building. During the first game her feet burned and itched. She spent the time of the second game in the locker room with her feet elevated. She no longer participates in snowmobiling. She does not have difficulty in the summer unless she undergoes a sudden change in temperature. She estimated that her problems begin when she is exposed for an extended period to an outdoor temperature of 50°.

She admitted that her condition does not interfere with her seamstress work at home. It does, however, preclude her going out in the wintertime to pick up work that needs to be repaired or to deliver things that have been completed.

Claimant testified that she has incurred medical expenses due to treatment for her feet. Her physicians have advised her to stay out of the cold, to keep her home warmer, to keep a constant body temperature and to have periodic testing of her condition. She last visited the doctor in November of 1982.

Claimant acknowledged that she makes more money as a seamstress than she did when she was working with defendant employer.

Ed Anderson, claimant's spouse of four years who has known her since March of 1979, recalled that in the fall and winter of 1979-1980 the two of them attended college games, went sledding and took long car trips. Claimant helped him with his coaching duties in football and basketball by riding the bus as a chaperone.

He said that claimant began complaining when she was moved to the basement at the store. More specifically, she complained of the cold. Anderson found her unable to be out for very long and he noted that her feet were constantly cold with inflammation, swelling, itching and blistering on her toes. He denied that claimant made any complaints in the heel area.

As to claimant's condition since the winter of 1981, he said that claimant does not go out as much as before, that she uses extra clothing, that she has stopped attending football games, and that he does pickup and delivery work for her when it is cold.

Patricia A. Sackville, who is currently a radio announcer and sales person, testified to working for defendant employer for seven years as a sales clerk and buyer. She also did advertising and had management responsibilities when the store owners were away. She worked with claimant in 1980 and she was familiar with the conditions in the basement at that time both from talking with claimant and from working there herself.

As Sackville recollected, the cold started in the middle of October and continued until February when the furnace was fixed. She estimated the temperature at from 40 to 45°--a temperature at which her hands and body became chilled. She stated that claimant wore heavy socks, boots, a blazer and sweater and came upstairs to get warm.

The witness overheard claimant's conversation with Atkinson in Feburary and she agreed with claimant's version.

Terry Hendricks, claimant's 28-year-old brother who lived with claimant as a member of the family until 1977 acquiesced in claimant's listing as to their winter activities. He also said that claimant walked to school. The two of them had the same ability to stay outdoors and she manifested no unusual sensitivity to the cold. Hendricks was aware of claimant's continuing wintertime pleasures without problems and of her walking to class when she commenced college.

He first learned of her foot difficulties in the winter of 1980. He saw redness and blisters on her toes in February of 1981. The witness stated that claimant has told him she is no longer able to do the things she once did.

Janet Hendricks, claimant's mother who spends six months of the year in claimant's town, described claimant as an active child who enjoyed the outdoors and participated with the family in winter sports. No cold sensitivity was evidenced. Hendricks first became aware of the trouble with her daughter's feet in the fall of 1980 when claimant began crying with pain, itching and burning in her feet. She observed that claimant's toes swelled and that she had purple blisters on both feet. She tried to get claimant to seek medical help.

The witness did not disagree with Anderson's testimony of claimant's having "not too many" problems since she left the store; however, she said that claimant still has symptoms in the cold, and therefore, she avoids the cold.

Mike Atkinson, owner of defendant employer, acknowledged that the store's basement was cold in the winter of 1980 and that there was a problem with the furnace which was not discovered until mid to late November because heat was being provided by another unit in the mild fall. A new furnace was ordered in early December, but apparently because many people were changing to gas heat, it did not arrive until February at which time installation was started.

He remembered the situation on February 4, 1981 as follows: "The air temperature in the basement was 50 to 55°. Claimant complained about being cold. She asked for a space heater. She did not speak of her feet. He told her the furnace was to be installed that day and the furnace people came.

Atkinson said that he has seen claimant around town most recently out in sixty degree temperature wearing sandals or sneakers. In January of 1983 he saw claimant at a dance in a metal building with a concrete floor. She was wearing open-toed shoes; and although he did not see her dancing, she seemed to have no problems. He acknowledged that he did not know how she got to the dance, where she was dropped off or what she had on her feet when she arrived.

Goods to replenish the store's stock are unloaded upstairs and then moved to the basement meaning that there is no dock door to the outside at the basement level.

The witness described Sackville as a good employee, but he denied being told by her that claimant was having trouble with the cold. He agreed that another employee who had complained of the cold had been moved to the upstairs; however, that move was done to utilize claimant's expertise with the basement stock and more particularly with the fabric.

Nirmalendu K. Pandeya, D.O., plastic surgeon, first saw claimant on July 14, 1980 and examined a deformity and scar formation in the right heel area back of the achilles tendon. On September 18, 1980 claimant underwent a scar revision of the right heel using a skin graft from the right buttocks. The pathology report shows submission of an ellipse of skin 2.2 x 1.2 x 0.2 cm. and two irregular shaped portions aggregating to 2.5 x 1 x 0.2 cm. Claimant's followup care was done by Keith L. Hansen, D.O.

Dr. Pandeya said that the tissue at the surgery site would leave an unpredictable and unusual behavior pattern. More specifically, he said that the area could become extremely red and hot in warm temperatures or could have abnormal feelings in cold temperatures. The doctor believed that it would be consistent for claimant in the winter of 1980-1981 to complain of coldness in the feet and that the sensitivity would continue over claimant's lifetime.

Notes from Dr. Hansen show claimant was seen on February 5, 1981 with complaints of her feet being cold and tender after working on a concrete floor with no heat. The physician observed that the second and third digits of both feet were cold to touch. He also recorded redness, tenderness and swelling.

Claimant returned on February 7, 1981 to see Steven E. Hart, D.O., to assert pain in the medial three toes on the left and the middle toes on the right. She had burning and itching. There was erythema of the second and third toes on both feet. Claimant was given vitamin E and referred to R. Bruce Trimble, M.D., who recommended testing. A serum protein electrophoresis, cyroglobulin, R.A. latex, ANA, GH+ and T4 were done. The only abnormality which was viewed as a normal variant in light of a normal sedimentation rate was polyclonal hypergammapathy.

Dr. Hart's assessment as of February 25, 1981 was Raynaud's disease. Claimant was advised to avoid excessive heat or cold. In a report dated April 7, 1981 Dr. Hart answered that claimant's injury would result in a permanent abnormal response to cold temperatures. He also responded yes to the question "Is injury above referred to the only cause of patient's condition?"

A letter from Dr. Trimble dated February 13, 1981 reports his seeing claimant on that date. Claimant gave a history of symptoms beginning when she was working in an area with cold floors. The rheumatologist was not able to feel the dorsalis pedis pulses. Claimant had purplish spotty discoloration on the tips of some of her toes. The doctor diagnosed Raynaud's phenomenon of uncertain etilogy. He noted: "Incidentally, though I don't think that working on the cold cement floor actually caused this I think it quite likely precipitated it, and I think it would be reasonable to allow Workmen's [sic] Compensation to pay for part of the work-up, if you and her employer agree.

In a letter dated March 11, 1982 J. H. Brinkman, M.D., wrote to claimant that her blood count, urinalysis, sedimenation rate, serum protein, electrophoresis, total protein, blood sugar, kidney function, sodium, potassium, calcium, phosphorus and liver function tests were normal. Tests for rheumatoid arthritis and lupus erythematosus were negative. Dr. Brinkman concluded: "Therefore, your laboratory studies at this time indicate no evidence of underlying system disease causing your Raynaud's phenomenon." He recommended that claimant be seen yearly.

In a letter dated March 29, 1982 Dr. Trimble wrote that Raynaud's phenomenon might be an initial manifestation of a systemic disease, that it would rarely be caused by trauma, and that if it resulted from frostbite it would usually involve only a few digits. He expressed the opinion which follows: "I would not expect this type of exposure to cause the Raynaud's phenomenon. Working under these conditions (working on a cold surface) might well bring out the symptoms, as Raynaud's phenomenon by definition becomes apparent on cold exposure. Again, however, the occupational history I obtained from Mrs. Anderson could not be expected to have caused the phenomenon."

Dr. Trimble reported reexamining claimant on November 22, 1982 at which time she continued to complain of burning discomfort in her feet, reddish or purplish discoloration of her toes and occasional whiteness in the toes with exposure to cold.

Claimant's feet were tested in ice water, and when they were removed their condition and coloration were observed. Claimant's symptoms were found compatible with Raynaud's phenomenon, but the physician found the diagnosis less likely than before as claimant lacked involvement of her hands, showed no progression of symptoms, had burning discomfort on cold exposure and had atypical findings on ice water immersion. As an alternative diagnosis, he suggested cold sensitivity. He thought claimant's treatment should be protection from the cold. He found her unable to work in a cold environment and stated: "Although it's difficult to see that occupational exposure caused her problem, it certainly made it manifest earlier than would have been the case had she been working in a warm environment."

In a letter dated February 7, 1983, Dr. Trimble wrote: "I am considerably less cetain that she has true Raynaud's phenomenon, although she certainly has cold sensitivity. Regardless of the diagnosis...it is almost tautologically true that her symptoms would have been brought out by work in cold environment, although the occupations which she describes would not be expected to have 'caused' the problem."

Dr. Trimble's most recent letter of May 14, 1984 reports his inability to make a diagnosis fitting the criteria for permanent disability although he did not think claimant should work in a cold environment.

APPLICABLE LAW AND ANALYSIS

In order to receive compensation for an injury, an employee must establish that the injury arose out of and in the course of employment. Both conditions must exist. Crowe v. DeSoto Consolidated School District, 246 Iowa 402, 405, 68 N.W.2d 63 (1955).

In the course of relates to time, place and circumstance of the injury. An injury occurs in the course of employment when it is within the period of employment at a place where the employee may be performing duties and while she is fulfilling those duties or engaged in something incidental thereto. McClure v. Union County, 188 N.W.2d 283, 287 (Iowa 1971).

In addition to establishing that her injury occurred in the course of her employment, claimant must also establish the injury arose out of her employment. An injury arises out of the employment when there is a causal connection between the conditions under which the work is performed and the resulting injury. Musselman v. Central Tractor Co., 261 Iowa 352 154 N.W.2d 128 (1967).

An award of benefits cannot stand on a showing of a mere possibility of causal connection between the injury and the claimant's employment. An award can be sustained if the causal connection is not only possible, but fairly probable. Nellis v. Quealy, 237 Iowa 507, 21 N.W.2d 584 (1946). Questions of causal connection are essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732. 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. See also Musselman, 261 Iowa 352, 154 N.W.2d 128.

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, 760-761 (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, 815 (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 supreme court of Iowa in Almquist v. Shenandoah Nurseries, 218 Iowa 724, 731-32, 254 N.W. 35, 38 (1934), discussed the definition of personal injury in workers' compensation cases as follows:

> While a personal injury does not include an occupational disease under the Workmen's Compensation Act, yet an injury to the health may be a personal injury. [Citations omitted.] Likewise a personal injury includes a disease resulting from an injury....The result of changes in the human body incident to the general processes of nature do not amount to a personal injury. This must follow, even though such natural change may come about because the life has been devoted to labor and hard work. Such result of those natural changes does not constitute a personal injury even though the same brings about impairment of health or the total or partial incapacity of the functions of the human body.
>
> ....
>
> A personal injury, contemplated by the Workmen's Compensation Law, obviously means an injury to the body, the impairment of health, or a disease, not excluded by the act, which comes about, not through the natural building up and tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee. [Citations omitted.] The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body.

A personal injury may develop over an extended period as illustrated by Black v. Creston Auto Co., 225 Iowa 671, 281 N.W. 189 (1938).

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 4, 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).

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).

Iowa Code section 85.34(2)(s) 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.

Testimony from claimant, her spouse, her mother and her brother regarding claimant's participation in wintertime activites supports the finding that claimant had no unusual sensitivity to cold prior to the winter of 1980-1981. There is some conflict in the records as to the actual temperature in defendant employer's basement, but there is no doubt that the basement was without heat. Claimant testified to rather constant duties in the basement which kept her there 80 to 85 percent of the time. Her testimony as to the development of itching, burning, redness and swelling in her feet was corroborated by lay testimony and by notes made by Dr. Hansen at the time of her visit on February 5, 1981.

Defendants have offered evidence from Dr. Pandeya that claimant could have abnormal temperature sensitivity. The better reading of Dr. Pandeya's testimony is that claimant's sensitivity will be primarily at the site of her surgery which is confined to the heel on her right foot. Dr. Trimble proposes nearly tautological truth in the expression of his opinion which was that while he does not feel claimant's condition, regardless of its label, was caused by her occupation, her symptoms would have been brought out by work in a cold environment. That claimant's sensitivity which is predominantly in her toes and which is present in both feet is primarily attributable to her surgery on her right heel is far from a tautological truth. Dr. Hart's report of April 7, 1981 also relates claimant's condition to her employment.

The record supports the conclusion that claimant had an injury to her feet in the form of an aggravation of a preexisting condition which arose out of and in the course of her employment and which resulted in her leaving work on February 4, 1981.

Claimant's testimony of some continuing problems with exposure to the cold and the restriction of her wintertime activities was supported by that of her spouse and her mother. Dr. Hart's report of April 7, 1981 states that claimant's injury will result in a permanent abnormal response to cold temperatures. Dr. Trimble finds claimant unable to work in a cold environment.

A causal relationship between claimant's injury and continuing disability is established.

The most difficult issue in this matter is determining claimant's permanent partial disability. This case presents a situation referred to in Iowa Code section 85.34(2)(s) in that claimant had injury to both feet in a single incident. It is noted that there is no showing in the medical evidence to this point of any systemic condition which would result in claimant's having impairment to her body as a whole. The Iowa Supreme Court in Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983) made it very clear that "compensation benefits for permanent partial disability of two members caused by a single accident is a scheduled benefit" meaning that "the degree of impairment must be computed on the basis of a functional, rather than an industrial disability." The court went on to explain at 887 the two methods for evaluating disability--functional and industrial:

> Functional disability is assessed solely by determining the impairment of the body function of the employee; industrial disability is gauged by determing the loss to the employee's earning capacity. Functional disability is limited to the loss of physiological capacity of the body or body part. Industrial disability is not bound to the organ or body incapacity, but measures the extent to which the injury impairs the employee in the ability to earn wages....
>
> ...A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability.

Dr. Hart indicates claimant has a permanent abnormal response to cold. Dr. Trimble refers to a definition for impairment used in social security proceedings and concludes that he cannot make a diagnosis conforming to that criteria. He does believe, however, that claimant is unable to work in a cold environment. Claimant should not be penalized in this matter by the inability of her physicians to assign a numerical rating necessary for her to receive benefits for an injury falling within the purview of section 85.34(2)(s). The Iowa Administrative Procedure Act found in chapter 17A of the Iowa Code, and more specifically section 17A.14(5) recognizes utilization of "[t]he agency's experience, technical competence and specialized knowledge" to evaluate evidence. Claimant will be assigned a permanent impairment rating of eight percent to each foot, which converts to six percent of the lower extremity to two percent of the whole person. Two percent combined with two percent is a total of four percent. Four percent of 500 weeks equals twenty weeks.

The parties stipulated at the time of hearing to a gross weekly wage of $88.43 weekly and to a marital status of married with two exemptions. Applying the applicable rate table for a February 4, 1981 injury results in a weekly compensation rate of $64.18.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is twenty-six (26) years of age.

That claimant is a college graduate with a degree in home economics.

That claimant is currently working as a self-employed seamstress.

That claimant started working for defendant employer as a sales clerk in November of 1979.

That claimant had no abnormal sensitivity to cold prior to the winter of 1980-1981.

That claimant had surgery on her right heel on September 18, 1983 to revise a scar.

That claimant spent the majority of her working time from the fall of 1980 to February 1981 in an unheated basement.

That claimant developed redness, itching, burning, swelling and blistering of her toes.

That claimant left work on February 4, 1981.

That claimant had medical treatment for the condition of her feet and thereby incurred medical expenses.

That claimant last had medica treatment for her foot condition in November of 1982.

That claimant continues to be troubled by redness, itching and a burning in her feet in cold conditions.

That claimant's primary complaints are in her toes and not in her heels.

That the appropriate rate of compensation for claimant is sixty-four and 18/100 dollars ($64.18).

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has a condition which arose out of and in the

course of her employment which resulted in her leaving work on February 4, 1981.

That claimant has established by a preponderance of the evidence a causal relationship between her injury and the disability on which she now bases her claim.

That claimant has established entitlement to permanent partial disability for twenty (20) weeks.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant twenty (20) weeks of permanent partial disability benefits at a rate of sixty-four and 18/100 dollars ($64.18).

That defendants pay that amount due and owing in a lump sum.

That defendants pay the following medical expenses:

Drs. Hart and Hansen	$ 181.00
Park Clinic	60.00

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants pay costs of these proceedings pursuant to Industrial Commissioner Rule 500-4.33.

That defendants file a final report in sixty (60) days.

Signed and filed this 30 day of May, 1984.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHARON ANDERSON,

Claimant,

vs.

SAMMONS TRUCKING,

Employer,

and

FEDERAL INSURANCE COMPANY and VIGILANT INSURANCE COMPANY,

Insurance Carrier, Defendants.

File No. 714216

A P P E A L

D E C I S I O N

By order of the industrial commissioner filed March 8, 1984 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 consists of the transcript; claimant's exhibits 1 through 7, inclusive; defendants' exhibits A through G, inclusive and exhibit AA, 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 reached in the arbitration decision as amended by a nunc pro tunc order of January 6, 1984.

ISSUES

The arbitration decision awarded benefits to claimant as surviving spouse of the deceased Fred J. Anderson, who was found to be an employee of Sammons Trucking and whose injury and death were found to have risen out of and in the course of the employment.

Defendants state the issues: "1. Whether claimant's decedent's death arose out of and in the course of employment; 2. Whether decedent was an employee or independent contractor; and 3. The rate of compensation."

SUMMARY OF EVIDENCE

The employee, Fred Anderson, was killed in a motor vehicle accident on August 24, 1982.

Prior to that, in January 1981, the employee entered into a lease agreement with Sammons Trucking which provided that the employee would exclusively and continuously furnish a truck and trailer to Sammons Trucking. Under that agreement, Sammons was to have exclusive possession as well as control and use of the equipment during the lease. In return, Sammons agreed to pay to decedent a certain percentage of the income from the operation of the tractor and trailer.

For the ensuing year and a half, until his death, the decedent worked exclusively for Sammons and, under the terms of the lease, Sammons collected the freight hauling fees.

Sammons Trucking is a common carrier which does not own any truck tractors of its own. Its principal business is freight hauling through such lease agreements. All of the permits, license plates and such items were in the name of Sammons.

On the other hand, Mr. Anderson had a workers' compensation policy which would have covered employees which he hired; however, he did not hire any employees. Sammons has a workers' compensation policy which covers its own employees.

The agreement between the parties stated that Mr. Anderson was not to be an employee of Sammons Trucking and that Mr. Anderson had the authority to hire and fire his own help. Mr. Anderson was not obliged to accept all those but did work continuously over the period of time he was with Sammons. Mr. Anderson was free to choose his own routes. He carried his own insurance on the truck and trailer but Sammons carried the cargo insurance. Income tax returns for 1979, 1980 and 1982 designated Mr. Anderson as an independent business man. The lease agreement itself provided for termination by either party without cause upon 30 days written notice or immediate termination by either party upon breach of the agreement.

APPLICABLE LAW

The statement of applicable law in the arbitration is sufficient and under the circumstances is adopted. Further propositions are discussed in the analysis.

ANALYSIS

Arthur Larson in the Law of Workmen's Compensation, expands upon the elements of the independent contractor relationship versus that of the employee and employer. Larson shows that where the work performed is an integral part of the employer's business, the relationship is more likely to be that of employee-employer. Larson, §45.21. See especially pages 8-143 to 145. Here, the facts clearly show that the decedent's activities in hauling motor freight were an integral part of Sammons business; in fact they were the integral part of the business. As such, then, that factor points toward a finding of the employee-employer relationship.

Looking at the problem from the nature of the worker's efforts, Larson states: "If the worker does not hold himself out to the public as performing an independent business service, and regularly devotes all or most of his independent time to the particular employer, he is probably an employee, regardless of other factors." Larson, §45.31(a), p. 8-175 Again the relationship appears to be that of employee-employer because Mr. Anderson did not hold himself out to the public as an independent businessman.

Finally Larson points out in §46.30 that the name chose by the parties for claimant ("independent contractor") has ordinarily very little importance "as against the factual rights and duties they assume." Larson, p. 8-213. Thus, the designation of Mr. Anderson as an independent contractor in the lease agreement does not preclude the employee-employer relationship.

Viewing the facts in light of Larson's remarks and in light of the analysis in the arbitration decision, one concludes that the deceased Fred J. Anderson was an employee of Sammons Trucking at the time of his death and that his surviving spouse is entitled to benefits under the Iowa Workers' Compensation Law.

There is really no question that the injury arose out of and in the course of the employment, and defendants do not argue that point. Also, neither party advanced any theory on the weekly compensation rate, so the rate found in the arbitration decision will be used as will the findings of fact and conclusions of law. The order as stated in the nunc pro tunc order of January 6, 1984 will also be adopted.

FINDINGS OF FACT

1. Claimant's decedent was selected to work for Sammons Trucking.

2. Decedent derived income from gross receipts generated by hauling for defendant employer.

3. Sammons had authority to terminate.

4. Sammons had authority to control the work.

5. Sammons was the authority in charge of decedent's work.

6. Decedent sustained an injury while driving for Sammons on August 24, 1982. He died from that injury.

7. Claimant proved by a preponderance of the evidence that decedent was an employee of Sammons.

8. Defendants failed to prove that decedent was an independent contractor.

9. Claimant incurred medical expenses as a result of decedent's death.

10. Burial expenses exceed $1,000.

11. The gross weekly wage is $293.

12. Claimant is the unremarried surviving spouse of decedent.

CONCLUSIONS OF LAW

1. Claimant's decedent, Fred Anderson, was employed by Sammons Trucking on August 24, 1982.

2. Fred Anderson sustained an injury arising out of and in the course of employment on August 24, 1982.

3. Claimant's decedent, Fred Anderson, died as a result of these injuries.

4. Defendants will be ordered to pay $139 in medical expenses incurred as a result of an injury.

5. Defendants will be ordered to pay $1,000 in burial expenses to claimant.

6. Defendants will be ordered to make the statutory payments of $2,000 to the Second Injury Fund.

7. Defendants will be ordered to make weekly payments unto claimant commencing August 25, 1982 in the amount of $189.18 per week.

ORDER

IT IS THEREFORE ORDERED that defendant employer and defendant insurers pay unto claimant one hundred eighty-nine and 18/100 dollars ($189.18) per week in death benefits commencing August 25, 1982 until claimant is disqualified from receiving same.

IT IS FURTHER ORDERED that defendants pay unto claimant one hundred thirty-nine dollars ($139.00) in reimbursement of medical expenses.

IT IS FURTHER ORDERED that defendants pay the Second Injury Fund two thousand dollars ($2,000.00) pursuant to section 85.65, Code of Iowa.

IT IS FURTHER ORDERED that defendants pay unto claimant the statutory burial benefit of one thousand dollars ($1,000.00).

Interest is to accrue on this award pursuant to section 85.30, Code of Iowa, from September 3, 1982.

Costs of this proceeding are taxed against defendants.

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

Signed and filed at Des Moines, Iowa this 15th day of May, 1984.

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

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BARBARA ARCE,	:	
Claimant,	:	
	:	FILE NO. 707677
vs.	:	
	:	R E V I E W -
SANDRA POLLOCK d/b/a ELECTRIC DOUGHNUT,	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
TOWER INSURANCE CO.,	:	
Insurance Carrier, Defendants.	:	

This is a proceeding in review-reopening brought by Barbara Arce, the claimant, against Sandra Pollock d/b/a Electric Doughnut, her employer, and Tower Insurance Company, the insurance carrier, defendants, to recover additional benefits under the Iowa Workers' Compensation Act by virtue of an industrial injury which occurred on July 8, 1982 resulting in severe right leg burns. This matter was heard in Mount Pleasant, Iowa on April 20, 1983 and considered as fully submitted at the conclusion of the hearing.

In this decision we will concern ourselves with the nature and extent of claimant's disability, if any.

Based upon the transcript of the proceedings which has been provided wherein the claimant gave oral testimony, the record in this matter consists of the evidentiary deposition of Albert E. Cram, M.D., and claimant's exhibit 1 containing 20 items.

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

Claimant, age 38 with two dependent children, sustained burns to the lower one-half of her right leg when, while cleaning a window, she slipped and "stepped my foot in a pan of hot oil" (Transcript page 6, line 13). Claimant was taken to Henry County Hospital and became a patient of J. V. Belsare, M.D.

Dr. Belsare reported his findings as follows: (Claimant's exhibit 1, item 2)

FINDINGS: This patient was found to have second degree scalds involving the right leg. Almost the whole right leg seemed to be involved with scalds, the area involved on the right leg was about 8%. The area on the medial aspect of the left leg was about 2%. These were second degree burns.
There were first degree burns on the lower back and lower buttock which involved about a 2% area.

PROCEDURE: The blisters on the right leg were opened, the superficial skin was excised with sharp dissection. The blebs on the medial aspect of the left thigh were also opened and the skin was removed in these areas. Silvadene Ointment was applied over these areas.

On July 21, 1982 an operative procedure was performed as follows: (Cl. ex. 1, item 4)

FINDINGS: This patient was found to have a granulating wound from third degree scalds involving almost the whole right leg below the knee extending onto the ankle, this was all around the limb.

PROCEDURE: The patient was placed in the supine position, the thighs were prepped in the usual fashion and isolated with sterile towels. With the help of Brown dermatome, split thickness grafts were obtained using #20 setting, the grafts were obtained from lateral, anterior and medial aspects of the right thigh, the grafts came in wide sheets using the full width of the Brown dermatome. Then moist lap sheet was placed over the donor site, the grafts were placed in the moist towel. The right leg was cleansed with hydrogen peroxide and the grafts were placed over the recipient site. Small openings were made in the graft to let air out. The procedure was very tedious and time-consuming. The edges of the graft were anchored to the surrounding skin and to the adjacent graft with pieces of Steri-strips.

After covering the anterior and lateral area with grafts the leg was placed on a wooden support to elevate the leg, the posterior aspect of the right leg was covered with split thickness graft as well. The grafts were treated in the same manner and anchored to the surrounding skin with Steri-strips several Steri-strips had to be used to hold the grafts in place.

Sheets of Adaptic were placed over the recipient site, pads were applied and Kling was rapped around the right leg, tapes were used to hold the dressing in place.

The donor site was covered with Adaptic and ABD's and was wrapped with Kling and tape. The leg was held in the air with the help of a heel support, this was attached to a Kling and was attached to an IV pole to suspend the leg in the air. A pillow was placed under the right thigh and the patient was wheeled out of the operating room into the Recovery Room. The patient tolerated the procedure well.

Dr. Belsare, in his report of October 8, 1982, indicated that in his opinion this case "does not need a specialist's opinion.... However, I will be glad to furnish the records." (Cl. ex. 1, item 1)

Claimant requested a change of physician which was refused by the defendants. Claimant became a patient of Albert Cram, M.D., a director of the burn center at Iowa City Hospitals. Dr. Cram gave the following testimony in his deposition: (p. 8, ll. 16-25 and p. 9, ll. 1-11)

Q. With regard to the capability of an individual to go outside in the extreme heat, would this in any way be sensitive to this area as well as compared to extreme cold?

A. The skin that has been grafted or skin that has been a deep second degree burn does not have normal vascular response to heat and cold, and it does not have especially in response to heat the sweat glands necessary to help cool the skin. So grafted skin in all cases is more susceptible to discomfort in terms of its exposure to warm environment, and it's much more susceptible to frostbite than normal skin when it's subjected to cold. So that these areas have to be protected throughout the life of the patient.

Q. By not having the normal skin glands, does this change the circulatory process in our body in that particular area?

A. Well, I think relating primarily to the skin, yes, the grafted skin doesn't have the normal vascular control in terms of the ability to contract or expand the vessels in response to temperature change. In terms of venous return from the foot in this particular case to the upper leg, I can't be certain of the effect. It could decrease it or it might not.

Dr. Cram expressed the medical opinion that claimant has a permanent impairment (Deposition p. 10, l. 1) and further testified as follows: (Depo. p. 10, ll. 16-25)

Q. And would you have an opinion as to what percent that would be of the lower extremity?

A. Well, I think it's difficult to assign a precise percentage to such a thing. There are no guidelines that I'm aware of such as exist for the type of impairment that may occur with joint dysfunction where a joint is unable to move through its full range of motion.

I would estimate that in terms of dysfunction to the leg she has perhaps ten percent disability to that leg due to the changes, permanent changes in the skin of the ankle.

This now brings us to the cutting edge of the issue in this matter. In light of Dr. Cram's medical opinion, whose opinion is given the greater weight in this decision, is the claimant to be awarded a functional impairment of her right leg by virtue of her residual permanent difficulty?

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 8, 1982 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).

In view of the foregoing legal principles, it is apparent that claimant has sustained her burden in producing supportive credible medical evidence. Claimant is denied, on the basis of her diminished ability to withstand extremes of heat and cold, those many outdoor employment opportunities which would otherwise be available for her consideration and is considered as a functional impairment. Claimant's inability to stand for long periods "are going to create discomfort and that will interfere with her ability to perform such an activity should it be required of her." (Cram Depo. p. 11, ll. 17-19). Claimant's lack of choice as to proper footwear (trans. p. 13, l. 18) can be and is a limitation as to her choice of future employment and is considered as a functional impairment in this decision.

Based upon the undersigned's years of experience and expertise and based upon claimant's testimony together with having had an opportunity to view the scarring, it is concluded that the claimant has a functional impairment of 15 percent of her right lower extremity.

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 finding of facts are made:

1. That this agency has jurisdication of the parties and the subject matter.

2. That the claimant sustained an admitted industrial injury on July 8, 1982.

3. That the claimant has been paid her healing period at the stipulated weekly rate of $76.86.

4. That the claimant has sustained a functional impairment of 15 percent of her right leg by virtue of her continued discomfort during periods of temperature extremes.

5. That the claimant has a 15 percent functional impairment caused by the pain and discomfort occasioned by prolonged standing.

6. That the claimant has a 15 percent functional impairment occasioned by her inability to wear appropriate footwear.

7. That all of the foregong impairments are causally connected to claimant's injury.

THEREFORE, IT IS ORDERED that the defendants pay the claimant a period of permanent partial disability of thirty-three (33) weeks duration at the weekly rate of seventy-six and 86/100 dollars ($76.86) in a lump sum. Legal interest shall commence on January 5, 1983, said date being the first time defendants were aware of Dr. Cram's medical opinion.

Defendants are charged with the costs of these proceedings as provided in Industrial Commissioner Rule 500-4.33 together with an expert witness fee of one hundred fifty and no/100 dollars ($150.00) payable to Albert E. Cram, M.D.

Defendants are ordered to file a form 2A within ten (10) days from the date below.

Signed and filed this 8th day of November, 1983.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FRANCIS L. ARGO, Claimant,	:	
vs.	:	
VAN HULZEN OIL COMPANY, Employer,	:	File No. 684081
and	:	A P P E A L
AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Insurance Carrier, Defendants.	:	D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision wherein claimant was awarded healing period benefits, permanent partial disability benefits, and medical expenses as a result of a myocardial infarction which occurred on September 23, 1981. Claimant has presented an issue on cross-appeal in this manner.

The record on appeal consists of the transcript of the arbitration hearing which contains the testimony of claimant and Ileta Argo; claimant's exhibits A through J; defendants' exhibits 1 and 2; and the briefs and filings of all parties on appeal.

ISSUES

The issues on appeal as stated by defendants are:

1. Whether the deputy erred in finding that the effort necessary to perform claimant's work duties was greater than that necessary to carry out his non-occupational activities.

2. Whether the deputy erred in finding that the onset of claimant's symptoms began at 3:30 - 4:00 p.m.

3. Whether the deputy erred in finding that claimant's activities after the onset of chest pain aggravated his myocardial infarction.

4. Whether the deputy erred in finding that claimant's physical abnormality is of a permanent nature resulting in an industrial disability of 15 percent to the body as a whole.

5. Whether the deputy erred in awarding healing period benefits.

6. Whether the deputy erred in awarding permanent partial disability benefits.

7. Whether the deputy erred in awarding certain medical expenses.

On cross-appeal claimant sets forth the following issue:

1. Whether the deputy erred by allowing into evidence the report of Regina McIntosh over the timely and proper objection of claimant.

REVIEW OF THE EVIDENCE

At the time of the hearing the parties stipulated the applicable workers' compensation rate, in the event of an award, to be $157.35 per week. (Transcript, p. 2)

Claimant, who was 60 years old at the time of the hearing, is a high school graduate who has received some additional training in mathematics and soil conservation. He worked for the Soil Conservation Service for 30 years before retiring in July 1977 at the age of 55. Claimant testified that he began to benefit from a 60 percent pension paid by the federal government in December 1977. (Tr., pp. 3-10)

Claimant testified that he began working on the Van Hulzen family farm in April 1978 building fences and working with livestock. He was originally paid $4.00 per hour and his paychecks were issued by Van Hulzen Oil Company. Claimant explained that the oil company consists of four service stations and a bulk plant. (Tr., pp. 11-13) During the months of July and August 1978 claimant constructed two erosion control devices and some new fences on some of his own farm property. (Tr., pp. 13-14)

Upon completeing his own work in August 1978, claimant began working for Van Hulzen Oil Company. Claimant recalled that his duties primarily consisted of performing mechanical work in the shop and driving a bulk delivery truck, but that he would occasionally perform work at the Van Hulzen farm if there was spare shoptime. (Tr., pp. 14-15) Claimant testified that prior to September 23, 1981 he normally worked eight hours per day. (Tr., p. 37)

Claimant recalled that during the weeks preceding September 23, 1981 he had performed mostly mechanical work. On September 23, 1981 he had worked in the shop until 3:00 p.m. at which time he was requested to go to the Van Hulzen farm to assist in replacing some dirt which had been dislocated by erosion and by hogs that had rooted it out. Claimant testified that Van Hulzen Oil Company continued to pay him while he performed work on the farm. Claimant and Ken Van Hulzen took turns operating a Bobcat to move the dirt, but some clumps of dirt along the concrete and fence line had to be moved by hand. Based upon his experience as a soil conservation technician claimant noted that many of

the clumps of dirt which were moved by hand were at least one cubic foot in size. He testified that one cubic foot of packed dirt weighed from 100 to 130 pounds. (Tr., pp. 15-19)

Claimant testified that he continued to move dirt until 5:30 p.m., but that he had broken out in perspiration approximately ten minutes before quitting. He drove a tractor to the farm yard and then layed down in a pick-up truck. He then drove the pick-up truck to the shop from where he drove his own vehicle home. Claimant's wife called his nephew, Charles Argo, M.D., who suggested that claimant enter the hospital. Claimant arrived at Mahaska County Hospital at approximately 7:00 p.m. and was immediately admitted to the intensive care unit under the care of Sidney A. Smith, M.D. Claimant spent ten days in the hospital, including three days in intensive care, and was told that he had experienced a heart attack. (Tr., pp. 19-25; 27-29)

Claimant related that his family has had a history of heart problems and that his mother and brother had had heart attacks in 1981. Claimant had visited L. A. Iannone, M.D., on June 15, 1981 to undergo a stress test. In a June 15, 1981 letter addressed to Dr. Smith, Dr. Iannone wrote:

> Physical examination was negative. Treadmill test was done and a copy is enclosed. As you can see, the test is felt to be negative for evidence of ischemia or arrhythmia.
>
> I have discussed this with the patient and his wife and feel that there is no evidence for significant cardiovascular problem at this time. I have advised him to check with you for follow-up on his lipid abnormality and that he also should consider yearly treadmill testing. The patient is agreeable to this plan and will be contacting you for follow-up. (Claimant's Exhibit F)

In a November 11, 1981 letter addressed to the insurance carrier, Dr. Smith reported on his treatment of claimant:

> This 59-year old white male with no previous history of anginal type pain has a markedly positive family history of coronary artery disease. His father suffered a myocardial infarction at the age of 50 and died at 67. The paternal grandfather died in his 50's and a brother died at the age of 49 of myocardial infarctions. The patient has a past history of lipid abnormalities. He had undergone a treadmill test on 6/15/81 which was interpreted as negative. This test was performed at Cardiology Associates, P.C. in Des Moines. On 9/23/81 the patient was engaging in heavy physical labor on a farm owned by the Van Hulzen's when at approximately 3:30 - 4 p.m. he developed precordial pain radiating into both sides of the chest and into the right shoulder down the right arm and into the neck and the jaws. This was associated with diaphoresis but no nausea or vomiting. He was seen at his home by his nephew, who is a partner of mine, and was admitted to the Coronary Care Unit where I assumed his care. Serial electrocardiograms and enzymes confirmed an acute inferior myocardial infarction. His post infarction course was very stable with minimal rhythm disturbances and no evidence of congestive failure. He was transferred from the Coronary Care Unit on 9/26/81, experienced an uneventful course on the floor, underwent cardiac rehabilitation exercises without problem, was discharged to home on 10/2/81, and has been followed as an out-patient periodically without problems. He is to consult with Dr. David Lemon at Methodist Hospital in Des Moines on 11/18 for consideration for further workup and possible cardiac catheterization.
>
> It is my opinion that Mr. Argo's prognosis is dependent upon further investigation. As you are probably aware, a significant percentage of inferior wall myocardial infarctions have multiple vessel disease and although Mr. Argo is at present asymptomatic and pain free, he may well have evidence of additional disease if he is submitted to cardiac catheterization.
>
> As to the answer to your last question concerning whether his heart attack was brought about by working conditions or job duties, we encounter the problem of medical opinion and medical fact vs. workman's [sic] compensation laws. It is my personal opinion that no myocardial infarction is compensable and that genetic factors, diet, and exercise are more important. I have pointed out the genetic factors of Mr. Argo's disease above. However, if myocardial infarctions are compensable under the law; then it would be my opinion that the activity in which Mr. Argo was engaged certainly were very likely to precipitate a myocardial event if one was so anatomically, physically, and genetically disposed. (Cl. Ex. I)

Claimant was admitted at Iowa Methodist Medical Center on November 18, 1981 and underwent a cardiac catheterization performed by David K. Lemon, M.D., on November 19, 1981. A report prepared by Dr. Lemon on November 23, 1981 stated, in part:

> CORONARY ARTERIES:
> 1. The left main coronary was normal.
> 2. The left anterior descending artery was normal.
> 3. The left circumflex coronary artery was very tortuous. There appears to be a less than 50% obstruction in the proximal one third of the blood vessel, but due to tortuosity it may not be that severe. The rest of the vessel appears normal.
> 4. The right coronary artery is 100% occluded in its proximal portion. Its posterior descending branch is seen from the left side injections.
>
> POST CATHETERIZATION DIAGNOSIS:
> 1. Evidence of previous inferior wall infarction.
> 2. Complete occlusion of the right coronary artery disease with subcritical disease in the circumflex.
>
> RECOMMENDATION:
> The patient should be treated medically.
> (Cl. Ex. G)

Claimant testified that he returned to work at Van Hulzen Oil Company in mid-January 1982, initially for one-half days only. He testified that he currently works seven hours each day at a self-service filling station owned by Van Hulzen Oil Company and is paid $4.00 per hour as compared to $6.25 per hour prior to his myocardial infarction. Claimant stated that he tires much quicker than he did prior to the myocardial infarction and is not permitted to partake in activities such as shoveling snow or raking leaves. (Tr., p. 38-42; 53-54)

In an April 29, 1982 letter addressed to claimant's counsel, Dr. Smith wrote:

> To facilitate matters I am enclosing a copy of a letter dated November 11, 1981 which I sent to the insurance carrier for the Van Hulzen Company. I believe this letter answers your first question. Subsequent to this letter Mr. Argo was evaluated by Dr. David Lemon at Iowa Methodist Hospital in Des Moines and underwent cardiac catheterization. This disclosed single vessel disease involving the proximal right coronary artery with no evidence of significant disease involving the other arterial supply of the heart. This gives Mr. Argo a good prognosis and obviates the necessity for surgery. With proper diet and exercise, Mr. Argo's prognosis should be little different than a member of the normal population who has not suffered a coronary event. (Cl. Ex. H)

In an October 14, 1982 letter addressed to Dr. Smith, defendants' counsel first summarized the court's decision in Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974) and then posed several questions to the doctor in view of the summary. The more pertinent of those questions, and Dr. Smith's answers thereto contained in his October 25, 1982 response, are printed below:

> 1. Do you have an opinion within a reasonable degree of medical certainty as to whether Mr. Argo had a previously weakened or diseased heart before September 23, 1981? Please state the basis of your opinion and if you are unable to form an opinion, please so state and specify why.
>
> In response to question #1: Coronary atherosclerosis is a process which develops over a period of time. The fact that Mr. Argo developed an acute myocardial infarction on 9/23/81 was the combination of this prolonged process. Mr. Argo, however, had not had any symptomatology in the form of anginal type pain to indicate that this process was due to emotion. He had had a negative treadmill test on June 15, 1981. Therefore, the presence of his coronary artery disease was unknown not only to Mr. Argo but to all the physician's who had attended him.
>
> 2. Do you have an opinion within a reasonable degree of medical certainty as to whether Mr. Argo's physical exertion on September 23, 1981, while employed by Van Hulzen Oil Company, would be any greater than physical exertion of Mr. Argo's nonemployment life or physical exertion of any other person's nonemployment life? Please state the basis of your opinion and if you are unable to form an opinion, please so state and specify why.
>
> In response to question #2: It is my understanding that Mr. Argo was engaged in the process of moving dirt to fill up hog wallows. This was being accomplished by both mechanical means with a Bobcat and also a tractor and blade, and also by hand, and that there were some large chunks of dirt involved which had to be lifted and rolled. This amount of exertion would certainly not be any greater than that possibly involved in shoveling the snow from one's walk.
>
> ....
>
> 5. Do you have an opinion within a reasonable degree of medical certainty as to whether Mr. Argo would have sustained his myocardial infarction regardless of his physical exertion on September 23, 1981? Please state the basis of your opinion and if you are unable to form an opinion, please so state and specify why.
>
> In response to question #5: This has also been previously answered. It is my opinion that Mr. Argo would have eventually sustained a myocardial infarction regardless of his physical exertion on September 23, 1981. The process of coronary atherosclerosis had been taking place for perhaps a number of years and eventually would be expected to reach the degree to precipitate a myocardial infarction. Although this cardiac event may have been precipitated prematurely on the basis of the physical exertion of the moment, it is my personal opinion that he would have probably suffered a cardiac event and

myocardial infarction regardless of his physical exertion on September 23, 1981. (Defendants' Ex. 1)

Claimant was interviewed by two vocational evaluation consultants. At the request of his own counsel, claimant was interviewed by G. Brian Paprocki, M.S., V.E., on August 26, 1982. At the conclusion of his report Mr. Paprocki expressed his opinion as to claimant's industrial disability:

> Based on the information noted above, it is my belief that the claimant, Francis L. Argo, has sustained an industrial disability of approximately 33%. This rating is principally based on: the wage differential between former and current job responsibilities with the same employer; the claimant's age; and the extremely limited probability of locating higher paying alternate employment in the Oskaloosa area. Essentially, in spite of Mr. Argo's diverse work background and apparently wide-ranging skill abilities, I doubt the availability of any more stable or remunerative work, or location of a more considerate, seemingly empathetic employer than the Van Hulzen Co. (Cl. Ex. J)

At the request of counsel for defendants, claimant was interviewed by Regina McIntosh, A.C.S.W., of Forensic Services Corporation in Olathe, Kansas. Ms. McIntosh first noted that arrangements had been made between attorneys Devine and Heslinga for her to meet with claimant on October 29, 1982. In her conclusion Ms. McIntosh reported in part as follows:

> Pursuant to my visit with Mr. Argo, I contacted his employer to inquire about his present wages and job duties. Ken Van Hulzen indicated Mr. Argo presently earns $4.00 per hour. The decrease in salary was due to some changed job responsibilities.
>
> ....
>
> I also contacted the Iowa State Soil Conservation Service and spoke with the Personnel Section. The State Soil Conservation Aides are a pay grade 16 with a salary range being $12,355.20 annually to $15,537.60 annually. There are both full and part-time positions. Presently there are vacancies, however, they are not filling them due to a hiring freeze.
>
> Mr. Argo stated during the interview that his previous supervisor has inquired about him possibly returning to work and apparently Mr. Argo would consider this a possibility if there were some "personnel changes" at the Mahaska County Soil Conservation Unit.
>
> If it were possible for Mr. Argo to obtain a State Aide position and start work at the lowest level, his hourly rate would be $5.94 per hour. If he were able to start higher in the pay grade, the hourly wage would be higher with a maximum of $7.47 per hour. (The pay range is $12,355.20 to $15,537.60 annually.)
>
> The Personnel Branch indicated there is a hiring freeze, however, there is a special process by which a unit can apply to have special considerations given to filling a vacancy. They also stated that other retired Soil Conservation employees have begun working for the State after they have retired from the Federal government. Therefore, this is not an uncommon or particularly unusual circumstance.
>
> ....
>
> My discussion at the State level indicated this is indeed a possibility and is a situation in which other retired Federal employees have arranged. From Mr. Argo's report, he seemed to have a good working relationship with this prior employer and feels he would be able to physically handle the work. In view of this, he could best maximize his earnings by returning to whatever position he might qualify for in the salary range from $5.94 to $7.47 per hour.
>
> ....
>
> His reason for not pursuing the State job has to do with personnel - not his dislike for the job or any concerns about not being physically suited for the job. Mr. Argo's primary occupation for over 25 years was a Soil Conservation Technician. From his interrogatory it is noted his salary level was approximately $11,900.00 to $12,200.00 the four years prior to his retirement. His retirement income is $11,469.00. His supplemental income from working at the Van Hulzen Oil Company placed him at a much higher income level. Even if he remains employed at $4.00 per hour, his seven hours per day combined income will be $18,749.00. Should he decide to return to Soil Conservation, his potential would be even greater. Although he immediately has experienced a decrease in his hourly wage, in my professional opinion he has not sustained any industrial disability because he possessed skills necessary to obtain a higher paying position. (Def. Ex. 1)

Claimant testified that none of his medical expenses have been paid by Van Hulzen Oil Company or the American Mutual Liability Insurance Company. (Tr., pp. 36-37) On cross-examination, however, claimant admitted that most of the medical expenses had been paid by Blue Cross/Blue Shield which is provided through his pension from the federal government. At the time of the hearing the only outstanding medical bills were for the ambulance service on September 23, 1981 and $75 owed to Iowa Methodist Medical Center. (Tr., pp. 49-50)

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...."

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."

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 23, 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).

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."

The court in Sondag cited with apparent approval 1A Larson Workmen's Compensation Law, section 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."

The court continued:

> 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.
>
> ....
>
> It has long been legally recognized that damage caused by continued exertions required by the employment after the onset of a heart attack is compensable....("The most obvious relevance of this element [continuing exertion after symptoms] is in showing causal connection between the obligations of the employment and the final injury; for if the workman, for some reason, feels impelled to continue with his duties when, but for these duties, he could and would have gone somewhere to lie down at once, the causal contribution of the employment to the aggravation of the condition is clear.").
>
> The common knowledge that complete rest and immobilization are ordinarily prescribed for persons who are undergoing a heart attack has been judicially noticed.

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).

ANALYSIS

Upon review of the record, and particularly the correspondences of Doctors Lemon and Smith, it is apparent that claimant suffered from a preexisting heart condition (coronary atherosclerosis) at the time of his myocardial infarction on November 23, 1981. In its decision in Sondag, 220 N.W.2d 903, the court noted two alternative circumstances under which workers' compensation benefits may be awarded in cases involving a preexisting heart condition: 1) where a heart attack occurs during an instance of employment stress greater than the stress of non-employment life and; 2) where a heart attack occurs during an instance of unusually strenuous employment exertion. In concluding that claimant suffered an industrial disability of 15 percent to the body as a whole as a result of his myocardial infarction, the deputy made a finding that the work performed by claimant on the Van Hulzen farm on September 23, 1981 was more strenuous than his non-employment activities. On appeal a finding shall be made that the activity of lifting 100-130 pound clumps of dirt is an unusually strenuous activity within the meaning of the second of the alternative tests set forth by the court in Sondag. As such, any issue as to whether the deputy erred in finding that the effort necessary to perform claimant's work duties was greater than that necessary to carry out his non-occupational duties (see defendants' appeal issue #1) is rendered moot as to its effect upon the outcome of this case and need not be addressed.

Defendants contend that the deputy erred in finding that the onset of claimant's symptoms began at 3:30-4:00 p.m. The deputy's finding finds support in the history reported by Dr. Smith on November 11, 1981. Claimant's objection on appeal to the report of Dr. Smith as constituting hearsay and double hearsay is overruled as being untimely. Because the deputy's finding as to the time at which claimant's symptoms began shall be adopted herein, the finding that claimant's activities after the onset of chest pain aggravated his myocardial infarction shall also be adopted.

Defendants also voice objection to the deputy's finding of an industrial disability of 15 percent to the body as a whole. Claimant is 60 years old and has training only as a soil conservation technician. While claimant may be capable of returning to the same type of work he once performed with the Soil Conservation Service, such positions are currently unavailable. As a result of physical limitations claimant's hourly wage with Van Hulzen Oil Company has decreased from $6.25 per hour before the myocardial infarction to $4.00 per hour. In light of these criteria the finding of an industrial disability of 15 percent to the body as a whole is reasonable. Because claimant has sustained the burden of proving that his myocardial infarction arose out of and in the course of his employment the deputy's award of healing period benefits and 75 weeks permanent partial disability benefits is proper. Defendants' contention that the amount of medical expenses which have been paid through claimant's own Blue Cross/Blue Shield coverage should not have been awarded to claimant is likewise found to be without merit. This agency is merely to determine which medical bills and expenses resulted from the injury arising out of and in the course of claimant's employment. The only parties named in this matter are Francis Argo, Van Hulzen Oil Company, and American Mutual Liability Insurance Company. Iowa Code section 85.38 provides for credit for any benefits paid under workers' group plans contributed to by the employer. We decline to expand upon the above language of section 85.38 to provide credit for benefits derived from a group plan to which the employer has not contributed.

Claimant's issue on cross-appeal, in which the introduction of the report of Regina McIntosh into evidence is objected to, is also found to be without merit. Ms. McIntosh's interview with claimant appears to have been sanctioned by counsel of both claimant and defendants, and her report was obviously intended to be used as an exhibit at the hearing. It should be noted, however, that the reports of both Mr. McIntosh and Brian Paprocki have been considered in the disposition of this matter.

FINDINGS OF FACT

1. Claimant was an employee of Van Hulzen Oil Company on September 23, 1981.

2. Claimant had a preexisting heart condition on September 23, 1981.

3. Claimant suffered a myocardial infarction while moving 100-130 pound clumps of dirt by hand during the course of his employment with Van Hulzen on September 23, 1981.

4. Claimant's work duties were unusually strenuous.

5. The onset of claimant's symptoms began at 2:30-4:00 p.m. on September 23, 1981 and he continued working until 5:30 p.m.

6. Claimant's activities after the onset of symptoms aggravated his myocardial infarction.

7. Claimant was hospitalized and unable to return to work until January 15, 1982.

8. Claimant is 60 years old.

9. Claimant has received training only as a soil technician.

10. Claimant's current wage is $4.00 per hour as compared to $6.25 per hour prior to his myocardial infarction.

11. Claimant has suffered an industrial disability of 15 percent to the body as a whole as a result of his September 23, 1981 myocardial infarction.

12. The stipulated rate is $157.35 per week.

CONCLUSION OF LAW

Claimant has sustained the burden of proving he received a myocardial infarction which arose out of and in the course of his employment on September 23, 1981 resulting in industrial disability of 15 percent to the body as a whole.

WHEREFORE, the deputy's arbitration decision filed May 16, 1983 is affirmed.

THEREFORE, it is ordered that the defendants pay the claimant a healing period beginning on September 23, 1981 and ending on January 15, 1982 at the stipulated weekly rate of entitlement of one hundred fifty-seven and 35/100 dollars ($157.35) together with statutory interest from the date due.

Defendants are further ordered to pay the claimant, commencing on January 16, 1982, a seventy-five (75) week period of permanent partial disability at the same stipulated rate together with statutory interest from that day on claimant's accrued weekly benefits.

Defendants are further ordered to pay the claimant the following medical expenses he has incurred as necessary to treat the injury:

Dr. Argo	$ 40.00
Sidney A. McIntosh, M.D.	332.00
Ambulance	60.00
Mileage	26.40
Drugs	144.00
Medical Item (jogger unit)	2,302.98
Iowa Methodist Hospital	2,425.19

Costs are charged to the defendants in compliance with Rule 500-4.33.

Defendants are further ordered to file a final report within twenty (20) days from the date that the terms of this decision become final.

Signed and filed this 19th day of January, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CARL ARINGDALE, Claimant, vs. FRENCH & HECHT, Employer, Self-Insured, Defendant.	File No. 672251 A P P E A L D E C I S I O N

By order of the industrial commissioner filed September 19, 1983 the 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.

The record consists of the transcript; claimant's exhibits 1-34, 36; and the deposition of Paul Howard Beckman, M.D., all of which evidence was considered in reaching this final agency decision. The deposition of Eugene Collins, M.D., was marked as exhibit 32.

The result of this final agency decision will be the same as that reached by the hearing deputy.

EVIDENCE

The review-reopening decision contained a good summary of the evidence and will be adopted herein. However, certain evidence needs to be repeated and emphasized.

Claimant described his injury of April 13, 1981 in his testimony:

> A. I was working on top of a machine. I crawled down the pipe, it was down the same pipes that I had crawled up on, and somebody had moved a conveyor in underneath the pipes. And I stepped on the conveyor and it flipped me backwards and I lit on my hips, and then my neck hit on the ladder that was setting on the edge up against the safety rail and my head hit on the safety rail.
>
> Q. How far did you fall?

A. About four feet.

Q. And how did you fall?

A. I fell backwards and lit on my hips and then my neck and my back hit on this ladder that was sitting on the edge and my head hit on the safety rail. (p. 18 ll. 9-23)

Claimant saw several physicians, the main treatment ultimately being surgery in the nature of a posterior cervical decompressive laminectomy, C4-7. The main medical evidence was by deposition.

Paul Howard Beckman, M.D., a general surgeon was the company doctor for the employer. He first saw claimant April 14, 1981 at which time claimant complained of multiple pains in the cervical, thoracic and paraspinus regions. He also testified claimant had degenerative arthritic changes and that the injury probably aggravated the preexisting condition. (Dep., p. 23, 41) Dr. Beckman testified that, although claimant had certain physical restrictions, such as a weight lifting restriction of 20 pounds, claimant could be "employable at something." (Dep., p. 43)

Eugene Collins, M.D., a qualified neurosurgeon, performed the cervical laminectomy in February 1982. He testified that while the surgery relieved some pressure, it was "not a particularly curative operation, per se." (Dep., p. 10) As to the cause of the degenerative arthritis and spondylosis, Dr. Collins testified that it originated by wear and tear over the years but that the injury aggravated that condition and caused his current problem:

A. Yes. I think that he needed two components, again, to get that. You need the preexisting cervical spondylosis and the actual, you know, injury. Yes, given that. See what I'm saying?

Q. Yes.

A. Given that preexisting cervical spondylosis, I believe that the mechanism of injury can account for the problems he was suffering with.

Q. Is it your opinion within a reasonable degree of medical certainty?

A. Yes. (Collins dep., p. 16 ll. 2-12)

In Dr. Collins opinion, claimant's lifting should be restricted to 10 pounds occasionally with no climbing, no heavy lifting, pulling, pushing, bending or prolonged standing.

Steven R. Jarrett, M.D., a physiatrist, stated in a report of January 25, 1983 that claimant should not engage in any heavy physical activity.

A report by Alfred C. Walker, M.S., a vocational consultant stated:

> Taking into consideration the vocational information discussed and medical information provided on Mr. Carl Aringdale, it is my opinion that this individual's vocational impairment is equivalent to a 91 percent reduction in his access to the labor market. It should be added at this time that it is questionable if Mr. Aringdale could fully sustain a eight hour work effort. Dr. Collins has suggested a six-hour limit specifically identifying two hours standing and four hours sitting and no more than 500 feet walking. Mr. Aringdale will have considerable difficulty re-entering the labor market with the current restrictions that have been placed on him by his physicians. In addition to these restrictions, Mr. Aringdale also has a limited educational experience and the type of retraining programs which would fall within his physical capabilities may be too difficult. If Mr. Aringdale were capable of performing in an academic setting, it would first require him to complete the preliminary academic preparations of obtaining a G.E.D. and involvement in developmental education coursework designed at bringing him up to a level of functioning in a short-term vocational program such as offered by our local community college and vocational technical schools. An additional factor which may seriously effect his vocational rehabilitation potential is his age. Although Mr. Aringdale is not at the retirement age, he is reaching the age where it becomes very difficult for job placement, especially in a labor market situation such as we have today, where there is an excess of skilled and able-bodied individuals who are capable of performing the type of work required for many more years than Mr. Aringdale would be able to contribute to any company that would hire him.

Claimant testified that he was 58 years of age and had a tenth grade education. His work background included jobs as a laborer, mechanic, machine operator, machine repairman and maintenance mechanic. He owned his own tavern for awhile and was in the army during the Korean War. At the time of the hearing he testified that he had constant neck pain and walked but about 500 feet a day. Aaron Snell, Lewis Herman, and Pamela Peters, friends of claimant testified that claimant appeared to be in good health prior to the injury and that, since the injury, he seemed unable to do certain of his usual activities.

ISSUES

Defendant states the issues: "I. The deputy erred in holding that all of claimant's impairment or disability was caused by the accident of April 13, 1982. II. The deputy erred in concluding that claimant was permanently totally disabled."

APPLICABLE LAW

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 Produce Co., 240 Iowa 1219, 38 N.W.2d 158 (1949); Almquist v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 (1934). "The incident or activity need not be the sole proximate cause, if the injury is directly traceable to it." Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974); Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971) "A cause is proximate if it is a substantial factor in bringing about the results." Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980)

In Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1960), 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."

Industrial disability is a reduction of earning capacity, and not mere functional impairment. Such disability includes considerations of functional impairment, age, education, qualifications, experience and inability because of the injury to engage in employment for which claimant 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 85 (1960). See also Blacksmith, 290 N.W.2d 348, and McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980)

ANALYSIS

It is quite clear that claimant had a preexisting condition in the nature of degenerative arthritis and spondylosis which is a form of degeneration also. It is equally clear that claimant had a serious and disabling accident while at work. Dr. Collins explains it well when he says it takes the two components, the preexisting condition and the accident, to produce the impairment. Viewing that testimony in the light of the ruling in Ziegler, it is clear that claimant more than slightly aggravated the preexisting condition and should be entitled to compensation benefits to that extent of that aggravation. The testimony of Dr. Collins is given the most weight because he is the principal treating physician; however, none of the medical evidence really rebuts the proposition that claimant seriously aggravated his preexisting condition.

Claimant's age and background do not prepare him to earn any kind of a living with such an impairment. As the rehabilitation counselor, Alfred C. Walker, stated his age and limited education are drawbacks. Mr. Walker's quantative assessment of a 91 percent reduction in access to the labor market also carries some weight to the extent that it shows claimant has a serious inability to compete for any kind of serious employment. One concludes, therefore, that the hearing deputy was correct and that claimant is permanently and totally disabled.

FINDINGS OF FACT

1. Claimant was hurt at work on April 13, 1981 when he fell, striking his neck on a ladder and his head on a safety rail.

2. Claimant was treated inter alia by Paul Beckman, M.D., a general surgeon, by Byron Rovine, M.D., a neurosurgeon, by Steven R. Jarrett, M.D., a physiatrist, by Sam K. Choi, M.D., a neurologist, and by Eugene Collins, M.D., a neurosurgeon who performed a C4-C7 decompressive posterior laminectomy and C6-7 foraminotomy, right with decompression of C7 nerve root.

3. Claimant had preexisting cervical spondylosis, and arthritis of the spine.

4. The work injury of April 13, 1981 aggravated the preexisting condition.

5. Claimant has a great deal of pain and restriction of motion in his cervical area and has permanent partial impairment which restricts him from manual labor.

6. Claimant was age 58 at the time of the hearing, with a tenth grade education and had always worked at jobs which required manual labor, as stated above.

7. Claimant's access to the labor market is seriously reduced and is compounded by his age and lack of education.

CONCLUSION OF LAW

Claimant sustained an injury which arose out of and in the course of his employment on April 13, 1981 which more than slightly aggravated a preexisting condition and which resulted in permanent total disability as defined in §85.34(3), The Code.

ORDER

THEREFORE, defendant is hereby ordered to pay weekly compensation benefits unto claimant at the rate of two hundred sixty-two and 82/100 dollars ($262.82) per week from the date of the injury during the period of his disability, accrued payments to be made in a lump sum together with statutory interest.

Costs of this action are taxed against defendant.

Defendant is ordered to file a report of payments upon completion thereof.

Signed and filed at Des Moines, Iowa this 12th day of December, 1983.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KAREN ASCHINGER,	:	
Claimant,	:	
vs.	:	File No. 540409
FARMLAND FOODS,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
AETNA LIFE & CASUALTY,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from a proposed review-reopening decision wherein claimant was denied permanent partial disability benefits and further healing period benefits. Claimant was awarded two weeks of temporary total disability benefits and certain medical expenses. The record on appeal consists of the transcript of the review-reopening proceeding; claimant's exhibits 1 through 4 and 7 through 16; defendants' exhibits A through K; and the briefs and filings of the parties on appeal.

ISSUES

1. Whether the claimant failed to prove a permanent partial disability by a preponderance of the evidence.

2. Whether claimant is entitled to healing period benefits.

3. Whether certain medical expenses incurred after September 10, 1979 are chargeable to defendants.

REVIEW OF THE EVIDENCE

Claimant was forty years old at the time her deposition was taken. She is married and had four dependent children at the time of the work-related injury. (Defendants' Exhibit K, pages 2-5) Claimant is a high school graduate whose prior work experience has included managing a family-owned tavern and working as a waitress, cashier and bartender in a restaurant. (Claimant's Ex. K, pp. 6-8) Claimant began working for defendant employer in August of 1974. She testified that she worked on the bacon line most of the time during her period of employment. Her duties involved packing, scooping and arranging bacon. (Def. Ex. K, pp. 9-11) On May 18, 1979 the bacon line broke down and claimant was assigned to packing bacon in boxes. (Def. Ex. K, p. 12) An ammonia leak developed near the bacon line where claimant was working and she inhaled the fumes. (Tr., pp. 28-30) Claimant testified she started coughing and wheezing, and she was unable to breathe. (Tr., pp. 29-30) She was taken to the bathroom by another employee and then went to the plant nurse's office. The nurse drove claimant to the hospital. (Tr., pp. 31-32) She was seen by J. L. Flood, M.D., who placed her in a croupette tent and treated her for chemical pneumonitis. (Claimant's Ex. 4) Claimant's lungs had cleared by May 20, 1979, and she was discharged from the hospital. Ilosone and Robitussin were prescribed. (Cl. Ex. 4) Claimant testified that following the injury her throat felt raw; it hurt to breathe; and she would lose her voice when she talked. (Tr., pp. 33-34) Claimant returned to work on or about May 29, 1979 and continued working until August 21, 1979, missing two days in July due to laryngitis. (Def. Ex. G) In August she was referred by Dr. Flood to Daniel Stone, M.D., an internist, for evaluation. (Tr., p. 34; Cl. Ex. 8) Claimant was hospitalized at Bishop Clarkson Hospital in Omaha with complaints of a dry, hacking cough, chest pains and shortness of breath. (Cl. Ex. 7, 8) Dr. Stone noted a history of "recurrent bronchitis one or two times each year and has had pneumonia three times." (Cl. Ex. 7) Pulmonary function testing was done on August 28, 1979 and the results were reported as showing a small airway obstruction. (Def. Ex. D) Claimant was discharged from the hospital on September 9, 1979 with instructions to return in six weeks for re-evaluation. (Cl. Ex. 7) In a letter to Dr. Flood dated September 10, 1979, Dr. Stone reported:

> I have recommended that this lady, who has recently been a patient of mine in the Bishop Clarkson Memorial Hospital, not return to work. I understand that she has been exposed to amonia [sic] fumes during her employment. She has all the signs of small airway lung disease. In my opinion, exposure to amonia [sic] aggravated a pre-existing condition. In my opinion Mrs. Aschinger should not return to this particular occupation or should not return to exposure to amonia [sic] fumes. (Cl. Ex. 8)

On October 12, 1979 claimant returned to Bishop Clarkson Hospital for a second series of pulmonary function tests. Dr. Stone reported that claimant had occasional episodes of dyspnea and weakness, but the pulmonary function tests results had returned to normal. (Def. Ex. D) Claimant was continued on Metaprel, and was told to return in six weeks. (Def. Ex. D) On November 11, 1979 Dr. Stone released claimant from his care, noting that her chest pains had "almost completely disappeared" and suggesting she continue taking Metaprel. On February 20, 1981 Dr. Stone reported to claimant's attorney that he doubted that claimant's illness was related to the ammonia exposure. (Def. Ex. D)

On December 4, 1979 claimant consulted Robert C. Larimer, M.D., who is board certified in internal medicine, at the request of defendants. (Cl. Ex. 16, pp. 3, 17) Dr. Larimer testified by deposition that x-rays of claimant's chest showed bronchial markings usually seen with a localized inhalation type of damage. (Cl. Ex. 16, p. 5)

> The fact that she had recently had what she described as a cold and bronchitis would suggest that her mucous membranes were already in kind of a precarious position and were probably jucier than normal, to use a reasonable expression. So they would be more likely to have severe -- she would be more likely to have a severe injury from pneumonia -- from ammonia inhalation than the next person who had not had recent bronchitis. (Cl. Ex. 16, p. 10)

Dr. Larimer stated his prognosis for the injury: "Generally speaking, the outlook for ammonia-inhalation injury is pretty good. In other words, most of the people who suffer this kind of an injury do very well and eventually over a period of months or a year or two recover to the point that there is no difficulty. They don't all, however." (Cl. Ex. 16, p. 9) Dr. Larimer conceded that repeated bouts of bronchitis could also have created the condition of claimant's lungs as indicated by the x-rays. (Cl. Ex. 16, p. 13)

In February of 1981, claimant consulted a doctor in Mexico on the advice of a friend. Claimant stated breathing tests and x-rays were taken and the medication Triaminoral was prescribed to help her breathing. She reported that the cost of the trip and medication for one year was $1,930. (Def. Ex. K, pp. 24-28) Claimant admitted she did not seek authorization of defendant employer to visit the Mexican clinic because she had been told by the plant nurse she no longer had insurance coverage. (Def. Ex. K, pp. 28-29)

In February of 1982, claimant was evaluated at Bishop Clarkson Hospital by Thomas Tinstman, M.D., a specialist in pulmonary medicine, for complaints of chest pains and increased coughing when exposed to cold, humidity or smoke. (Def. Ex. D; Cl. Ex. 8) New pulmonary studies yielded scores within normal limits, with Dr. Tinstman noting that tests which depended on patient effort had poorer results than some of the other tests. Dr. Tinstman reported: "The ultimate question is, does she have asthmatic bronchitis de novo, which was short-term aggravated by pneumonia, or does she have permanent disease as a result of ammonia." (Def. Ex. D)

In March 1982 claimant again consulted Dr. Larimer, who found that her complaints were similar to what they had been in 1979. He prescribed a Vanclearil inhalor, a cortisone treatment for pulmonary mucosa. (Cl. Ex. 12)

In December 1982 claimant was evaluated by Craig Bainbridge, M.D., who is board certified in internal medicine and pulmonary disease. Based upon a physical examination, chest x-rays and new pulmonary function studies, Dr. Bainbridge concluded that claimant did not have any permanent damage as a result of her exposure to ammonia. (Def. Ex. J, pp. 21-22) Dr. Bainbridge found evidence of possible minimal obstruction of air flow but reported that the results from the pulmonary function tests were essentially normal. (Def. Ex. J, p. 39)

John E. Kasik, M.D., a board certified internist with training in pulmonary medicine, testified by deposition in February 1983 after reviewing claimant's medical records and reports. (Cl. Ex. F) Dr. Kasik concluded that claimant had essentially normal pulmonary function which should not significantly limit her activities and found no indications of permanent damage from ammonia inhalation. (Cl. Ex. F, pp. 21, 27) Dr. Kasik testified that claimant's medical history was of repeated episodes of respiratory tract infections and laryngitis.

> The natural history of her illness, based on the past records, would indicate to me that she probably would continue to have repeated episodes of upper respiratory infection followed by complications, whether or not she had been exposed to ammonia. In other words, what I'm saying is that I would normally expect a person with this history to continue to have troubles with their respiratory tract.
>
> Generally speaking, individuals who have bronchitis for whatever reason tend to have recurrent episodes, particularly as they get older. (Def. Ex. F, pp. 11-12)

Claimant's medical records from 1974 indicate she has been treated for a ruptured liver and fractured coccyx. (Cl. Ex. 1)

Claimant testified that she worked in damp cold of 34-40 degrees temperatures and caught colds when she got wet. (Tr., pp. 15-19) Her medical records note she has no history of smoking. (Cl. Ex. 4) She was treated for coughing and congestion in November and December of 1974 and for laryngitis and a cough in January of 1976. In March 1976 she was seen for a sore throat. (Cl. Ex. 1) In December 1976 she had a cold, congestion and a cough. (Cl. Ex. 2) In March and December of 1977 she was treated for sinusitis. (Cl. Ex. 2) In February, July and December of 1978 claimant again had cold symptoms with laryngitis and nasal mucosal erythema. (Cl. Ex. 2, 3) In March of 1979 P. L. Myer, D.O., noted that claimant had previously had a hysterectomy, appendectomy, and a portion of bowel removed. Dr. Myer diagnosed claimant as suffering from acute duodenal ulcer. (Cl. Ex. 2)

Her employment records indicate she has not worked for defendant employer since August 21, 1979. She testified she is limited in doing housecleaning or gardening because she gets out of breath. Her home has a basement and second floor and the stairs tire her. (Tr., p. 51) She relies on her inhaler in dusty or humid conditions. (Tr., p. 52)

Paul Aschinger, husband of claimant, testified that his wife was generally healthy before the work-related injury. Following the injury she coughed up pieces of dark material for a year or more. Mr. Aschinger stated the material looked like dried blood. (Tr., pp. 104-110) He testified his wife could no longer bowl where there was smoking and had to rest when she cleans house or helps him in his construction business. Mr. Aschinger believed that claimant's condition had improved since 1981. (Tr., pp. 108-111) He confirmed that claimant was not a smoker. (Tr., p. 113)

Mary M. Daniel, health nurse for defendant employer, testified that her nursing notes show claimant came to her with cough complaints once in 1976 and twice in 1974. (Tr., pp. 116-119) Ms. Daniel indicated claimant had excessive absences from work as compared with other employees during the period prior to the May 18, 1979 injury. Claimant had 10 days of illness in 1974; 8 1/2 days off in 1975, and 28 days off in 1976. Claimant was absent 23 days in both 1977 and 1978. (Tr., pp. 119-120) Ms. Daniel stated that such absences included knee and neck injuries, a fractured tail bone, and gallbladder problems. (Tr., p. 122) Claimant had also suffered a contusion of the chest in an auto accident in 1977. (Tr., p. 126)

Pete Scavone, a foreman for defendant employer, testified that he had been claimant's immediate supervisor for the six months prior to the May 1979 injury. (Tr., p. 127) Mr. Scavone stated that prior to the ammonia injury, claimant was often sick with colds and coughing. Following the injury, when claimant returned to work she seemed much the same as before the injury. Mr. Scavone described her cough before the injury as loud and distinct and stated that claimant's present cough is similar in sound. (Tr., pp. 128-129)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 18, 1979 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).

ANALYSIS

Claimant seeks to introduce a new cause of action on appeal; that of gradual or cumulative damage to her lungs over a period of time as a result of plant working conditions. Since only those matters considered by the deputy are reviewed on appeal, this decision will not reach the question of gradual or cumulative injury.

The record reveals that claimant has a history of bronchial-related illnesses which have contributed to excessive absences from her job. Medical reports and the testimony of the plant nurse and foreman substantiate an almost continuous incidence of coughing and colds symptoms experienced by claimant prior to the May 18, 1979 ammonia injury. It becomes claimant's burden, therefore, to demonstrate that the respiratory problems she experienced following the injury were the result of ammonia inhalation and not the usual, for claimant, recurrance of previous problems. The evidence presented by claimant has not only failed to demonstrate this necessary causal relationship between injury and subsequent disability, but has also failed to establish the nature and extent of the disability.

Following her exposure to ammonia fumes, claimant received medical care and returned to work at the end of May, 1979. The record indicates that she worked nearly 2 1/2 months before seeking specialized medical evaluation of her respiratory complaints. Such delay in assessment leaves open the question of whether other intervening factors, i.e., renewed infection unrelated to the work injury, might have been in operation to affect the results of the August 28 pulmonary studies. Dr. Stone, the treating physician, could report only that exposure to ammonia aggravated a preexisting condition of small airways obstruction. A second series of tests administered in October of 1979 yielded normal results of pulmonary function, and claimant was released from the care of Dr. Stone, who later stated he doubted that claimant's illness was related to the exposure to ammonia.

Since the fall of 1979, claimant has been evaluated by a number of doctors for her continuing respiratory complaints. Although there has been some disagreement between the doctors as to whether certain pulmonary test results fall within normal limits, none of the doctors have diagnosed permanent lung, throat or nasal damage as a result of the ammonia injury. Absent proof that claimant has sustained a permanent impairment as a result of the work-related injury, the deputy was correct in denying an award of healing period or permanency benefits.

With regard to claimant's last issue, claimant incorrectly interprets the deputy's award of medical costs. The Bishop Clarkson Hospital expenses were limited to claimant's period of hospitalization for the purpose of initial evaluation from August 27, 1979 through September 9, 1979. Dr. Flood's charges were limited to the care given claimant prior to September 10, 1979. The charges of Drs. Stone and Larimer, both of whom saw claimant after September 10, 1979 were ordered paid.

FINDINGS OF FACT

WHEREFORE, it is found:

1. That claimant was forty years old at the time of the hearing.

2. That claimant is married with four (4) dependent children.

3. That claimant's previous work experience has included owning and managing a tavern and restaurant.

4. That claimant has a medical history of recurring bronchial-related illnesses.

5. That claimant has been employed by defendant employer since August of 1974.

6. That claimant had excessive absences from work due to illnesses.

7. That claimant was exposed to ammonia fumes on May 18, 1979 while working near the bacon line.

8. That claimant was hospitalized for two (2) days following the injury.

9. That claimant returned to work on or about May 29, 1979.

10. That claimant continued working for defendant employer until August 21, 1979.

11. That claimant had a series of pulmonary function tests performed in August-September of 1979 to evaluate her condition.

12. That the tests did not substantiate evidence of permanent lung damage due to the ammonia injury.

13. That subsequent pulmonary function studies yielded essentially normal results.

14. That claimant has continued to suffer recurring bronchial and throat problems.

15. That claimant is entitled to temporary total disability benefits for the period of August 27, 1979 to September 9, 1979.

16. That claimant is entitled to medical costs incurred as a result of her May 18, 1979 work-related injury.

17. That claimant has not received any permanent partial disability benefits as a result of her injury.

CONCLUSIONS OF LAW

The claimant has failed to sustain her burden of proof that she incurred a permanent impairment as a result of the work-related injury of May 18, 1979. Claimant is entitled to temporary total disability benefits for the period of her August-September hospitalization and to certain medical costs pursuant to section 85.27, Code of Iowa.

WHEREFORE, the deputy's proposed review-reopening decision is affirmed.

ORDER

THEREFORE IT IS ORDERED:

That defendants pay unto claimant temporary total disability benefits from August 27, 1979 to September 9, 1979 at a rate of one hundred ninety-four and 54/100 dollars ($194.54) per week.

That defendants pay medical expenses or reimburse claimant for expenses for which she can establish payment from her own funds as follows: Bishop Clarkson Memorial Hospital for a hospitalization from August 27, 1979 through September 9, 1979; bills from Dr. Stone; charges of Dr. Larimer; and costs of Dr. Flood prior to September 10, 1979.

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

That defendants file a final report in sixty (60) days.

Signed and filed this _____ day of June, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SANDRA K. ASH, Surviving Spouse, RALPH R. ASH, Jr., Deceased, Claimant,	
vs.	File No. 677749
INCORPORATED CITY OF SWEA CITY, IOWA,	D E C I S I O N
Employer,	O N
and	E Q U I T A B L E
AID INSURANCE SERVICES,	A P P O R T I O N M E N T
Insurance Carrier, Defendants.	

This is a proceeding to determine the apportionment of compensation benefits among the various conclusively presumed dependent parties. Those parties submitted the case on a stipulation of facts.

FACTS PRESENTED

The deceased, Ralph Ash, Jr., first married Linda; of their marriage one child was born in 1965, John Wayne Ash. Later, Ralph and Linda were divorced and Linda married David Henriksen who adopted John Wayne.

Later, Ralph married Sandra, and they had two children, Laurie born in 1972 and Danny born in 1976.

On August 8, 1981, Ralph Ash, Jr., was killed in an accident which arose out of and in the course of his employment.

ISSUES

The issues are whether or not John Wayne Ash is entitled to any portion of the weekly compensation benefits, and, if so, the extent of the apportionment to the entitled parties.

APPLICABLE LAW

Section 85.31, Code of Iowa, provides in part as follows:

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.

Section 85.42 states in part as follows:

The following shall be conclusively presumed to be wholly dependent upon the deceased employee:

1. The surviving spouse....

....

2. A child or children under eighteen years of age, and over said age if physically or mentally incapacitated from earning, whether actually dependent for support or not upon the parent at the time of his or her death.

Effective July 1, 1981 the following provision was deleted from the Iowa Code, §633.223: "A lawfully adopted person and his heirs shall inherit from and through the adoptive parents the same as a natural born child. The adoptive parents and their heirs shall inherit from and through the adopted person the same as though he were a natural born child." That code section now reads:

1. Except as provided in subsection 3, a lawful adoption extinguishes the right of intestate succession of an adopted person from and through the adopted person's natural parents. The adopted person inherits from and through the adoptive parents in the same manner as a natural born child inherits from and through the child's natural parents.

2. Except as provided in subsection 3, a lawful adoption extinguishes the right of intestate succession of a natural parent from and through the parent's natural born cild who is adopted. The adoptive parents inherit from and through the adopted person in the same manner as natural parents inherit from and through the parents' natural born child.

3. An adoption of a person by the spouse or surviving spouse of a natural parent has no effect on the relationship for inheritance purposes between the adopted person and that natural parent or natural parent's heirs. An adoption of a person by the spouse or surviving spouse of a natural parent after the death of the other natural parent has no effect on the relationship for inheritance purposes between the adopted person and the deceased natural parent's heirs.

4. A person inherits through an adopted person, an adoptive parent, or a natural parent of an adopted person only if the adopted person, adoptive parent, or natural parent of an adopted person would have inherited under subsection 1, 2, or 3.

Snook v. Hermann, 161 N.W.2d 185 (Iowa 1968) stands for the proposition that the natural child who is adopted is a conclusively presumed dependent of the natural parent in a compensation case where the natural parent is killed.

ANALYSIS

Claimant argues that Snook v. Hermann no longer applies because of the amendment to the Iowa Code. Claimant further appears to argue that the Iowa Court approves of the proposition that the laws of descent and distribution should influence workers' compensation entitlement. (See page 190 of the Snook case) One would point out that the Iowa Court seemed more to rely upon the plain meaning of the workers' compensation statute, and it dwelled less upon the descent and distribution rulings from other jurisdictions. Further, the Iowa Court did not cite the code section referred to, §633.223. Finally, a reading of subsection (3) of that statute as presently worded would seem to confirm the idea that a child who is adopted by the spouse of the natural parent can take from the other natural parent. For these reasons, the Snook case does not seem to have been affected by the change in the Iowa Code.

The brief filed on behalf of John Wayne Ash requests an apportionment of one-quarter to him and three-quarters to the other claimants. As this is an equitable apportionment, the suggested equal division of the proceeds seems fair.

There is one other matter. On February 15, 1983, claimant Sandra K. Ash filed an original notice and petition for commutation of all remaining benefits. Service was made upon the defendant employer and insurance carrier, but no service was made upon John Wayne Ash. Further, the arithmetic computations would be altered by the apportionment made. Therefore, that petition should be dismissed.

The following findings of fact are taken from certain portions of the stipulation of facts.

FINDINGS OF FACT

1. John Wayne (Ash) Henriksen was born July 18, 1965 to the marriage of Ralph R. Ash, Jr. and Linda L. Ash, now Linda L. Henriksen.

2. Subsequent to the birth of John Wayne (Ash) Henriksen, Ralph R. Ash, Jr. and Linda L. Ash, now Linda L. Henriksen, were divorced.

3. Subsequent to the divorce Linda L. Ash married David Henriksen.

4. Subsequent to the marriage between Linda L. Henriksen and David Henriksen the minor, John Wayne (Ash) Henriksen was adopted by his step-father in approximately 1973.

5. John Wayne (Ash) Henriksen has just graduated from Truman High School, Truman, Minnesota. He intends to attend Jackson Area Vocational Technical Institute at Jackson, Minnesota commencing in September where he will be enrolled in a two year course to study carpentry. John is a good student.

6. John Wayne (Ash) Henriksen's only assets consist of about $200.00 in savings. The estimate of his cost of education will be as follows:

a.	Tuition	$1,300.00
b.	Room, board, clothing, transportion entertainment, and miscellaneous expenses	Approx. 500.00 per mo.

7. Ralph R. Ash, Jr. did not provide any material support for John Wayne (Ash) Henriksen after his adoption by David Henriksen nor had he provided any support for John Wayne (Ash) Henriksen for some substantial period of time prior thereto.

8. Subsequent to his divorce from Linda L. Ash, now Linda L. Henriksen, Ralph R. Ash, Jr. married Sandra K. Clausen, who is now his surviving spouse, Sandra K. Ash. They were married on September 23, 1970, at St. Paul, Mn.

9. Two children were born to the marriage of Ralph R. Ash, Jr. and Sandra K. Ash. They are Laurie May Ash, born March 19, 1972, and Danny Richard Ash, born March 8, 1976. At the time of his death, Ralph R. Ash, Jr. was still married to and living with Sandra K. Ash and the two children named in this paragraph.

10. On August 8, 1981, Ralph R. Ash, Jr. was killed in the course of his employment as the Chief of Police for the City of Swea City, Iowa.

CONCLUSIONS OF LAW

That John Wayne Ash, Sandra Ash, Laurie Ash, and Danny Richard Ash are conclusively presumed dependent as a result of the death of Ralph R. Ash, Jr., which arose out of and in the course of his employment on August 8, 1981.

That the weekly compensation benefits should be apportioned as follows: one-quarter to John Wayne Ash and three-quarters to Sandra Ash on her own behalf and on behalf of Laurie and Danny Ash.

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimants for the period of their entitlement at the rate of one hundred sixty-one and 54/100 dollars ($161.54) per week, accrued payments to be made in a lump sum together with statutory interest from August 8, 1981.

One-quarter (1/4) of the weekly rate shall be paid to the Clerk of the Court of Kossuth County as trustee for John Wayne Ash and three-quarters (3/4) of the weekly benefit shall be paid to Sandra Ash on her own behalf and on behalf of Laurie Ash and Danny Ash.

Claimant's petition for commutation of all remaining benefits filed February 15, 1983 is hereby dismissed without prejudice.

Signed and filed at Des Moines, Iowa this 12th day of October, 1983.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SANDRA K. ASH, Surviving Spouse, RALPH R. ASH, Jr., Deceased,	:	
Claimant,	:	File No. 677749
vs.	:	R E H E A R I N G
INCORPORATED CITY OF SWEA CITY, IOWA,	:	D E C I S I O N
Employer,	:	
and	:	
AID INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

On October 12, 1983, the undersigned deputy industrial commissioner filed a decision on equitable apportionment. On November 1, 1983, defendants filed an application for rehearing on the issue of the weekly compensation rate. According to defendants, since the deceased employee did not provide any support for John Wayne (Ash) Henriksen, the employee would not have been entitled to claim the child as an exemption for income tax purposes. As a result, the compensation rate should be figured on the basis of fourt exemptions instead of five.

Defendants are correct.

WHEREFORE, the decision on equitable apportionment is hereby amended to show that the correct weekly compensation rate is one hundred fifty-nine and 57/100 dollars ($159.57) per week, and defendants are obliged to pay that amount in all respects ordered in that decision.

Signed and filed at Des Moines, Iowa this 5th day of December, 1983.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAUL K. ASHER,	:	
Claimant,	:	File No. 603001
vs.	:	D E C I S I O N O N
POLK COUNTY,	:	CLAIMANT'S APPLICATION FOR
Employer, Self-Insured, Defendant.	:	MEDICAL EXAMINATION AS CONTEMPLATED BY SECTION 85.39, (1979)

This is a proceeding as contemplated by section 85.39, Code of Iowa, wherein the claimant, Paul K. Asher, requests an order from this agency requiring Polk County, his self-insured employer, to reimburse him the cost of a proposed physical examination to be conducted by Jerome G. Bashara, M.D., an orthopedic surgeon.

This matter came on for hearing before the undersigned on November 15, 1983, at the agency's office in Des Moines, and considered as fully submitted at the conclusion of the hearing.

The record in this matter is based upon the undersigned's notes and the live testimony of the claimant and B. E. Mackin, the defendant's safety officer. Defendant produced exhibit 4, being a copy of the claimant's sick leave and vacation record.

The issue requiring a ruling appears to be whether or not, in light of the employer's apparent policy of allowing the employee choice of attending physician, the employer may now decline claimant's application for an independent medical examination.

Section 85.27, Code of Iowa, reads, in part, as follows: "For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care."

There is sufficient credible evidence contained in the commissioner's file and in the record made in open hearing to support the following statement of facts:

Claimant, age 52, sustained an admitted industrial injury on March 14, 1979, said injury arising out of and in the course of the claimant's employment activities. A first report of injury was duly filled out that day and Mr. Mackin, the safety officer, conducted his investigation and concluded that Deputy Sheriff Asher did sustain an injury which arose out of and in the course of his employment.

During the intervening period, the claimant sought medical assistance from Dr. Robert J. Conair, D.O., who referred the claimant to Martin S. Rosenfeld, D.O., an orthopedic surgeon.

Following examination, surgery on claimant's left knee appeared to be in order. Communication between the claimant and Mr. Mackin occurred on the Sunday prior to surgery. Mr. Mackin testified that he expressed some dissatisfaction with the claimant's choice of physician, but since the surgery had already been scheduled and the claimant was a patient in the hospital, he felt it appropriate not to disturb the doctor/patient relationship.

Mr. Mackin also testified that he had prior conversations with Deputy Sheriff Asher during his investigation of the March 14, 1979 incident. Mr. Mackin and the employer had the opportunity at that time to exercise their statutory option as it relates to the choice of medical care. Based upon the defendant's medical policy, this was not done.

The employer subsequently paid the medical and hospital expenses incurred, as well as discharging their obligation for the claimant's permanent partial disability, as provided for in section 85.34(2)(o), Code of Iowa

Defendant now has exercised its statutory option and has directed the claimant to seek future medical treatment from William R. Boulden, M.D., an orthopedic surgeon.

Claimant now asks to have a physician of his own choosing conduct an independent evaluation, as provided for in the unnumbered paragraph of section 85.39, Code of Iowa, which reads, in part, as follows:

> 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 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.

The cutting edge of this dispute appears to be whether or not the choice made by the claimant of the original treating surgeon, Dr. Rosenfeld, now prevents him from exercising the choice of an independent physician, as contemplated by the above statutory language.

In light of the fact that the defendant herein does not have a written policy, nor has identified a physician or a list of physicians from which injured employees may choose care, the choice by the claimant of Dr. Rosenfeld does not relieve the defendant of its obligation to provide reasonable medical care, as required by section 85.27.

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

1. That this agency has jurisdiction of both the subject matter and the parties.

2. That the claimant sustained an admitted industrial injury on March 14, 1979.

3. That the parties hereto agreed verbally and by subsequent actions that Martin S. Rosenfeld, D.O., was to be the original treating physician.

4. That the claimant has timely filed his application for an independent medical examination.

THEREFORE, IT IS ORDERED that the proposed physical examination to be conducted by Jerome Bashara, M.D., shall occur within the next sixty (60) days from the date below; and that the reasonable costs related thereto shall be reimbursed to the claimant.

IT IS FURTHER ORDERED that the costs of this action as provided by the Iowa Industrial Commissioner Rule 500-4.33 be charged to the defendant.

Signed and filed this 9th day of March, 1984.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARILYN BARNER, Claimant, vs. RALSTON PURINA, Employer, and AETNA LIFE AND CASUALTY INSURANCE COMPANY, Insurance Carrier, Defendants.	FILE NOS. 700322 & 699551 A R B I T R A T I O N D E C I S I O N

These are proceedings in arbitration brought by Marilyn Barner, claimant, against Ralston Purina, employer, and Aetna Life and Casualty Company, insurance carrier, defendants, to recover benefits under the Iowa Workers' Compensation Act for two alleged injuries arising out of and in the course of her employment on January 24, 1982 and February 14, 1982. They came on for hearing on March 24, 1983 at the Woodbury County Courthouse in Sioux City, Iowa. They were considered fully submitted at that time.

No filings were made with the industrial commissioner regarding the January 24, 1982 injury. A first report was received April 7, 1982 for an incident in the week of February 8, 1982. A denial of compensability was received on May 13, 1982.

The record in this matter consists of the testimony of claimant, Sandra Brinkerhoff, Frances Cole, Raymond Smith, and Andrew Barner; claimant's exhibit 1, a listing of travel expenses and time off work; claimant's exhibit 2, various medical reports and statements; defendants' exhibit A, medical reports; defendants' exhibit B, the discovery deposition of claimant; defendants' exhibit C, medical reports and office notes; defendants' exhibit D, the deposition of Dr. McGowan; and defendants' exhibit E, medical expenses.

ISSUES

The issues in these matters are whether claimant's injuries arose out of and in the course of her employment; whether there is a causal relationship between claimant's injury and her present disability and whether claimant is entitled to healing period or permanent partial disability benefits for the injury of February 14, 1982.

STATEMENT OF THE CASE

Thirty-five year old married claimant, mother of two daughters, is a high school graduate with six months in business school. She reported doing waitressing and clerical jobs prior to commencing computer work in 1968. In 1981 she went to work for defendant employer operating a CRT. Her work terminated on February 16, 1983 when her job was eliminated. Prior to that time she had been receiving partial unemployment because she had been placed on a part-time job.

Claimant's past medical history includes two goiter operations, an appendectomy, a procedure to make a slit in the urinary tract, blood clots in the legs in 1972 and 1974 and hospitalizaton for a nervous disorder in 1977.

Claimant recounted an incident in January 1982 as follows: She slipped on ice by the bulk plant. She told her supervisor Ray Smith. She was sore for two or three weeks. She missed no work.

As to the February episode, claimant said: She was sitting at her desk clearing orders. The back of her chair broke. She caught herself with her hands on the deck and with the bursa of the knee on the left. She said both that she was bruised and that she was not black and blue. Smith was called to come in. She showed him how her chair had broken. He said that the chair would have to be repaired. She was sore. Two weeks later she was at a hockey game going up a ramp when her left leg went limp. She became concerned about a blood clot. She told Smith that she was going to the doctor. She saw Dr. Rains whom she told about the incident and previous bouts with blood clots. She said that her leg did not swell at first, but it was swollen when she went to Dr. Rains and at the time she was hospitalized. A Doppler and venogram were done. A blood clot was found. She was admitted to the hospital and attached to a heparin machine. Heating packs and medication were tried. While she was hospitalize Smith came to visit. There was no discussion of compensation, but there was talk about salary. After her dismissal from the hospital, she called Smith about workers' compensation. She was told he would check into it. Eventually a claim was filled out. Smith felt it would be "too conspicuous" to file two claims.

Following her release from the hospital she had difficulty walking and swelling, burning and aching across her knee. She took Coumadin, Ativan and an anti-inflammatory. In April she was placed back in the hospital and put on Heparin. She was given pain pills. Cortisone injections were proposed but not given.

She saw a series of physicians including Drs. Rudersdorf, Lucke, Dougherty and McGowan.

In July she went to the Mayo Clinic where she was seen by cardiovascular specialists and an orthopedist. She had a number of tests and was given a cortisone injection which relieved her for three weeks. She had two more injections in Sioux City.

On her next visit to Mayo she was referred to physical therapy and a psychiatrist.

Claimant reported a fall on steps at home.

Claimant stated that her current problems are aching, burning and soreness. Her pain is "tourniquet type" in nature. Flareups in her condition are attributable to changes in the weather and activity. She takes no medication. She said that she is not working at the moment because she is unable to find a job.

Claimant alleged that as a result of her chair breaking she has had pain and suffering, medical expenses, and mental problems including fear, frustration and anxiety. She asserted that the anxiety she has experienced is different from what she had before. She testified that one could say she had a problem with phobias. Her claim for unemployment benefits was unsuccessful. She acknowledged leaving an employer because of emotional problems.

She was questioned about the condition of her legs in 1981. She did not believe she had difficulty on many occasions because she was unable to recall them. She stated that if she indeed had problems they were in the calf area. She denied telling Mayo of trouble with her legs in 1981. Claimant was able to recollect a sunburn for which she was hospitalized which she thought was in July or August, but not to remember being to family practice twice for swelling. Neither did she recall being told in August of 1981 to elevate her leg and not stand too much.

Claimant was sure, but not positive, that she told Dr. Rains about hitting her desk. She also believed she told Dr. Thorn that leg problems started with her chair breaking. She denied leg difficulty on the day before the incident.

Claimant thought the first time she told Smith of the pain or swelling was after the hockey game. She denied ever telling him she was going to withdraw her petition.

Sandra Brinkerhoff, a coemployee whose desk was behind claimant's, testified that when claimant's chair broke Smith came in. She did not see the chair break. She recalled no complaints of pain or bruises or limping. She did not remember claimant's being in the hospital in March or April. She thought it might have been May when claimant went to the doctor. She believed it was quite awhile after the chair incident that claimant complained of her legs. She said that claimant related her problems to the fall and hitting her legs under the desk. Claimant had talked about female problems before the chair broke and the witness thought it was on a visit to the doctor for such problems that a physician discovered a difference in the size of claimant's legs.

Frances Cole, an accounting clerk for defendant employer and a coemployee of claimant's, testified to sitting to the right of claimant near a computer printer and a blower. She did not hear the chair crack. The immediate reaction was to joke about the break. Cole said claimant did not complain of her leg, hip or knee. She believed that claimant had polyps, that claimant was contemplating not keeping a doctor's appointment, and that claimant kept the appointment at which time the doctor measured her legs and discovered the difference. Although she was unsure, she thought claimant first related her knee or hip to the chair incident after she was out of the hospital and back to work. The witness said claimant did not miss bowling until she went to the hospital. Cole said that claimant talked about her leg a couple times a week.

Raymond Smith, plant controller for defendant for four years and claimant's supervisor in 1982 remembered both claimant's fall on the ice and the broken chair. Regarding the latter he said: It was the first or second week in February. He was in his office with no direct view of claimant's work area. He heard a commotion. He found claimant, Brinkerhoff and Cole looking at the chair. Claimant gave no indication of injury and made no complaints of pain or swelling. He observed no limping.

Smith testified that the log showed claimant saw the doctor on March 4. He remembered there was a question as to whether or not she would keep the appointment.

The witness said that on March 27 claimant called him at home to ask about workers' compensation, brought up both the chair and the slip on the ice and related her medical difficulties to those incidents. The matter sort of slipped his mind; but when claimant phoned again in the next week, he checked with the corporate office and made out a first report. He asserted that the decision to file one first report was a mutual one.

He did not remember claimant complaining of her knee or hip in the three weeks after the chair incident; however, after her second hospitalization she talked of hip, knee and leg problems one time a week.

Smith reported that a downturn in business resulted in a decrease in the volume of work so that there was not enough for three full time persons. No other person had been hired. He denied that claimant's layoff was related to the chair incident.

He was not aware of claimant's trouble with her legs in July of 1981, but he found an injury on the record.

Smith said he called claimant at home on May 12 regarding her accrued sickness and vacation pay and to tell claimant to send in a check to keep her sickness and accident in force. He claimed that claimant told him she was going to call the carrier and drop her action in that her blood clot had been there three or four years ago.

Andrew Barner, claimant's spouse of thirteen years, testified on rebuttal that claimant had a black and blue mark 1 1/2 inches across the top of her knee and 1 inch wide. He claimed the problems with her legs which occurred during pregnancy were in the calf.

The deposition of Gerald J. McGowan, M.D., which was taken in a job service action against another employer was offered in this workers' compensation case. Dr. McGowan testified that claimant's first difficulty with anxiety began in 1977 and her first mention of anxiety over work came in January of 1978. The following month she reported an argument with her boss and difficulty with her spouse as well. She was given medication for anxiety and depression. In March a Dr. Hoelting commented that claimant might be better off not working. By June claimant was advised to leave her job. A diagnosis of anxiety depression was made.

In July claimant was referred to a psychiatrist.

The doctor stated that there were persons in claimant's employment with whom she did not get along, but he was unsure there would not have been persons in other places with whom she did not get along. He attributed claimant's anxiety both to her work situation and to her relationship with her husband. Although he would not agree her disability was caused by her employment, he did feel that it was aggravated by employment.

Early medical records show claimant was seen by Robert Telste, M.D., on July 15, 1981 complaining that her legs felt heavy and swollen. She was diagnosed as having a sunburn. Claimant returned on August 4, 1981 with similar complaints. The diagnosis was nonspecific edema of the lower extremities.

Medical records show claimant was admitted to the hospital on March 5, 1982 with complaints of leg discomfort and a sensation of swelling and tenderness in the left pelvis and left upper leg of two months duration. On examination claimant was described as extremely nervous. She had full range of motion in her extremities without deformity, stasis or edema. There was tenderness to palpation in the left calf and thigh. Measurements taken by Dan Rains, M.D., prior to the admission record a 39 inch left calf, a 37.5 right calf, a 55.5 inch left thigh and a 53 inch right thigh. A venogram was interrupted as showing an occlusion of the left posterior tibial. Claimant was given T.E.D. stockings and Heparin therapy followed by Coumadin. Claimant was observed to be depressed and started on Ludiomil and Ativan. Claimant's final diagnosis was thrombophlebitis of the posterior tibial vein.

R. C. Thorne, M.D., reported on March 24, 1982 that claimant was complaining of pain in her upper thigh and behind and on top of the knee. Her Coumadin had been increased. On examination there was no erythema or induration in that left knee.

Dr. McGowan responded to an inquiry from the insurance carrier in early April with "I do not see how we can say clots were a result of the accident."

Claimant was re-hospitalized on April 13, 1982 with upper left thigh pain. She traced development of her most recent problem "to about 8 weeks ago" when a chair broke on her and she fell injuring her left leg. She also states that in January, she "fell on the ice." On examination there was no peripheral clubbing, cyanosis, or edema. Her calves and thighs measured the same. There was tenderness on the anterior thigh. The venogram for her previous admission was reviewed and it was determined that the findings could have been from her previous phlebitis associated with childbirth.

Claimant was seen in consultation by D. W. Lucke, M.D., who found .5 cm. difference in the lower part of her leg and a 1 cm. difference in the upper leg. Pain was elicited in the left hip on the extreme of lateral rotation. Dr. Lucke wrote: "I really think the diagnosis of trochanteric bursitis is a correct diagnosis for her proximal left thigh pain. I really have no explanation for her distal anterior left thigh pain and I really have no objective findings there whatsoever." He suggested an echocardiogram, blood gasses and perhaps a serum thyroid function. Dr. Rudersdorf agreed with the diagnosis of trochanteric bursitis which he thought was responsible for proximal left thigh pain. He found no objective findings for the distal anterior left thigh pain. Claimant's discharge diagnoses were "[b]ursitis of the left knee and left hip" and "[r]esolving thrombophlebitis."

John J. Dougherty, M.D., saw claimant on April 22, 1982 at which time she was complaining of pain in her back and left leg. She gave a history of the back of her chair breaking. Dr. Dougherty made diagnoses of "questionable lumbosacral sprain with a mild 'S' shaped scoliosis to the right in the dorsal lumbar junction to the left and the lumbar spine, with an asymmetry of the facets at L5, S1" and "previous contusions of the anterior aspect of both thighs, by history." He advised her to increase her activity. He reported an abnormal Minnesota Multiphasic Personality Inventory. In his letter dated June 24, 1982 Dr. Dougherty stated he could see no reason why claimant should not be working.

Records from Satterfield Psychiatric Associates, P.C., show claimant was seen there on April 27, 1982 with complaints of fear that she would develop a blood clot in her leg which would break loose, go to her heart and kill her. She connected her fear to her fall and to a leg on her desk breaking off and hitting her on the knee. Claimant reported frustration at her inability to learn from her physicians why she had a blood clot. She was tested. The doctor thought the claimant attributed feelings of hopelessness and failure to problems with her job.

When claimant was seen on May 4, 1982 she recounted feeling angry when she considered going back to work. Her medication was increased. Later in the week claimant learned she had lost her job. The next week claimant said that she had been to a lawyer about filing a claim and that she felt as if she had been relieved of a great weight. She complained of joint pain and expressed the thought that she had arthritis. Dr. Satterfield proposed having Dr. McGowan monitor claimant's medication, but she requested another appointment.

On May 18, 1982 claimant called to say she was having stomach trouble, diarrhea and morning shakiness. She wondered if those things were caused by Ludiomil. Claimant did not keep an appointment of May 25, 1982

In a letter dated August 9, 1982 Dr. Sattefield wrote to Dr. McGowan that dexamethasone tests had been conducted on claimant which did not support a diagnosis of endogenous depression. He provided a diagnosis of adjustment disorder with mixed emotional features. On a report to the insurance carrier, Dr. Satterfield responded "no" to the question "Is condition due to injury or sickness arising out of patient's employment?"

On April 30, 1982 Dr. McGowan reported that claimant's chair gave way and her legs hit the underside of her desk. She developed thrombophlebitis in her left leg and bursitis in the left knee and hip. He responded "no" to the question "Is accident above referred to the only cause of patient's condition?" The other contributing cause was arthritis. In the same month Dr. McGowan wrote to the insurance carrier "I do not see how we can say clots were result of accident."

Dr. McGowan signed an insurance form on May 14, 1982 which answers no to the question "Is the condition due to injury or sickness arising out of patient's employment?"

On June 29, 1982 Dr. Lucke wrote to defendants' attorney that studies for collagen vascular disease were negative. The doctor, prior to writing his letter, had seen claimant on June 11 and found "no identifiable pathology." Repeat studies for collagen and vascular disturbances were conducted and nothing was found.

Dr. McGowan in a letter to defense counsel dated August 17, 1982 wrote: "Exactly how much of this if any of the pain and discomfort, malaise can be attributed to her injury at work is impossible to say."

In a report dated November 15, 1982 Dr. Dougherty indicated "no" to the question: "Is condition due to injury or illness arising out of patient's employment?" The doctor's report states that claimant's first symptoms appeared in February 1982 and that he was first consulted on April 22, 1982

On November 30, 1982 Dr. McGowan wrote to claimant's attorney that there was an increase in the size of the left calf and thigh when she was seen on March 4. He reported claimant's later hospitalization and treatment for recurrent phlebitis and bursitis of her left hip. Dr. McGowan's letter states: "There is no way to say whether the phlebitis was related to her work injury or if in fact it was a new condition as compared to her previous problem with phlebitis years ago." Neither was he able to "directly connect" the bursitis to her injury. In further explanation he stated: "In my judgement, there is no way to associate or disassociate these conditions."

A letter dated August 25, 1982 from Titus C. Evans, Jr., M.D., specialist in cardiovascular disease and internal medicine, relates a history of a postpartum phlebitis in 1972 and suspected phlebitis in 1974 which the doctor thought was itchy neurodermatitis rather than phlebitis. In February 1982 claimant fell backward and struck her anterior thighs. Claimant's venogram of March 5, 1982 was interpreted by a diagnostic radiologist as showing no definite evidence of thrombophlebitis. On examination there was no significant difference in the size of claimant's calves or thighs, no venous cords, increased warmth, varicosities, venous distention or other evidence of either venous disease or lymphatic disease. Hip maneuvers were normal and straight leg raising was accomplished to 90 degrees.

Claimant was seen by Dr. B. A. Kottke, a specialist in cardiovascular disease who found no evidence of venous insufficency or phlebitis. He doubted that claimant had true thrombophlebitis following her first episode of postpartum phlebitis.

An electromyogram of the left lower extremity was normal as interpreted by Dr. T. Oh of the neurology department. A Minnesota Multiphasic Personality Inventory showed claimant to be concerned with bodily functions and to be tense and apprehensive. She had sinus tachycardia on her electrocardiogram. Her cholesterol was elevated.

Dr. R. G. Auger of neurology examined claimant and found the

neurological normal except for functional discrepancies which included a nonanatomical sensory loss extending to the left upper thigh with a sharp distinction between the absence and presence of sensation. A Doppler showed incompetence of the right popliteal vein but no venous abnormality.

Mark B. Coventry, M.D., of the orthopedic department saw claimant in consultation and injected her trochanteric area. He said he had no specific diagnosis for pain except possible trochanteric bursitis which he said is not disabling.

Claimant was advised by the clinic that she no longer needed oral anticoagulation, to try to return to full time activity and to use physical therapy to speed her recovery.

Dr. McGowan wrote a letter dated November 3, 1982:

> There is no way to say whether the phlebitis was related to her work injury or if in fact it was a new condition as compared to her previous problem with phlebitis years ago. The bursitis which persisted and in fact is still present to some degree in this patient probably contributes considerably to her leg and general discomfort. However, again I cannot directly connect that to her injury she sustained at work.

In a letter dated December 13, 1982 Dr. Evans expressed the opinion that claimant's discomfort was not related to blood vessel disease. Dr. Coventry sent a letter about the same time saying that claimant's condition could not be called a definite trochanteric bursitis. He continued:

> As to the cause of your problem, you stated it all began when you fell backwards in your chair, that you had no trouble before then; and thus we would have to assume that this is a cause and effect relationship and would feel that the incident described when you fell at work is the cause of your present left thigh pain.
>
> As you know, however, we have been unable to find anything very definite other than some muscle trauma from this, and therefore, it should get well of its own accord in time. But from your history, we would have to assume that it is work related, and therefore, subject to workmen's compensation review at least.

Gerald K. Newman, L.P.T., agreed with Dr. Coventry.

On February 14, 1983 Dr. Evans wrote to Dr. Lucke that claimant had returned to the clinic and a CT scan was done which was negative. He reported his feeling and that of Dr. Coventry that claimant's pain was either psychosomatic or hysterical as no demonstrated injury was present. Dr. Martin of the psychiatry department recommended supportive psychotherapy. Neither a pain management center nor continued physical therapy was viewed as likely to be productive. Chronic pain behavior, hysterical personality disorder and probable hysteria post traumatic were the diagnoses made.

APPLICABLE LAW AND ANALYSIS

The first issues to be determined are whether or not claimant's injuries arose 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. 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, 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).

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. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591, (1960).

Claimant alleges two incidents. Both of those incidents occurred on her employer's premises and clearly were in the course of her employment. The more difficult question is whether claimant had an injury resulting from those incidents. At the time of hearing she made no claim for any benefits resulting from a fall in January of 1982. Smith indicates an awareness of this incident. This deputy will conclude that claimant suffered a fall in January of 1982 which resulted in neither temporary nor permanent disability and for which she incurred no medical expenses.

A careful review of the evidence is necessary regarding the February 1982 chair breaking incident. Claimant testified that she hit the top of her knee under the bottom of her desk when the back of her chair broke. Her spouse verified some evidence of injury. Claimant's co-worker, Brinkerhoff, remembered no complaints of pain, bruises or limping. She said claimant made no complaints until sometime after the incident. Her co-worker, Cole, testified in a similar matter. Smith, her supervisor, recalled no complaints of pain or swelling and no limping.

The medical evidence indicates claimant had a problem with phlebitis following her first pregnancy. The two cardiovascular specialists who saw claimant at the Mayo Clinic suspected that claimant did not have phlebitis after that time. Dr. Evans proposed an itchy neurodermatitis rather than phlebitis. Other early medical records show claimant was seen for leg pains in late 1976 and nondescript leg pains in early 1977. In August of 1981 claimant was seen for edema of the extremities. In January of 1982 she complained of low abdominal pains and was given a diagnosis of a fibroid uterus and vaginitis.

At the time of her admission to the hospital she was complaining of swelling and tenderness in the left pelvic area and upper leg. What was thought to be a clot in her leg at the time of that hospitalization was later thought by the Sioux City doctors to be associated with her prior phlebitis. A diagnostic radiologist at the Mayo Clinic saw no definite evidence of thrombophlebitis.

It is not clear from the record precisely when Dr. McGowan knew of the chair breaking incident; however, it appears it was sometime in late April. Dr. McGowan consistently reported that claimant's condition was not related to her employment. Ultimately he concluded, "In my judgement there is no way to associate or disassociate these conditions". Dr. Satterfield states that claimant attributed feelings of hopelessness and failure to problems with her job, but he seemingly did not as he responded no to the question "Is condition due to injury or sickness arising out of patient's employment?" Dr. Satterfield's history of the chair incident was inaccurate.

At the Mayo Clinic claimant was seen by two cardiovascular specialists, an orthopedist and two neurologists. She has an abnormal Minnesota Multiphasic Personality Inventory, sinus tachycardia, elevated cholesterol, a nonanatomical sensory loss in the left upper side and incompetence in the right popliteal vein without venous abnormality.

The strongest evidence in the records supporting claimant's claim comes from Dr. Coventry, an orthopedist at Mayo Clinic. He apparently assumed that claimant had no problems with her extremities prior to the fall and then made the further assumption that there was a cause and affect relationship. A more recent letter from Dr. Evans reports his feeling and that of Dr. Coventry that claimant has no demonstrated injury and that her pain is either psychosomatic or hysterical.

Evidence from Dr. Dougherty is not helpful to claimant. The record viewed as a whole will not support an award of benefits in this case.

FINDING OF FACTS

WHEREFORE, it is found:

That claimant is thirty-five years of age.

That claimant is a high school graduate with 6 months of business school.

That claimant did waitress and clerical work before beginning jobs with computers.

That claimant stopped working on February 16, 1983 when her job was eliminated.

That prior to February 16, 1983 claimant was receiving partial unemployment.

That in January 1982 claimant slipped and fell on ice by a bulk station on her employer's premises as she went to pick up orders.

That in February 1982 claimant was sitting at work at her desk when the back of her chair broke.

That claimant's current complaints are aching, burning and soreness in her legs.

That claimant currently takes no medication.

That claimant is not working at present because she is unable to find a job.

That claimant had one and possibly two episodes of phlebitis associated with childbirth.

That claimant was seen in the mid-seventies for leg pain.

That claimant suffered from anxiety beginning in 1977.

That claimant was treated for sunburn to her legs in July of 1981.

That claimant had non-specific edema of the lower extremities in August of 1981.

That claimant was seen in January of 1982 for swelling and tenderness in the left pelvis and upper leg.

That claimant was admitted to the hospital on March 5, 1982 with swelling in her left calf and thigh.

That claimant's proximal left thigh pain was diagnosed as trochanteric bursitis.

That no etiology has been found for claimant's distal left thigh pain.

That claimant has had two abnormal Minnesota Multiphasic Personality Inventories.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

That claimant had an injury on January 24, 1982 which arose out of and in the course of her employment, but resulted in neither temporary nor permanent disability nor in medical expenses.

That the back of claimant's chair broke in an incident in February of 1982 resulting in no temporary nor permanent injury to claimant other than perhaps a bruise.

That medical expenses incurred by claimant since January 24, 1982 are not causally related to any compensable injury.

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 19th day of August, 1983.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARJORIE L. BARTA,
Claimant,
vs.
LITTLE GIANT CRANE & SHOVEL,
Employer,
and
UNITED STATES FIDELITY AND GUARANTY COMPANY,
Insurance Carrier,
Defendants.

File No. 411098

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from a review-reopening decision wherein claimant was found to be permanently and totally disabled as a result of an injury occurring on September 27, 1973.

The record on appeal consists of the transcript of the proceedings together with claimant's exhibits 1 through 22, defendants' exhibits 1 through 21, and the filings of all parties on appeal. Defendants filed an appellate brief in this matter.

ISSUES

1. Whether claimant has sustained the burden of proving a causal relationship between her existing disability and her accident of September 27, 1973.

2. The date on which claimant's healing period benefits should have ended.

3. Whether the deputy erred in admitting and considering medical records which had been objected to on the basis of inadequate foundation.

4. Whether the deputy placed too much weight on the testimony of claimant in light of impeachment throughout her testimony.

REVIEW OF THE EVIDENCE

Claimant, who was 59 years old at the time of the hearing, began working at Little Giant Crane & Shovel in May 1973. Claimant was involved in an industrial accident on September 27, 1973 which resulted in the payment of temporary total disability benefits from October 4, 1973 through July 26, 1979, with the exception of several weeks during November and December 1973 when claimant resumed work on a part-time basis. (Transcript, pp. 3, 12-13; Defendant's Exhibit 19, p. 22) The proceeding in review-reopening was brought to determine the nature and extent of claimant's disability relating to the September 27, 1973 incident.

Claimant was involved in an automobile accident on June 14, 1971 wherein the car in which she was a passenger was rear-ended. (Tr., p. 8) Claimant filed a lawsuit against the driver of the other vehicle and gave her deposition with regard thereto on July 13, 1976. (Tr., pp. 53-54) That deposition, marked as defendants' exhibit 19, was received into evidence during the review-reopening hearing with several passages thereof being used for impeachment purposes during defendants' cross-examination of claimant.

During the review-reopening hearing claimant testified that she suffered from a slight headache after the June 1971 automobile accident and subsequently entered the hospital for several days during which time a myelogram was performed. Claimant denied missing a substantial amount of work as a result of any injuries received from the accident. (Tr., pp. 8-9) Records from St. Francis Hospital in Waterloo indicate that claimant was admitted on November 28, 1971 complaining of occipitocervical pain and headache with some radiation down the arm into all the fingers. Robert H. Kyle, M.D., examined claimant and recorded his impression: "Cervical spondylosis, worse at C-4, aggravated by an auto accident." While a lumbar myelogram performed on November 29, 1971 proved negative, a cervical myelogram performed on the same date indicated an "indentation of the anterior spinal canal at the levels of the interspace between C-4 and 5 and between C-5 and 6." In a discharge summary dated November 30, 1971 Dr. Kyle wrote: "I think that sooner or later Mrs. Barta is going to require C-4 and C-5 diskectomy with anterior intrabody fusion." (Def. Ex.1) During her deposition taken in July 1976 claimant testified that she had been under the care of Dr. Shimoda for about six months prior to entering the hospital. When asked what symptoms she had relating to the automobile accident, claimant answered:

> A. Well, right away at first I had this terrific headache and I had it for a long, long time. I don't know. It seemed like forever, but it was probably two or three months and Doctor Shimoda couldn't really understand why it kept hanging on as long as it did for the treatments that he had given me, but I still had these headaches, and then as the headaches went on I had all this problem with my shoulders and back hurting then I got to the point where my hands were going numb.
>
> Q. When did your shoulders and back start hurting?
>
> A. Well, by the next day it was stiff.
>
> Q. What was stiff?
>
> A. My neck and back or upper part, just up in here from my head down to my shoulders is where it was.
> (Def. Ex. 19, pp 38-39; Tr., pp. 67-68)

Claimant also commented on her treatment from Dr. Shimoda and Dr. Kyle:

> A. I went to Doctor Shimoda. That was at first every day then twice a week and three times a week and this. I was still having a lot of problems and he was giving me a lot of medication. Then I went to Doctor Kyle, who is a neurosurgeon in Cedar Falls and he examined me and he put me in the hospital in Waterloo at the Saint Francis Hospital in Waterloo and did a myelogram and while I was in Saint Francis Hospital in Waterloo Doctor Kyle did this myelogram and he told me at that time I had a pinched nerve and I should have surgery. I chose not to have surgery so he released me to go home with medication and therapy, what I could do at home. He told me that if I didn't have surgery right then that I would, in his belief, have to have surgery within three or four years, but I thought, well, if I had three or four years to go why do it right away because it is risky. I mean, as far as the surgery was concerned. So I chose not to have surgery at that time.
> (Def. Ex. 19, pp. 32-33; Tr., pp. 62-64)

Following her release from the hospital, claimant apparently did not return to work of any nature until she purchased a tavern in June 1972. She testified during the review-reopening hearing that she worked from 8:30 a.m. until midnight, six days a week during the ten months that she owned the tavern. (Tr., pp. 10-11) Claimant also discussed the purchase and management of the tavern during her deposition in July 1976:

> Q. Did you then return to work?
>
> A. I was trying to think of the date. I have got it here. Then on July 14th of 1972 I borrowed some money thinking that maybe I could manage a tavern. I thought, well, I could be the manager and let everybody else do the work. I could surely do that much, but it didn't work out that way. I found myself there eight, ten, twelve hours a day which I could not stand to do because I was having these headaches. I was taking medication and I was really causing myself to be in more pain than before, so I sold it.
>
> ....

Q. What was the name of your tavern?

A. Charlie's Lounge.

Q. Were you Charlie?

A. Yes. So that wasn't working for me so I sold that then on April the 15th of 1973. I had it about nine months and I just couldn't take it no more, so I sold that.
(Def. Ex. 19, pp. 44-45; Tr., pp. 69-71)

Claimant testified during the review-reopening hearing that she began working at Little Giant in May 1973 and that she usually worked nine hours a day. She testified that her job duties at Little Giant consisted primarily of running, filing, and distributing blueprints. Claimant recalled that on September 27, 1973 she was carrying an armload of blueprints when she fell while going up some stairs. She fell down four or five steps and hit her shoulder against the railing. (Tr., pp. 12-14)

During the July 1976 deposition claimant discussed the period from May 1973, when she began working for Little Giant, until the September 27, 1973 incident:

Q. What transpired then from that time up until the time you had the fall at work?

A. Well, I just was really taking medication such as Valium and aspirin and everything trying to get by, which I was working and getting by. I was working sometimes six, five and a half days a week.

Q. Who prescribed that medication that you were taking during this period from May to September?

A. Doctor Kruse.

Q. Did you see any other doctors from the time you started working for this Little Giant Company up until the time of your fall?

A. No. The only doctor I had seen was Doctor Kruse.

Q. And all he did was prescribe the pain medicine and Valium which, I believe, is some kind of a --

A. Doctor Fathie sent me Valium already from Cedar Rapids. He had sent me prescriptions for that and I was taking that along with Darvon.

....

Q. Is there anything else you can tell me about your condition or how you felt during that period from May to September of 1973?

A. Well, it was the same as what I was when I had the tavern and when I went to work. It was still -- like I said, I was taking medication to cover up the pain and to be able to go to work.

Q. Where was this pain that you were covering up?

A. I was still having headaches and my eyes were bothering me and it was down through my spine to the shoulders and down my arm.

Q. And then after the fall in September of '73 apparently your pain and symptoms became much worse?

A. Yes, that's right.

Q. Became worse than they had ever been before, I gather?

A. They were bad enough at first that they were kind of -- I thought that it was something that I was just going to have to live with.

Q. It had become sort of chronic? Is that what you are saying?

A. Yes.
(Def. Ex. 19, p. 46-48; Tr., pp. 76-82)

Claimant testified that her arms soon began to hurt while she filed blueprints and she was eventually sent to see Steven Kruse, M.D.

In a July 19, 1980 letter addressed to claimant's attorney, Steven G. Kruse, M.D., summarized his treatment of claimant:

> Marjorie Barta has been under my care since the fall of 1973. At that time, she was having difficulty with pain involving her back and neck which she related to an automobile accident that had occurred in July of 1971, and also to a fall at work which had occurred in September of 1973. She had had previous treatment for this and had seen other physicians and had had a cervical myelogram done some time earlier, which reportedly was negative. She was treated conservatively with physical therapy and analgesits and a cervical collar for a period of time but had worsening difficulties and was referred to the Mayo Clinic in December of 1973. I am enclosing a copy of the letter that was sent to me from Mayo Clinic and you will note that in this letter she related her symptoms to the automobile accident that had occurred in 1971. Also, note that this examination took place after the injury that she experienced at work in 1973. Over the next few years she continued to have increasing difficulty and she was hospitalized in April of 1975 and seen by Dr. Robert Rayne, a Des Moines neurosurgeon. A lumbar and cervical myelogram was carried out on May 1, 1975, and this showed pressure defects at the C4-5 level and C5-6 level. On May 6, 1975, Dr. Hayne carried out removal of protruded discs at C4-5 and C5-6 with cervical fusion at these interspaces. Her post-operative course was quite satisfactory and for a time she did well but she began having more pain of a similar type and she was hospitalized again by Dr. Hayne in August of 1976. A cervical myelogram was done which showed essentially normal post-operative findings.
>
> She has continued to have considerable difficulty with pain over the last several years. This involves the neck and shoulders and arms but he has also had pain involving the back, hips, and knees. She has been seen by a number of doctors for this and I am enclosing a copy of a letter that was written by Dr. Josephson in July of 1979 in regard to her situation at that time and also another letter dated January 30, 1980, when she was seen by Dr. Kitchell. I have continued to treat her for generalized degenerative arthritis with various medicines including anti-inflammatory agents and analgesics with some limited improvement but her general course has been one of continuing disability and pain.
>
> I am enclosing these letters from other doctors who have seen her to illustrate the extent to which they have felt that her problem has been caused by a single injury. Before attempting to answer your specific question in regard to Mrs. Barta, I must say that I am unable to establish any definite cause and effect between a single injury that Mrs. Barta has sustained in the period of time which I have been treating her and her present condition. I feel that she is suffering from a degenerative arthritis which is generalized and which she has to a greater degree than most other individuals in her age group but I am unable to relate this to any single injury or event.
>
> To answer the questions that you have specifically asked:
>
> 1. What is your general diagnosis of the injury sustained by Mrs. Barta;
>
>   Myofascial injury of the back and neck. (This refers to the injury of September 1973.)
>
> 2. Whether or not, in your opinion, the injury was caused by the fall which she sustained at Little Giant Crane and Shovel on September 27, 1973;
>
>   Yes.
>
> 3. To the extent of your knowledge, whether or not her present condition is due to any injuries sustained by Mrs. Barta prior to September 27, 1973;
>
>   A part of her problem may relate to the auto accident in 1971.
>
> 4. To the extent of you knowledge, whether or not her present condition is due to any injuries sustained by Mrs. Barta subsequent to her injury at Little Giant Crane and Shovel on September 27, 1973,
>
>   Mrs. Barta has sustained falls and injuries of a relatively minor nature but which may have aggravated her condition.
>
> 5. The length of time you have been treating Mrs. Barta for her injuries;
>
>   I have treated Mrs. Barta since the fall of 1973. As to treatment specifically for injuries this has been only for a very limited period of time; not for more than a few months following the injury.
>
> ....
>
> 7. The approximate number of times she has been treated by you for this injury;
>
>   She was only seen for the injury for the limited amount of time noted above. She has had complaints of pain wich antedated the injury, and has continued to the present, but I am unable to relate this specifically to the injury.
>
> ....
>
> 14. Your professional opinion, stated in percentage terms, regarding the extent of Mrs. Barta's injury to the body as a whole, sometimes also referred to as the percentage of "Industrial Disability";
>
>   I am unable to state that a direct cause and effect relationship exists between the injury that she sustained in Sept. 1973 and her subsequent difficulties with arthritis and the cervical discs, although this injury may well have been a contributing factor. My opinion is that no more than 10% of the disability can be related to this injury.
>
> 15. Your professional opinion on whether or not Mrs. Barta will ever recover from her injuries, and if so, when;

I do not anticipate improvement in her general condition.

16. Any additional information you might wish to state regarding Mrs. Barta which might be helpful in reaching a decision concerning the nature, extent, and permanency of her injuries and the probability of her being gainfully employed in the future.

I do not feel her history of injury can be held fully responsible for her present condition, or indeed conclusively related to her present condition in terms of cause and effect.
(Claimant's Exhibit 2)

Robert A. Hayne, M.D., who performed the laminectomy on claimant on May 6, 1975, summarized his treatment of claimant in a letter dated June 23, 1980 addressed to claimant's attorney.

I first saw Marjorie L. Barta for examination on April 28, 1975, at which time she was a patient at Iowa Lutheran Hospital. I saw her at the request of Doctor Steven Kruse. At that time she was forty-eight years of age and had a history dating back to September, 1973, at which time she fell at work and since that time has had pain in the back of the lower neck, back of shoulders, and over the lateral aspect of the arms. She had been unable to work since that time. Her past medical history at that time revealed she had been involved in an automobile accident in June, 1971, which gave her a "whiplash" and this resulted in headaches which persisted for approximately six months. Again she seemed to improve spontaneously. The neurological examination in April, 1975, was essentially within normal limits. The strength and coordination of the upper and lower extremities were normal. There was no disparity in the reflexes throughout.

She was subjected to a myelogram which showed involvement of the 4th and 5th cervical interspaces and as a consequence she was subjected to surgery on May 6, 1975. At that time the major portion of the intervertebral disc between C4-5 and C5-6 were removed and bone plugs which had been obtained from the right iliac crest were placed at these interspaces for purposes of fusion.

....

Mrs. Barta was seen by me on the last occasion on June 9, 1980. At this time she stated her symptomatology had improved. She felt that physical therapy had helped her neck pain. The neurological examination was unchanged and I recommended she obtain physical therapy for an additional six weeks.

The diagnosis for Mrs. Barta when she was first seen by me for examination in 1975 was herniated cervical disc. In the recent years I feel that her symptomatology is more in the nature of a chronic neck syndrome or fibromyositis. According to Mrs. Barta's history there appears to be a relationship between the fall that she sustained in 1973 and the onset of her symptoms which required surgery in 1975. I feel she has made a recovery from her original injury. There is a large functional component to Mrs. Barta's symptomatology and I feel she has poor motivation for work. Her permanent disability rating is 19% of body total.
(Cl. Ex. 9)

Thomas W. Bower, L.P.T., examined claimant on July 25, 1979 at the request of the insurance carrier. In concluding that claimant has a 25 percent functional impairment to the body as a whole, Mr. Bower wrote in a September 23, 1981 summary addressed to claimant's counsel:

In regards to your correspondence of 9/18/81 concerning Marjorie L. Barta. This patient was seen by myself on July 25, 1979 at the request of USF & G Insurance company of West Des Moines, Iowa. This fifty-two year old female at that time was seen as a result of an accident which occurred back in 1973 while working for Little Giant Crane and Shove [sic] Co. She stated at that time that while going up some stairs, she fell hitting her left shoulder and at that time had considerable pain in both the cervical region as well as the left shoulder with some pain transfered [sic] into the right shoulder. She also complained of some lower back pain. The patient, also through history, indicated that she had undergone numberous [sic] treatments for physical therapy for the past six years, consistsing of physical therapy & numberous [sic] evaluations in Rochester, at the medical center. She was also seen by Dr. Robert Haines [sic] a Neuro-surgeon in Des Moines who performed a cervical fusion in May of 1975.

....

The general diagnosis or at least impression at that time as a result of the injuries sustained by Mrs. Barta, would be that of a post-tramatic [sic] injury to the left shoulder and neck with post-surgical fusion of the C spine. Since this patient did not give any history of any problems since or prior to the accidnet [sic] which occurred while working for Little Giant Crane and Shovel, September 27, 1793 [sic], there was no indication, at least in my opinion, that this injury could not be the result of any other injuries previous. Therefore, to the extent of my knowledge, her particular problems where demonstrated as a result of the trauma which occured [sic] while working for Little Giant Crane and Shovel. Again, this patient was only seen for a one time evaluation therefore no treatment was given by myself, but it was indicated by the patient that she was treated by physical therapy in the Rochester, Minnesota area. She presently is not under any care of mine in regards to any prescriptive treatment.
(Cl. Ex. 16)

On October 1, 1981 John P. Albright, M.D., an orthopedic surgeon at University Hospitals in Iowa City, reported claimant suffered from some form of polyarthritis. Dr. Albright indicated that treatment by the Rheumatology Department would be necessary and that the condition would render claimant permanently disabled. (Cl. Ex. 22)

The record also contains medical reports and summaries of the following practitioners: John A. Grant, M.D., Juergen Thomas, M.D., Michael Kitchell, M.D., N. Josephson, M.D., P. L. Collins, D.C., David McClain, D.O., Kazem Fathie, M.D., Charles Bendixen, M.D., David Blair, M.D., Timothy Murphy, M.D., and Melvin Hurd, M.D. Each of these reports have been weighed in the disposition of this case.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 27, 1973 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).

ANALYSIS

The first issue on appeal is whether claimant sustained the burden of proving a causal connection between her existing disability and her injury of September 27, 1973. In the review-reopening decision issued on April 26, 1983 the deputy found claimant to be permanently and totally disabled as a result of her industrial injury. Upon review of the record as a whole, however, we are unable to concur with the deputy's conclusion as to the existence of a causal connection.

The record clearly indicates that claimant suffered an injury to her cervical spine in the automobile accident occurring in June 1971. A cervical myelogram performed in November 1971 revealed an indentation of interspaces at C4-5 and C5-6, and claimant was informed at the time of the necessity for undergoing back surgery within the following three to four years. The symptoms experienced by claimant following the automobile accident included severe headaches as well as back, shoulder, and arm pain. Testimony during claimant's July 1976 deposition indicated that her symptoms remained essentially unchanged through the date of her work injury in September 1973. Claimant testified that persistent headaches, back pain, and shoulder pain necessitated the sale of a tavern she had operated during parts of 1972 and 1973. Claimant further indicated that throughout the period that she worked for Little Giant, including the period prior to her fall, she had relied upon pain medications such as Valium and Darvon to subdue the continuing symptoms.

While claimant's symptoms appear to have worsened for a period following her fall on September 27, 1973, the results of a cervical myelogram performed on May 1, 1975 were essentially the same as those from the November 1971 myelogram -- defects at C4-5 and C5-6. Dr. Kruse, who has continued to treat claimant since her fall in September 1973 apparently relied upon an erroneous history which indicated that the cervical myelogram performed in November 1971 was negative. Even so, the doctor stated that claimant's present condition could not be conclusively related to her September 1973 injury. Dr. Kruse believed that claimant merely suffered from a myofascial injury of the back and neck, and noted that the treatment rendered with regard to the September 1973 injury lasted only for a few months.

Dr. Hayne determined that claimants symptomatology appears to be related to her fall in September 1973 and ascribed an impairment rating of 19 percent of the body total. Scrutinization of Dr. Hayne's report, however, reveals that he too relied upon an erroneous history of claimant's past symptomatology. Dr. Hayne stated that claimant's symptoms following her automobile in 1971 improved spontaneously six months afterwards. As was noted above, however, claimant's symptoms following the automobile accident appear never to have subsided prior to her fall on September 27, 1973.

Thomas W. Bower, L.P.T., also concluded that claimant's disability was related to the September 27, 1973 incident and ascribed a functional impairment rating of 25 percent to the body as a whole. Nowhere in his report, however, does Mr. Bower indicate any knowledge of claimant's automobile accident in 1971 and the accompanying symptoms.

Little doubt exists that claimant suffered an injury when she fell at work on September 27, 1973. Her fall, however, appears merely to have caused a temporary exacerbation of symptoms which related back to the automobile accident in 1971. While there is no easily determined date upon which the effects

of claimant's fall became totally diminished, the condition for which claimant underwent surgery in May 1975 was clearly related to symptomatology which had existed since 1971. Therefore it is determined that any disability relating to claimant's injury of September 27, 1973 ended at some point prior to her surgery in May 1975, and that her present disability bears a causal connection only to injuries she sustained in the June 1971 automobile accident.

In light of the resolution of the first issue, the remaining issues on appeal need not be addressed.

FINDINGS OF FACT

1. Claimant suffered an injury to her cervical spine in an automobile accident occurring in June 1971.

2. Claimant suffered from defects at the C4-5 and C5-6 levels of the cervical spine in November 1971.

3. Claimant's symptoms following her auto accident were headaches accompanied by back, shoulder, and arm pain.

4. Claimant was advised in November 1971 of her need to undergo back surgery within three to four years.

5. Claimant began working at Little Giant Crane & Shovel in May 1973.

6. Claimant's symptoms relating to her auto accident persisted throughout the period that she was employed by Little Giant Crane & Shovel.

7. Claimant took pain medication to subdue the pain so that she could work.

8. Claimant exacerbated her symptoms in a work related accident on September 27, 1973.

9. The exacerbation of claimant's symptoms caused by the work related injury had diminished by the time she underwent back surgery in May 1975.

10. Claimant is presently unable to work due to persistent headaches as well as back, shoulder, and arm pain.

11. Claimant's present disability is not causally connected to her work related injury of September 27, 1973.

12. Claimant's present disability is causally connected to injuries she sustained in the 1971 auto accident.

CONCLUSION OF LAW

Claimant had failed to sustain the burden of proving that her present disability is causally connected to her work related injury of September 27, 1973.

WHEREFORE, the deputy's decision filed April 26, 1983 is reversed.

THEREFORE, it is ordered:

That claimant take nothing as a result of these proceedings.

Costs of the proceedings are taxed to defendant.

Signed and filed this 30th day of December, 1983.

Appealed to District Court;
Pending

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LINDA K. BELCHER,	:	
Claimant,	:	
vs.	:	
TAMA MEAT PACKING CORP.,	:	File Nos. 698426/701423
Employer,	:	R E V I E W -
CRAWFORD & COMPANY,	:	R E O P E N I N G
Insurance Carrier,	:	D E C I S I O N
and	:	
SECOND INJURY FUND OF IOWA,	:	
Defendants.	:	

These are proceedings in review-reopening brought by the employee, Linda K. Belcher, to recover additional benefits under the Iowa Workers' Compensation Law from her employer, Tama Meat Packing Corporation and its insurance carrier, Crawford & Company (sic) and the Second Injury Fund of Iowa, for personal injuries she sustained on December 4, 1981 and March 9, 1982. On September 23, 1983, evidence was presented to the undersigned deputy industrial commissioner at the industrial commissioner's office in Des Moines.

The record consists of the notes taken at the hearing; the deposition of Arnis Benny Grundberg, M.D.; claimant's exhibits 1 and 2; defendant employer and insurance company exhibit A and defendant second injury fund exhibit A, all of which evidence was considered in reaching this proposed agency decision.

The parties stipulated that the proper rate of compensation for both injuries would be $146.70 and that all healing period disability had been paid. Further, the parties stipulated that the defendant employer and insurance carrier have paid permanent partial disability of five percent of each hand.

EVIDENCE

The claimant was the only witness who testified at the actual hearing. She stated she was age 24, divorced and had custody of two children. She had quit school in the eleventh grade. She went to Marshalltown Junior College for secretarial training but for a very short time. Further, she has never worked as a secretary.

She worked as a cashier at a Pamida store in 1978 and in a jacket factory for one month in 1979. Also in 1979, she began work at a factory in Grinnell where plastic pipe was manufactured. This job was light work at a machine.

On November 16, 1981 she began work for the defendant employer, Tama Meat Packing Company Company. At that job she was a trimmer, which involved using a knife and a hook. Claimant would pull the meat off the line with a hook and trim it with a knife. She used the left hand for the hook and the right hand for the knife. She did the same thing all day long. She testified that she used her right hand much more than her left hand. After a few weeks her right hand had a tingle, then began to hurt. She went to James B. Paulson, M.D., in Grinnell in December 1981 because of pain and tingling in her right hand. She testified that at that time she had no trouble with her left hand. Her left hand problems began in February of 1982 when she returned to her regular work.

Later Dr. Grundberg became her treating physician and claimant elected to have carpal tunnel release on each hand, the right hand in March of 1982 and the left in April of 1982.

Claimant later took some maternity leave and does not plan to return to work for the employer. She has looked for cashier work but claims it is difficult to find any work because she has a 10 pound lifting limit. She stated that she had looked at "quite a few" and "all" stores in Newton and Grinnell for the past few months. It was not clear if these places were not hiring or if she was disqualified because of her carpal tunnel surgeries.

Written notes and reports of James B. Paulson, M.D., a family practitioner, were admitted into evidence. They showed claimant was seen on December 4, 1981 for a problem with her right hand.

Claimant later saw Arnis Grundberg, M.D., a qualified orthopedic surgeon. His reports, notes and deposition were admitted into the record. A report of March 9, 1982 shows an impression of right carpal tunnel syndrome and right ring trigger finger with locking, as well as some other problems. Dr. Grundberg operated on March 17, 1982, performing a decompression of the right carpal tunnel and a decompression of the right long, ring and little trigger fingers. On March 30, 1982 he diagnosed the same conditions on the left, and on April 12, 1982 performed surgery on the left.

On November 17, 1982 Dr. Grundberg reported that "[i]t is not unusual, however, for symptoms to first start on one hand and then at another point, in the other hand." The reports clearly related the carpal tunnel syndromes and trigger finger syndromes to the work at the employer's plant.

Dr. Grundberg testified in his deposition that about 50 percent of the people who have a carpal tunnel syndrome will have it bilaterally. He assigned a permanent partial impairment rating of five percent of each hand.**

ISSUES

Claimant's post hearing brief gives a good statement of the issues: "The issues are whether the evidence has established that the claimant suffered two separate injuries to scheduled members as required by §85.64 of the Code, the extent of her industrial disability and the respective responsibilities of the defendants for that industrial disability."

APPLICABLE LAW

Section 85.64, Code of Iowa, states:

> If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no pre-existing disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

The additional payment of compensation from the second injury fund is based on industrial disability. Irish v. McCreary Saw Mill, 175 N.W.2d 364 (1970). In these cases, "the commissioner must...make a factual finding as to the degree of disability to the body as a whole of claimant caused by the second injury." Second Injury Fund v. Mich Coal Co., 274 N.W.2d 300, 304 (Iowa 1979). Before claimant can cross the threshold to secure payments from the second injury fund, the employer must pay the industrial disability occasioned by the subsequent injury. Id., at 303. If the conditions to the scheduled members occur simultaneously, there can be no prior and subsequent injury, and the second injury fund therefore is not liable. McMurrin v. Quaker Oats Co., 1 Iowa Industrial Commissioner Report 222 (1981). Claimant has the burden of proof to show the extent of permanent disability. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963). Industrial disability includes considerations of functional impairment, age, education, qualifications, experience and claimant's inability, because of the injury, to engage in employment for which she is fitted. Id., at 1112; 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).

ANALYSIS

Aside from claimant's evidence that she did not have any problems with her left hand until after she had problems with her right hand, there is the evidence of Dr. Paulson's notes which show she was first seen only for a right hand condition. There is a prescription slip which shows a diagnosis by Dr. Grundberg of a right carpal tunnel and a right long, ring and little trigger fingers on March 9, 1982, and there is a report of March 9, 1982 which shows the condition only with respect to the right hand. It was not until March 30, 1982 that the medical evidence shows any problem on the left. Claimant therefore meets the threshold requirement of having previously lost or partially lost the use of one member.

Clearly, the first injury is to the right hand and the subsequent injury is to the left hand. Claimant's dominant hand is the right one. In the sort of work claimant was doing at the time and in considering her prior work history, which is rather meager, a low physical impairment to her left hand would have caused no industrial disability which would equate to more than the 9.5 weeks of compensation heretofore paid by the employer for the functional impairment. Therefore, it is held that the subsequent injury to the left hand did not cause any industrial disability.

The question then becomes whether claimant is entitled to any industrial disability over and above the 19 weeks which she has been paid for the functional impairment to each hand. As shown above, her work history is not a lengthy one. Although she has not obtained a high school education or equivalency, she appears to be of at least average intelligence. Considering the various factors, then, of industrial disability her employment future is somewhat limited by the loss of the five percent impairment to each hand, and it is hereby found that she have a seven percent industrial disability.

Under the formula in the statute as interpreted in Second Injury Fund, 274 N.W.2d 300 the impairment to the first member (worth 9.5 weeks), the impairment to the second member (9.5 weeks) and the amount of industrial disability to the body as a whole occasioned by the second injury (0 weeks) must be deducted from the total amount of industrial disability in order to compute the amount owed by the second injury fund. Seven percent industrial disability equates to 35 weeks; deducting 19 weeks from that amount means that the second injury fund owes the claimant 16 weeks compensation.

FINDINGS OF FACT

1. That on December 4, 1981, claimant sustained a carpal tunnel syndrome, right, while at work.

2. That on March 9, 1982, claimant sustained a carpal tunnel syndrome, left, while at work.

3. That claimant was age 24 at the time of hearing, did not finish the eleventh grade in high school, had some experience as a cashier and in light industry, and had experience as a trimmer at the employer's plant.

4. That as a result of the above work episodes, claimant sustained a permanent partial impairment to each hand of five percent.

CONCLUSIONS OF LAW

That on December 4, 1981, claimant sustained an injury to her right hand which arose out of and in the course of her employment and that on March 9, 1982, claimant sustained an injury to her left hand which arose out of and in the course of her employment.

That employer and insurance carrier owe no disability to the body as a whole.

That as a result of the injuries, claimant sustained a total industrial disability of seven (7) percent.

ORDER

THEREFORE, the defendant second injury fund is hereby ordered to pay weekly compensation benefits unto claimant for a period of sixteen (16) weeks at the rate of one hundred forty-six and 70/100 dollars ($146.70) per week, all of which has accrued, to be made in a lump sum together with statutory interest as of the date of this decision. Claimant is denied recovery against the defendant employer and insurance carrier.

Costs of this action are assessed against the defendants and are to be equally divided between the employer and insurance carrier as one entity and the second injury fund.

The employer and insurance carry are ordered to file a report of payments on the first injury, that of December 4, 1981. Upon payment by the second injury fund of the sixteen (16) weeks compensation, claimant shall deliver unto the second injury fund a receipt therefor.

Signed and filed at Des Moines, Iowa this 13th day of October, 1983.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARY L. BERGREN, Widow and Surviving Spouse,	:	
Claimant,	:	
vs.	:	
PACIFIC INTER-MOUNTAIN EXPRESS (P.I.E.),	:	File No. 628249
Employer,	:	A P P E A L
and	:	D E C I S I O N
LIBERTY MUTUAL INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

Claimant appeals from an order denying claimant the opportunity to introduce the oral or written testimony of Dr. Melvin Marcus or Dr. Roy M. Hutchinson in the trial of this matter. Although the appeal is interlocutory it will be considered in that the result is not the same as that made by the deputy and it will allow the parties to proceed in an orderly manner.

Defendants generally object to the live testimony of Drs. Marcus and Hutchinson as they did not know claimant intended to call them live until claimant served her witness list on September 9, 1983 for a hearing scheduled for September 21, 1983. The assignment order indicated witness lists were to be exchanged by September 12, 1983.

Although it is apparent from the file that it had been earlier contemplated that medical witnesses would be deposed, that did not happen for various reasons. Earlier prehearing notes and status certificates indicated claimant intended to call four live witnesses at the hearing. The witness list contains five names.

Although defendants may have been lulled into believing that expert medical testimony was not to be presented by claimant nothing is found to prohibit claimant from doing so.

This does not resolve the matter entirely in claimant's favor, however. If a party is to call witnesses live they have

to take the appropriate measures to obtain and insure their presence at the hearing. As noted in the assignment order, "No request for continuance based on an allegation that the record will not be completed prior to the date of the hearing will be granted unless filed by August 15, 1983."

A motion for continuance was filed September 13, 1983. The request was based upon the unavailability of Dr. Marcus to appear at the hearing as he was out of the continent. Although it is not clear when Dr. Marcus was asked to attend the hearing it appears, the contingency of Dr. Marcus' unavailability was known at that time. The continuance requests time "to complete whatever depositions may in fact be necessary." Prior prehearing orders indicated deadlines in January of 1983 for scheduling of medical depositions. Although some were scheduled and later cancelled they were never rescheduled. We shall not allow a party to do indirectly what they cannot do directly.

As Dr. Marcus would not have been available at the hearing of September 21, 1983, we shall not allow his testimony at a latter hearing which was postponed merely because of action on this interlocutory appeal.

The live testimony of Dr. Hutchinson is not affected by this ruling. Any deposition testimony of Dr. Hutchinson, however, is also barred by this ruling.

WHEREFORE, the order of September 13, 1983 is modified.

THEREFORE, claimant is prevented from presenting the live or deposition testimony of Dr. Melvin Marcus and the deposition testimony of Dr. Roy M. Hutchinson at the hearing to be held in the arbitration proceeding in this matter.

This case is remanded back for inclusion in the assignment pursuant to this order.

Costs of this appeal are taxed to claimant.

Signed and filed this 22nd day of December, 1983.

Appealed to District Court;
Dismissed

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GEORGE R. BEVERIDGE, JR.	:	
Claimant,	:	File No. 635130
vs.	:	R E V I E W
ASSOCIATED GROCERS OF IOWA,	:	R E O P E N I N G
Employer,	:	D E C I S I O N
AMERICAN MUTUAL INSURANCE COMPANY,	:	
Insurance Carrier,	:	
Defendants.	:	

This is in a proceeding in review reopening brought by George R. Beveridge, Jr., claimant, against Associated Grocers of Iowa, employer, and American Mutual Liability Insurance Company, insurance carrier, defendants, to recover additional benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of his employment on April 15, 1980. It came on for hearing on December 9, 1983 at the office of the Iowa Industrial Commissioner in Des Moines, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file shows a first report of injury received May 9, 1980. A memorandum of agreement was received on May 16 as well as a final report showing the payment of two days of compensation totaling $60.27.

At the time of hearing, the parties stipulated to a rate of $210.73 and to time off beginning on August 2, 1980.

The record in this matter consists of the testimony of claimant, Kathleen A. Benson, Mark Beveridge, Lee Hacker, Larry Clausen and Betty Foster; claimant's exhibit one, the deposition of James L. Blessman, M.D.; claimant's exhibit two, the deposition of B. C. Hillyer, M.D.; claimant's exhibit three, a letter from Sam C. Evans, D.C., dated December 13, 1980; claimant's exhibit four, a letter from Ronald C. Evans, D.C., dated April 12, 1981; claimant's exhibit five, a letter from Thomas A. Carlstrom, M.D., dated February 15, 1983; claimant's exhibit six, a letter from Dr. Blessman dated March 25, 1983; claimant's exhibit eight, claimant's tax return from 1981; claimant's exhibit nine, claimant's tax return from 1982; claimant's exhibit ten, a letter from William C. Miller, Jr.; claimant's exhibit eleven, an evaluation from Benson; claimant's exhibit twelve, a resume from Benson; claimant's exhibit thirteen, a bill from Drs. Evans; claimant's exhibit fourteen, a bill from Dr. Evans; defendants' exhibit A, claimant's answers to interrogatories; defendants' exhibit B, claimant's motion to strike in resistance to respondents' motion for summary judgment; defendants' exhibit C, the affidavit of Lee Hacker; defendants' exhibit C1, information from Job Service of Iowa; defendants' exhibit D, the affidavit of Larry Clausen with attachments; defendants' exhibit E, claimant's application for employment, defendants' exhibiit F, company rules; defendants' exhibits G1 through G6, trip sheets filed by claimant; defendants' exhibit H, a driver's credit report; defendants' exhibit I, a report from Dr. Sam Evans dated May 31, 1980; defendants' exhibit J, a return to work assessment from Mercy Hospital Medical Center; and defendants' exhibit K, a letter from James C. Davis dated April 1, 1981. The undersigned greatly appreciated the filing of the transcript by defendants. The parties filed briefs.

ISSUES

The issues in this matter are whether or not there is a causal relationship between claimant's injury and his present disability; whether or not claimant is entitled to healing period and permanent partial disability; and whether or not claimant's treatment by Dr. Meier and Drs. Evans was authorized.

STATEMENT OF THE CASE

Forty-eight year old claimant, the presently divorced father of four children who has a ninth grade education, testified to 21 years' work experience as a truck driver for a grocery chain prior to beginning work for defendant in 1980 as a part time driver. His duties included driving the truck and both loading and unloading. He customarily drove a tractor and trailer although the company had straight trucks as well. Drivers were notified the night before where their runs would take them. Claimant said he did not always know where he was going so he would ask other drivers for directions for the quickest way to get to various locations. Claimant reported that he was functioning in a 60 day trial period with earnings of $6 or $7 per hour.

He recalled the circumstances surrounding his injury of April 15, 1980: He had unloaded the grocery portion of an order. Strawberries had spilled. He picked up a 100 pound bag of potatoes to go on the conveyor and slipped on the strawberries. He fell hitting his right shoulder on the conveyor and floor, and he landed with the potatoes on top of him. He had a sharp pain in his lower back and a lesser pain in his shoulder. He finished the remainder of the day's work and reported his injury to the dispatcher.

He, of his own volition, sought treatment from Dr. Meier, who gave him a back support and stayed off work about three days. He told the company he was going to the doctor. He worked for a while and then he was off for three weeks because the jarring of the truck bothered the nerves in his back. Claimant acknowledged being off some days because there was no work for him.

He treated with Dr. Evans. He slowed down and was unable to function as he had before, either at home or at work. He felt stiff in the mornings and sometimes got to work later. He thought he had called in when he was going to be late getting to work. He sometimes did not complete his rounds on time.

He was notified of his termination on August 2, 1980. Following his termination, he tried to get another job in trucking, but he was unable to do so. Claimant's interrogatories attribute his discharge to his having to slow down from the pain from his injury. He drew unemployment from October 5, 1980 to October 4, 1981.

Claimant's answers to interrogatories express his fear of being fired if the company learned of treatment for his job-related injury. He claimed that he said that he was going to the doctor for his back, but he created incidents to explain his inability to work. Claimant testified that he had not seen a portion of a credit form. He was unaware of where the spoiled merchandise had gone. He did not recall anyone's talking to him about leaving late on his runs. He denied having seen a copy of company rules. He stated he was not told until his second and final load that he was to call in. He said that he would have called in as he could call collect. He definitely recalled being told about the pallets, but he did not know about the leaving of crates and other things. He did not recollect any notice in the drivers' room.

Eventually, he went into the solar business with a friend.

Beginning on April 14, 1983, he commenced work for another solar company with earnings of $295 a week.

A note from William C. Miller, Jr., the vice-president of Energy Savers Sales of Iowa indicates claimant's gross pay from April 14, 1983 to December 2, 1983 was $10,020.88. Claimant's tax return for 1982 shows business income of $3600. Claimant's 1981 tax return shows a $677 loss.

Claimant uses a TENS unit about three days out of a week which he said helps his pain. The pain clinic was recommended for him by Dr. Blessman. Dr. Hillyer gave him exercises which he did not think helped. He claimed that he has never taken any medication. He uses his belt if he is going to lift in excess of 35 pounds. Sitting in one position for a long period of time gives him pain.

Claimant testified that he was told by his doctors not to return to truck driving where he believed he could earn in excess of $30,000 yearly.

Claimant said that he had not submitted his doctor bills to either defendant because he didn't know that he could and because he did not want to be fired. Claimant recollected having a pulled muscle in his back about 20 years before this injury.

Claimant stated that the recurrence of back pain on May 29 referred to in Dr. Evans' notes was nothing new but rather an increased sharpness in his pain.

Claimant's application for employment dated October 25, 1979 denies physical defects, major illnesses in the past five years or compensable injuries. Claimant was hired as an "on call, part time employee." A notation on his application indicates he was to start at $7.94. On June 29, 1980, he was moved to full time at $8.04 per hour with health, welfare and pension benefits.

Mark Beveridge, son of claimant, testified to residing continuously with his father since August 2, 1980. He described his father prior to April 15, 1980 as healthy and able to lift heavy objects. After his father's injury, he laid around and had trouble moving and walking. He no longer did things around the house. He noted that his father walked "funny" or "bent out of shape."

After claimant's termination, Beveridge continued to observe his father's being uncomfortable. He stated that he had seen sores on the claimant's back from the TENS unit.

Lee Hacker, risk manager for defendant employer since February of 1979, who has access to employment records, testified that a casual employee is one who works part time and is not guaranteed hours or on an on call basis.

According to company records claimant missed three days' work in the week of his injury. In the week ending May 31, 1980, claimant did not work two days. Claimant missed one day in the weeks of June 14 and June 21. He did not work the weeks ending June 7 and June 28. The witness said that claimant might not have been called into work on days missed after the week of his injury. Hacker said that he first got a letter from claimant's attorney notifying the company that additional benefits were claimed on April 2, 1981.

An affidavit from Hacker shows that claimant worked as a probationary employee for in excess of 50 hours for the weeks ending July 12, July 19, July 26, and August 2.

Larry Clausen, supervisor of shipping on the night shift who was, at the time of claimant's injury, his immediate supervisor and dispatcher, testified that casual employees are hired with the understanding that they will work only as the company has need of extra trucks beyond the number that can be handled by the regular drivers with no guarantee of hours or driving. Fridays were reserved for regular drivers on the basis of seniority.

The witness recalled that claimant had turned down runs because he was in the process of purchasing a house and had a meeting with his lawyer or banker. He did not remember claimant's telling him of a recurrence or of the inability to do his job after his return to work. Neither was the company aware that claimant was continuing to seek chiropractic treatments.

From July 5, 1980 through August 2, 1980, claimant was a probationary employee meaning that it was contemplated claimant would go to work full time after he had served a 90-day trial to see if he could handle the job and whether the company was satisfied with his work. At the end of 90 days, the claimant would be earning the same salary as a full-time employee. A full-time employee is guaranteed a 40 hour week with hours both driving and working in the warehouse. Only full-time employees have health, welfare and pension benefits.

Clausen recalled two specific times claimant refused work. In the first instance claimant told him that he had hurt himself helping a friend move furniture. On another occasion, claimant himself was moving. Company records did not show any allegations of inability to work on claimant's part attributable to his injury of April 15, 1980.

The witness explained the circumstances of claimant's termination:

> During the course of the time between the end of June and August the 2nd, when he was terminated, there was a number of discrepancies arose on trips that he took and in his handling of his job and the times that he left on trips that was not to the company's liking or the rules and regulations that he was to abide by.

More specifically the witness cited occasions on which claimant did not leave the warehouse at the specified time without explanation of his deviation; an incident in which he overslept and did not call in; and a time when there was a delay in loading his truck, a failure to get all the product and no request for instructions from claimant. The supervisor stated that claimant would know that he was supposed to call in because the truck was not loaded through information the drivers were given verbally and through notice posted in the drivers' room. He specifically said that claimant had been told he was to call.

Clausen reported an incident in which product was damaged and the store didn't want to pay for it. Claimant indicated six hams and six cottage cheese were damaged, but the witness was able to find only three hams on the truck. He said that damaged goods are not always brought back to the warehouse and that they might be disposed of by the grocer. When a driver returns without a haulback, he parks his trailer and puts a clipboard with the trip sheet, credit sheet, and other papers in the back of the trailer. Someone then goes through the truck to remove the pallets and other foreign items so that the trailer is ready for loading. Merchandise listed on the credit sheet is found.

Clausen said a copy of the company rules and regulations was given to all probationary and full-time employees. A signed and dated sheet is to be returned to the supervisor before the employee becomes a full-time driver or before the end of 90 days probation. He agreed that in claimant's case, a copy might not have been filed.

The witness had pulled claimant's trip sheets for two specific dates and four random dates. The sheet for the date of injury showed the claimant was to leave the warehouse at 3 a.m. and travel to Ft. Atkinson, Ossian, Postville and Elgin. He worked 13 1/2 hours that day and made no notation of an injury. The trip sheet for May 29, 1980 showed claimant left the warehouse 7 minutes late without explanation for the delay. He took a straight truck with a light load to Polk City and then Grimes. A notation was made of a 21 minute delay as claimant waited for a beer truck. There was no notation of reoccurrence of pain. Other trip sheets showed time deviations as well. Those in excess of 5 minutes were to be noted. The supervisor said that he had talked to the claimant about his lateness.

The supervisor stated that he had no knowledge of claimant's seeking medical treatment, but he recalled being told by claimant that he hurt himself moving a sofa downstairs and on another occasion when he was moving. He did not know if the time the claimant was absent because he was purchasing a house was before or after his injury. As explanation of why claimant was promoted to full time probationary employee, Clausen said,:

> Mr. Beveridge, as previously stated, had twenty-one years' experience. A lot of this, if not all of it, with a grocery warehouse, in which case he should know how to drive a rig, which is a big responsibility and a lot of money with a lot of expensive product in it. And since he was familiar with it, it shouldn't and would not be that hard for him to convert to our policy.
>
> It would have been much easier to make him -- or have him become an AGI employee than it would to take somebody that had driven some other kind of a truck and never delivered groceries. So for the benefit of AGI, we should have had a step up with Mr. Beveridge as far as him qualifying and becoming an employee at AGI because he had done it.

He acknowledged that claimant had worked a lot of hours for a casual employee.

Clausen testified that the current rate for full-time union drivers is $9.76 per hour with health, welfare, pension benefits worth $54 to $64 weekly.

Betty Foster, claim manager for the insurance carrier, testified to familiarity with claimant's claim. She indicated that the first notice the insurance carrier had of claimant's asking for medical treatment came when a letter dated April 1, 1981 was received from claimant's counsel.

Robert W. Jones, B.S., performed a return to work assessment and found claimant able to do all the physical activities listed most of the time although claimant himself thought he could do the activities only some of the time. The major portion of claimant's work characteristics were in the average range with above average marks given for following instructions, maintaining physical stamina, motivation and competitive ability.

Kathleen A. Benson, branch manager for a private rehabilitation service whose written report was offered, testified to completing a personal interview with claimant exploring medical problems, family background, education and employment history in an attempt to analyze skill levels and locate transferable skills.

Benson recalled that claimant's subjective complaints at the time of her interviewing him consisted of chronic lower back pain and irritation of his back and neck with prolonged sitting. Claimant told her that he feels better if he alternates standing and sitting.

Benson classified claimant's work in trucking as both semi-skilled and unskilled. She listed his transferable skills as knowing how to operate and control a motor vehicle, being able to follow directions, knowing how to observe and follow traffic regulations, using arithmatic for collections and having the ability to adjust to simple, repetitive, uncomplicated work. She acknowledged some problems with transferring truck driving skills, particularly if a person can do only sedentary to light work.

The witness thought that the medical evidence would restrict claimant to sedentary or to light work allowing him to change positions as he needed to do so. As alternative jobs for claimant, she suggested cashier, small parts clerk, ticket taker, security guard, or dispatcher with entry level positions at minimum wage or slightly above.

Benson calculated claimant's present wage at $7.36 an hour. She believed the claimant's current wage if he were employed by defendant employer as a union driver would be $9.64. Benefits in addition to salary were not considered.

Regarding her conclusion, Benson testified:

> My work was somewhat already done because Mr. Beveridge had placed himself in a position, so, therefore, analyzing that and coming to the conclusion that it appears to be an ideal spot for him, as he can control his environment. I feel that he's making a high wage, considering the limitations that he does have. If he did not have that job, he would be reduced significantly in the wage that he could earn.

Sam C. Evans, D.C., first treated claimant on April 16, 1980 for a lumbosacral sprain. A past history of an acute lumbosacral sprain with right leg pain on December 18, 1974 which resulted in no time lost and a similar incident on October 5, 1979 with myospasms were recorded. Claimant was released on January 3, 1975 following the first episode and on October 6, 1979 after

the second. Claimant was seen on June 2 complaining of the recurrence of severe pain radiating into the right leg on May 29. A diagnosis of acute L5-S1 syndrome with radiculitis was made. Claimant was treated with ultrasound, pelvic traction, bed rest and a back support. He was pronounced unable to work from May 30 through July 21, 1980.

Claimant was back on November 18, 1980 complaining of continued low back pain and intermittent posterior thigh pain. X-rays were interpreted as showing marked narrowing at L5-S1 with spondylosis. Claimant was again treated conservatively. It was the doctor's opinion that claimant had lumbar disc syndrome with intermittent radiculitis involving the S1 nerve root. As for claimant's prognosis, Dr. Evans predicted claimant would have acute exacerbations from time to time which would prevent strenuous activity. He expressed the opinion that maximum medical improvement had not been reached.

Ronald C. Evans, D.C., examined claimant on April 8, 1981 to establish an impairment rating. Dr. Evans took a history of claimant's being off work initially for three weeks. Claimant complained of stiffness in the fingers of the right hand, particularly after lifting, tightness in the neck, numbness in the arm, a dull ache in the low back which radiated into the right leg after prolonged sitting and numbness in the great toe in the right foot.

Cervical ranges of motion were flexion 25°, extension 26°, right lateral flexion 25° and left lateral flexion 22°. There were radiating trigger points at the trapezius/levator muscle on the right. Dorsal lumbar ranges in motion were flexion 27°, extension 8°, left lateral flexion 17°, right and left rotation 5°. There were radiating trigger points paraspinally at L3-4-5 to the right buttocks and calf. Mankoff's was positive. Straight leg raising, Faber's, valsalva, Ely and Nachla's were all positive on the right. X-rays were interpreted as showing a left convex lumbar scoliosis with Vanzetti's evident, grade II-III spondylosis at L5-S1 with productive bone spurring anterioraly.

Dr. Evans made a diagnosis of "moderate cervical strain syndrome with cervico-brachial myofascial syndrome" and "severe lumbosacral sprain syndrome with lumbar disc syndrome and nerve compression L5 & S1 on the right." Using the AMA Guide, the chiropractor assigned a 50 percent rating and declared that the claimant had reached maximum improvement.

Thomas A. Carlstrom, M.D., saw claimant on January 25, 1983. He took a history of claimant's being injured "well over a year ago" and being off work for two weeks following the incident. Claimant complained of back pain particularly after he was up and around and engaged in heavy exertion. He did not complain of leg pain.

Dr. Carlstrom found some diminution in range of motion in claimant's back with forward bending to 80°. Claimant was unable to extend. Straight leg raising was negative, and motor sensory exams were normal. The left achilles was slightly hypo-active. X-rays showed a severe spondylosis with a vacuum disc phenomenon at L5-S1.

Dr. Carlstrom assigned a body as a whole disability based on diminished range of motion at four to five percent.

Thomas W. Bower, LPT, saw claimant on September 29, 1982 and found a flat lordosis and asymmetry. Ranges of motion were flexion 65°, extension 25°, lateral bending 10° to each side. Straight leg raising and Lasegue's were negative. Hamstrings, quadriceps and lumbar extensors all had moderate to severe tightness. The therapist proposed an exercise program to relieve the hamstring lumbar extensor tightness.

An eight percent impairment to the body as a whole based on the AMA Guides was assigned.

D. C. Hillyer, M.D., examined claimant on September 28, 1982 as part of an evaluation done at Mercy Medical Occupational Evaluation Center. X-rays brought by claimant were interpreted as showing degenerative arthritis with spurring of L4 and L5 and loss of joint space between L5 and S1. Dr. Hillyer expressed the opinion that the arthritis was a preexisting condition which may have been aggravated by claimant's accident. He later said it is possible the arthritis was brought on by the fall, but he continued to think that if the fall had not caused the degenerative arthritis to flair, something else would have. He found the muscle spasm of claimant's left side consistent with degenerative arthritis and probably caused by it. Dr. Hillyer rated claimant's permanent impairment at ten percent with a zero to five percent related to the fall. The physician said that within a reasonable degree of medical certainty, claimant's injury was at L4-L5 and L5-S1. Regarding carpal tunnel syndrome the physician thought it more likely attributable to claimant's use of his hands at work than to traumatic injury by falling. He said aggravation of the wrist possibly would have occurred if he fell on his wrist or twisted his wrist causing swelling; however, he also stated, "A sudden trauma, unless it involved a fracture, it would be unlikely to make a change in that ligament." He doubted that any injury to the wrist would cause pain in claimant's arm. He stated that there is no relationship between what claimant has in his back and the pain in his shoulder and arm.

Dr. Hillyer felt that the pain in claimant's right leg was irritation of a nerve root, but he did not think the irritation had caused any change in the extremity. The expert related the extremity pain to claimant's fall.

The Mercy service recommended no additional diagnostic or treatment procedures other than a trial of a non-steriodal anti-inflammatory drug exercises and the TENS.

James L. Blessman, M.D., certified specialist in family practice with an interest in chronic pain management, first saw claimant on March 25, 1983. He reviewed medical records from Mercy Occupational Evaluation Center. Claimant was complaining of low back pain of three years' duration which he attributed to a work injury which occurred as he unloaded freight. Based on the disease which claimant had, the doctor anticipated his pain would be dull and aching rather than sharp and burning. On examination, claimant had pain in the right scapula, the lumbo-sacral region from L2-L3 and both sacrioiliac joints. Claimant had full range of motion in the right upper extremity, reasonably good range of motion in the back, a normal gait and good strength in the lower extremities. Objective symptoms other than pain on palpation of the right shoulder blade were minimal.

Dr. Blessman found the circumstances of claimant's injury compatible with the pain he said he had and believed the pain to be real. His diagnoses were chronic lumbosacral back strain and degenerative osteoarthritis of the lumbosacral spine. He stated that the latter malady possibly can begin with the traumatic injury.

Dr. Blessman recommended admission to the pain center. He was unable to state whether or not claimant would have future disability. The physician felt that claimant could be rehabilitated to the point that he could resume over the road truck driving. He proposed that generally someone with a back injury would have restrictions on lifting with no repetitive bending or stooping.

APPLICABLE LAW AND ANALYSIS:

The first issue to be decided is whether or not there is a causal relationship between claimant's injury and any disability he now may suffer.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 15, 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).

Defendants argue that claimant had two work incidents--one on April 15, 1980 of which they knew and for which he was compensated and a second one when claimant had a recurrence of pain on May 22, 1980 of which defendants were not aware. This deputy commissioner agrees that what happened to claimant on May 29, 1980 was a recurrence; i.e., an occurrence of the same condition after an interval of time. Defendants seem to assert that claimant needed to give notice of that recurrence. The undersigned knows of no such requirement.

Claimant testified that what he experienced on May 29, 1980 was not anything new but rather an increased sharpness in his pain. Dr. Evans recorded a recurrence of severe lower back pain with radiation into the right leg and a complaint of claimant's having continuous discomfort after April 15, 1980.

Claimant was first treated by Dr. Sam Evans. His treatment was concentrated in the lumbosacral area both when he was seen in April and again when the doctor reported his findings on June 2 and November 18. Dr. Ronald Evans examined claimant for purposes of making an impairment rating almost exactly a year post-injury. Although Dr. Evans took a history of low back and leg pain, he also noted discomfort in the fingers of claimant's right hand and neck tightness. Dr. Evans then causally connected to claimant's injury of April 15, 1980 both "a moderate cervical strain syndrome, with cervico-brachial myofascial syndrome and severe lumbosacral sprain syndrome with lumbar disc syndrome and nerve root compression L5 & S1 on the right." This is not consistent with the other medical evidence or claimant's own history and complaints. Cervical problems will not be found related to claimant's fall.

Neither based on the evidence from Dr. Hillyer will carpal tunnel syndrome or upper extremity complaints be related. Dr. Hillyer testimony supports the causal relationship between claimant's back and lower extremity pain.

Dr. Blessman's testimony is also supportive of claimant's claim.

The record allows claimant to preponderate on the issue of disability causally connected to his injury.

Claimant also has established his entitlement to some further healing period benefits. Dr. Evans pronounced claimant unable to work from March 30 through June 21, 1980. Claimant will be allowed healing period from May 30 to June 7. Claimant missed worked off and on after this time, but it is unclear whether he was off because of his injury or because no work was available. In the weeks prior to his termination he was working in excess of 50 hours. He was not seeking medical treatment on a regular basis. He collected unemployment from October 5, 1980 to October 4, 1981. Claimant appears to have started his solar business prior to the time his unemployment compensation ceased. The evidence before this deputy industrial commissioner will allow no additional healing period other than that set out above.

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, 902 (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 industrial commissioner has said on many occasions:

> 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 Company, II Iowa Industrial Commissioner Report 39 (1981); Enstrom v. Iowa Public Services Company, II Iowa Industrial Commissioner Report 142 (1981); Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981).

Claimant is rapidly approaching middle age, but he has a considerble working life ahead of him--probably more than ten years. His formal education has been limited and his work experience has not been broad. His work history appears to be good in that he worked 21 years for the same employer.

Jones' work assessment of claimant found him able to do listed physical activities most of the time. Claimant showed above average ability in following instructions, maintaining physical stamina, motivation and competitive ability. Benson found claimant to have some transferable skills, but she also noted difficulty in transferring truck driving skills to other areas. Based on medical evidence, she thought claimant would be restricted to sedentary or to light work which allowed him to change positions. She listed some alternative jobs which would pay minimum wage or only slightly more for entry level positions. She concluded that claimant had done a good job in placing himself.

Claimant was healthy before his fall although he had two prior episodes of lower back and right leg pain. Following his fall in 1980 he had steady chiropractic treatment. Dr. Ronald Evans applies the AMA Guides and assigns an impairment rating of 50 percent. Some of that rating is for cervical problems which previously have been found unrelated. Combining claimant's range of motion and sensory impaiment ratings for the lumbar area totals 23 percent. Ten percent is given for a lumbar disc at L5-S1. Dr. Carlstrom, neurologist, rates claimant's impairment at four to five percent of the body as a whole based on diminished range of motion. As defendants point out there was some error in Dr. Carlstrom's history. Bower, a licensed physical therapist, gave claimant eight percent of the body as a whole based on the AMA Guides. Dr. Hillyer assessed a ten percent rating with zero to five percent attributable to his fall. It will be found that claimant has a functional impairment related to the fall in April of 1980 of from four to eight percent. Greater weight is being given to the ratings from Drs. Carlstrom and Hillyer and therapist Bower whose ratings are fairly close together and are more recent in time.

Claimant was hired as an on-call part-time employee. On July 5, 1980 he became a probationary employee in contemplation of his becoming a full-time driver after serving a 90 day trial period. The undersigned believes that claimant was very concerned about losing his job because of his injury. She also thinks he did a good job of concealing his back trouble from his employer even to the point of making up excuses for his absences. Company records show no allegations of inability to work because of the injury. In the month immediately prior to his termination, claimant was working in excess of 50 hours on a regular basis. While his late arrivals and his failure to complete his work in a timely manner may have been traceable to his injured back, those shortcomings were viewed by the employer as faults rather than physical problems. Those faults added to those others testified to by Clausen ultimately led to claimant's termination.

Claimant has good motivation to work. He has done a remarkable job of rehabilitating himself. The undersigned believes that claimant has a chronic pain syndrome which contributes substantially to his disability.

After reviewing the Iowa case law, the factors discussed in this section and the findings set out below, this deputy industrial commissioner concludes that claimant has a permanent partial industrial disability of 20 percent.

The remaining issue is claimant's entitlement to benefits under Iowa Code section 85.27. That section gives the employer the choice of medical care. Defendants argue that claimant's chiropractic treatments by Dr. Evans were unauthorized.

Bills have been offered from Drs. Evans. At the time of hearing claimant was asked if he sought authority from his employer to go to the doctor. He responded, "No, I just told them I was going to the doctor." He then said that he did not know the company had a doctor. He also claimed that he did not know he could submit his bills to his employer and that he did not do so because he did not wish to be fired.

After his initial medical care, claimant commenced hiding his medical treatment from his employer. Foster testified that the insurance carrier first learned claimant was asking for medical treatment when a letter was received from claimant's counsel. The employer has an affirmative duty to monitor the care of the employee and there is some indication in the record that it should have been alerted to the need for future medical care. Dr. Evans' report to the insurance carrier dated May 31, 1980 states that whether or not further treatment will be needed is "unknown" and that claimant has been released p.r.n. (pro re nata).

The undersigned is willing to find that the employer initially acquiesced in claimant's seeing Dr. Evans. In fact, the insurance carrier paid for claimant's first two visits. Claimant's next visit was after the report referred to above. This deputy commissioner is compelled to conclude claimant's treatment by Drs. Evans after his visit of April 18 was unauthorized. The employer has the responsibility to furnish medical care; but when, as in this case, claimant makes a concerted effort to conceal his need for care, the employer cannot be expected to provide treatment.

Claimant did not make a specific request at the time of hearing for treatment at a pain center. His brief contains that petition. Claimant's entitlement to 85.27 benefits is in issue here. Dr. Blessman expressed the opinion that a pain clinic would help claimant. Defendants will be ordered to offer claimant such treatment. If claimant elects to accept that offer, he should be paid healing period benefits for the time he is actually hospitalized.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is 48 years of age.

That claimant has a ninth grade educaton.

That claimant's primary work experience has been as a truck driver for a grocery chain.

That claimant commenced work for defendant employer in 1980 on a part-time basis.

That claimant's duties included both loading and unloading in addition to driving the truck.

That on April 15, 1980 claimant fell as he unloaded groceries and experienced pain in his lower back and shoulder.

That on May 29, 1980 claimant had a recurrence of back pain.

That claimant was paid two days' compensation as a result of his injury.

That claimant slowed down after this injury and was sometimes late in getting to work or in completing his work.

That claimant feared termination if the company learned of his injury.

That claimant was terminated on August 2, 1980.

That claimant drew unemployment beginning on October 5, 1980 through October 4, 1981.

That claimant went into the solar business with a friend.

That claimant now works in the solar business with someone else.

That claimant has a reduction in his actual hourly earnings.

That claimant has had a decrease in actual earnings.

That claimant uses a TENS unit and a back support.

That claimant is motivated to work.

That claimant has done a good job of finding work within his physical capabilities and interest.

That claimant needs work which will allow him to alternate positions.

That claimant must exercise caution with lifting, bending and stooping.

That claimant's work has provided him with few transferable skills.

That claimant had a preexisting arthritis.

That claimant had prior lumbosacral sprains.

That claimant has a functional impairment rating in the four to eight percent range.

That cervical, upper extremity and carpal tunnel problems are not related to claimant's injury of April 15, 1980.

That claiment has pain which is related to his fall of April 15, 1980.

That defendant employer acquiesced in claimant's initial treatment by Dr. Evans.

That defendant employer did not know that claimant needed further medical care because of his attempts to conceal his medical condition.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established by a preponderance of the evidence that his injury of April 5, 1980 is causally related to the disability on which he now bases his claim.

That claimant has established entitlement to healing period benefits from May 30, 1980 to June 7, 1980.

That claimant has not established entitlement to benefits under Iowa Code section 85.27 relating to the payment of the bills of Drs. Evans.

That claimant has established a permanent partial industrial disability of 20 percent.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant healing period benefits from May 30, 1980 to June 7, 1980 at a rate of two hundred ten and 70/100 dollars ($210.70).

That defendants pay unto claimant permanent partial disability benefits for one hundred (100) weeks at a rate of two hundred ten and 70/100 dollars ($210.70).

That defendants pay amounts due and owing in a lump sum.

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants offer to claimant treatment at a pain center.

That claimant either accept or reject defendants' offer of pain clinic treatment within thirty (30) days after the offer is made.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

That defendants file a final report in sixty (60) days.

Signed and filed this 2nd day of March, 1984.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MURL L. BLAND, Claimant, vs. CROUSE CARTAGE COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	FILE NO. 661754 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 a proceeding is review reopening brought by the claimant, Murl L. Bland against his employer, Crouse Cartage Company, and its insurance carrier, Liberty Mutual Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained February 13, 1981.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Office of the Iowa Industrial Commissioner in Des Moines, Iowa, November 23, 1983 and November 25, 1983. The record was considered fully submitted at close of hearing.

A review of the industrial commissioner's file reveals that a first report of injury was filed February 19, 1981. A memorandum of agreement was filed June 22, 1981.

At time of hearing, the parties stipulated that the applicable rate of weekly compensation in event of an award is $275.09.

The record in this case consists of testimony of the claimant, Murl L. Bland, of claimant's wife, Edna L. Bland, of John A. Marrs, and of Kate Benson; claimant's exhibits 1, 2, and 4 through 14; and Defendants' exhibits A, and D through G; objections to specific evidence will be treated in the review of the evidence.

The issues to be resolved are:

1. Whether a causal relationship exists between the alleged injury and the disability.

Whether claimant is entitled to benefits and the nature and extend thereof including benefits for healing period, if any.

3. Whether claimant shall be reimbursed for medical travel expenses

REVIEW OF THE EVIDENCE

Claimant, Murl L. Bland, testified in his own behalf. Claimant was 63 years old at the time of hearing. He has been married 43 years, has three adult children and seven grandchildren, none of whom are dependent. Claimant completed eighth grade, but has no further education or job skills training. He has been a trucker throughout his adult work life.

Claimant began work for Crouse Cartage in June 1977. On February 13, 1981, claimant was on the loading dock when a fellow employee ran over him with a fork lift. The fork lift hit claimant in the stomach; he was hospitalized for 43 days.

Claimant testified that his preinjury job duties included lifting materials weighing 50 or more pounds each day while loading truck trailers. He also fished, camped, went auto driving, and repaired cars before his injury. He reports he had had no broken bones before his injury. In 1978, his doctors discovered claimant has a blood pressure problem. Claimant currently takes medication to control this condition.

Claimant reported that after his injury, his doctors advised his wife to administer therapy for his foot. The therapy consists of bending the foot back and forth with 15 to 20 second holds in position for approximately 15 minutes per session. Initially, therapy was administered eight to ten times per day; now it is administered four times per day.

Claimant reported he now can do few household activities. He does dishes and vacuums. He can drive an automatic transmission car but has difficulty getting in and out of his vehicle. He walks intermittently at Southridge Mall and the Kmart about two to three hours. He relayed that after he has walked approximately one half block, his leg and hip get weak and he must sit down for 15 minutes. Claimant continues to attempt to walk since he believes "trying to get me exercise [is] better than sitting home." Claimant cannot sit with his back against a chair without pain. He continues to fish when he is able to, but feels he no longer could do the stooping and bending required to repair cars or change tires.

Claimant characterized his leg and foot as always hurting, as feeling half asleep, and as numb. He stated his hip bone, where hit [by the forklift], feels like a toothache. His low back and buttocks still hurt all the time and his legs and big toe are always numb.

Claimant stated he must "gooze" down to pick up objects from the floor. He uses a cane or a chair or table for support when walking or standing. He needs assistance in dressing since he cannot balance to insert his leg in his pant. When claimant climbs stairs he must use the hand rail but apparently can walk nine or ten steps before rest is required.

Claimant reported he had planned to continue working as long as his health permitted. He stated he tried working in his son's second hand shop after his injury, but "got nervous just sitting there." Claimant said he had liked the work he had been doing for Crouse Cartage, but did not believe he could return to it with his present problems.

As a trucker, claimant completed haul logs but otherwise did no paper work. Claimant advised he has problems with reading and writing. He glances through the daily paper. He has never read books. At hearing, it was apparent claimant has difficulty thinking abstractly and is most comfortable when conversation proceeds in the plainest of Anglo-Saxon.

Claimant stated he hadn't considered working on small engines or appliances. He stated Crawford Rehabilitation had given him tests to see how smart or dumb he was.

On cross-examination, claimant stated that he felt Crawford fairly tested his abilities. He conceded he has read invoices at Crouse Cartage and has had to figure out "what is in a load and how it should go." Claimant weighs approximately 200 pounds. His wife or sister accompany him on his walks; he never goes alone. He walks at Southridge or the Kmart three or four times per week.

He reported his bladder, his pelvis, and his leg nerves were injured in the accident.

Claimant receives $438.00 per month social security retirement benefits. These began in April 1983. He does not receive social security disability.

Claimant reported he was examined by a Mr. Johnson at Crawford Rehabilitation and not by Kate Benson with whom he had had no contact before the hearing date. Claimant reported his belief that Crawford never authorized job interviews for him nor directed him to any and never discussed claimant's case with potential employers.

Claimant stated he trusts John Marrs.

Claimant reported he usually drives when traveling with his wife. On redirect, he clarified to state that, when the family travels outside of Des Moines, his son or daughter-in-law drive.

Edna L. Bland, claimant's wife of 43 years, testified in his behalf. The witness was present throughout the proceedings. It is noted that loyalty to and ferocious protectiveness of a spouse such as hers are admirable qualities, rare in this age of lightly taken and transient relationships. This witness' expression of those qualities was not altogether in keeping with the decorum or deportment common to a proceeding before this agency, however.

The witness reported claimant "couldn't get around" when he returned from the hospital.

She substantiated claimant's testimony concerning his daily physical therapy. She explained that the exercises are to strengthen claimant's leg muscles and if they are not done each morning, claimant has difficulty walking throughtout the day.

The witness reported that, while claimant attempts to do dishes and to vacuum, he generally is unable to complete these tasks and she must take over. Mrs. Bland also must mow the lawn since her husband cannot.

She reported claimant has trouble remembering things now. He was smart before his injury. Claimant gets frustrated over his limitations and gets "stirred up" over matters which previously had not bothered him.

On cross-examination, the witness admitted she and claimant last biked the year before last. Claimant tried to ride once after his injury while wearing a leg brace. He hurt his leg in the driveway. Claimant and his wife last bowled three years ago.

The witness reported twice talking to Joe Thompson from Crawford. Mr. Thompson tested claimant at home. Mrs. Bland reiterated her belief that Crawford has not offered to help claimant find a job or to help in any other way.

Mrs. Bland said she would support claimant in returning to work but admitted that but for administering claimant's therapy she has not helped claimant attempt to return to work. She reports she knows of no jobs claimant could do.

On redirect examination, the witness explained that when claimant tried to ride his bike he couldn't because his brace pinches the upper calf of his left leg all the time. She stated claimant also has difficulty rising from a chair or getting out of a car because of his brace.

John A. Marrs, a manager at Crouse, was next called in claimant's behalf. He reported he has known claimant since his employment in 1977. Claimant's current status with Crouse is off on account of injury. He reported this status remains unchanged bat admitted claimant was sent a lay off notice September 16, 1983. He relayed that, at deposition, he felt claimant could be a co-dispatcher, but that that position is no longer available. He expressed his belief that co-dispatcher was the only job claimant could perform wthout a medical release to return to work. The witness stated managerial jobs would not be available to claimant because these require excess walking. Dock work is not available as this encompasses fork lift operation.

The witness detailed the duties of a dispatcher as mailing, correspondence, as answering and logging telephone calls to the terminal, and as "gridding" loads for pickup. The dispatcher also assigns drivers their loads. The dispatcher should either have experience as a driver or otherwise be familiar with the towns to which freight is delivered. The Crouse dispatcher works in a nine by sixteen foot room with a four by six foot table at its center. The dispatch sheet and a telephone are on the table. The dispatcher has a tall, adjustable, backless stool. A shelf circles the room. This contains a second telephone. A lower table and chair are about five feet away from the higher table. A transmitter is beside each phone and a CB radio is on the wall behind the high table. The dispatcher mans all units. The witness stated he has worked as a dispatcher and that on occasion all or a number of the communication centers are active at one time. The witness reports all centers can be reached from the high table simply by moving things back and forth

The dispatcher works fulltime from 9:00 a.m. to 5:30 p.m. Monday through Friday. He receives neither lunch nor rest breaks. The witness relayed that incoming calls are particularly heavy between 2:00 and 4:00 p.m. with "everything ringing off the walls at one time." The dispatcher must go to the dock at least once an hour to check on dock loading and unloading. The dispatch office is 11 or 12 stair steps above the dock. The dock is 350 feet long. There is no elevator from the dispatch office. The witness "keeps in shape" ascending and descending the steps. He is 49 years old and has no physical problems.

The witness opined that approximately 133 calls, concerning either assigned or requested pickup, come into the dispatch office per day. Other calls are also received for a total of 150 per day. Each call is approximately one minute long with several running up to six minutes. The dispatcher must log the name and address of each caller as well as the type of shipment involved and its destination.

The dispatcher also fields from 440 to 530 calls from drivers each day. The dispatcher must call the central dispatcher and detail the lineup of trucks each day.

The witness characterized the dispatch office as the "command center" of the business. He stated dispatching is a fast paced, pressured job where the dispatcher is kept with his ears to the phone all the time. He felt it was not the type of job in which a person with a kink in his back could break to walk it off.

The witness opined that claimant had always been a good, thorough worker who took pride in his work and did not cause discipline problems. The witness expressed a willingness to train claimant as a dispatcher and stated he felt claimant could handle the job but for his physical limitations. He opined claimant could not work in the dispatch office as it is now set up and that management would need to decide whether to modify the job for claimant.

On cross-examination, the witness reported that the dispatcher's job has changed since first offered claimant in that the company's "break bulk" operation has been pulled out of Des Moines and 31 people have been laid off. The witness opined claimant could not preform the supervisor's job because it requires frequent stair climbing.

On redirect examination, the witness admitted the physical requirements of the dispatching job have not changed since his depostion on August 16, 1983. He relayed that the dispatcher may sit and do paperwork or take phone calls for 20 minutes at a time and may choose the location where he works. The dispatcher's stool has a padded seat.

Kate Benson of Crawford Rehabilitation was next called in claimant's behalf. Defendants' counsel objected to the witness testifying on the grounds that the witness had no direct contact with claimant or his wife; that the records from which Ms. Benson would testify were not business records but were records prepared for litigation; and that defendants have been denied their constitutional right to cross-examine Mr. Joe Thompson, who actually evaluated claimant for Crawford. Claimant's counsel asserted that the testimony should be permitted under the business records exception to the hearsay rule. He stated Mr. Thompson no longer works for Crawford and was not available to testify; that Ms. Benson was Mr. Thompson's immediate supervisor and reviewed his reports while he was employed at Crawford; and that defense counsel knew Mr. Thompson's identity in July 1983 and had been provided with copies of all Mr. Thompson's reports. Testimony was permitted to proceed subject to the objection. Defendants' objection is overruled pursuant to Iowa Rules of Evidence Rule 805(6) and (24) and section 17A.14(1), the Code. Defendants' contention that the reports are not business records if prepared in contemplation of litigation is not well taken. See Ashmead vs. Harris, 336 N.W.2d 197 (Iowa 1983). Ms. Benson is branch manager and educational consultant at Crawford's place of business at 3737 Woodland, West Des Moines, Iowa. Ms. Benson has testified before the undersigned on previous occasions; her curriculum vitae is well known to the undersigned and is in evidence as claimant's exhibit 14 and, therefore, will not be set forth herein. She reported that her duties as branch manager require her to review every client file at least twice monthly. She reviewed all of Mr. Thompson's files. Mr. Thompson was employed as a certified vocational evaluator; as such, he tested client's for vocational skills. Defense counsel's objection to Ms. Benson's testimony regarding evaluation tools utilized by Mr. Thompson in testing claimant on the grounds of hearsay and lack of proper foundation are overruled as is defense counsel's objection that the objectivity of the medical reports relied on in preparing claimant's evaluation is speculative and unclear. After reviewing career alternatives suggested for claimant, Ms. Benson opined that claimant is limited to sedentary or light weight work but that claimant's limited physical and educational abilities make him a poor candidate for retraining. The witness opined claimant would not be able to perform the duties of a dispatcher. She further opined that claimant is foreclosed from all regular full-time employment.

Mr. Marrs was called on defendants' behalf. He stated he would recommend claimant for a dispatch job and that he had offered claimant such after his injury. Claimant's objection to such testimony on the grounds of relevancy because the dispatch job is no longer available is overruled under section 17A.14(1).

Claimant's exhibit 1 is Crawford's initial vocational and job placement evaluation of claimant, prepared August 10, 1983.

Claimant's exhibit 2 is Crawford's report of claimant's Valpar Work Sample Assessment. Defendants' objections to these exhibits are overruled. No claimant's exhibit 3 was offered. Claimant's exhibit 4 is a wage and tax statement for claimant from Crouse Cartage for the years 1977 through 1981. Claimant's exhibit 5 states claimant's weekly earnings for the 13 weeks ending November 14, 1980. Claimant's exhibit 6 is claimant's layoff notice from Crouse Cartage, effective September 16, 1983.

Claimant's exhibit 7 is an estimate of claimant's mileage for medical treatment to August 11, 1983. Claimant's exhibit 8 through 11 are statements for certain medical reports and depositions. Claimant's exhibit 14 is the resume of Kathleen Benson.

Claimant's exhibit 12 is the deposition of G. Charles Roland, M.D. At deposition, the doctor stated claimant's lumbosacral range of motion, as of March 1, 1982, was forward flexion 90 degrees, extension 10 degrees; right lateral bend 15 degrees; left lateral bend 15 degrees; internal rotation 10 degrees; external rotation 20 degrees. Range of motion of the knee was zero to 90 degrees; of left ankle in dorsiflexion minus 17 degrees; plantar flexion 20 degrees; eversion 25 degrees and inversion of the ankle zero degrees.

Motor strength at the toe and dorsiflexion measure 3 plus to 4 minus; at dorsiflexion 3 plus to 4 minus; at ankle dorsiflexion 2 plus to 3 minus; plantar flexion strength 4 in plantar flexion of the toes and ankle; knee at 4 in extension and 4 minus in flexion.

The doctor explained that a plus five is normal, four is weak but near normal, 3 is very weak; plus 2 and 1 indicate the individual can no longer lift the joint against the effects of gravity.

The doctor noted that as of May 3, 1982, claimant had experienced some improvement in ankle motion due to therapy although his paralysis was unchanged. The doctor opined that, where a patient's damaged nerves do not return to near normal function in the first few months, prognosis for further improvement is only moderate. He stated claimant's paralytic gait could increase his chances of developing an arthritic condition in the low back area. The doctor stated he would restrict claimant to lifting five to ten pounds, from bending from the waist, and from climbing stairs.

Roland deposition exhibit 2 is a letter of Dr. Roland of May 3, 1982. to claimant's counsel's law firm which letter states:

> The permanent partial disability rating is as follows; [sic] the back, based upon motion, is given a 4% rating of the body as a whole. At the left lower extremity it is 18% of the hip, 21% of the left knee and 19% of the left ankle. He also has a paralysis of the left lower extremity. This corresponds to 47% disability rating of the body as a whole.

Claimant's exhibit 13 is the deposition of Kent M. Patrick, M.D. The doctor assigned claimant a functional impairment rating of 60 percent of the body as a whole, attributing 32 percent to the lower extremity, 18 percent to the back, and 10 percent to his nerve injury. The doctor felt that, at most, claimant might gain a loss of pain but that his range of motion and his functional capacities were unlikely to change appreciably the following exchange regarding claimant's employability, took place between claimant's counsel and the doctor:

Q. At the time of your last examination [sic] Mr. Bland, what types of physical activity do you believe he might be able to perform in order to earn a living or at least earn some income?

A. He is able to sit although not for prolonged periods of time. He is able to stand and walk but again not for prolonged periods of time. Other than these activities I do not see any that he could participate in in any type of employment. He certainly does not possess the ability to do any bending, stooping, twisting or lifting of even something greater than ten pounds.

Q. When you say a prolonged period, what do you mean?

A. Anything over about 10 to 15 minutes, a patient such as he needs to shift their weight from time to time to get up and move around in order to prevent stiffness and soreness from becoming more of a problem. I do not think he could sit in a chair for a period of an hour without the ability to get up and move around and have some freedom in his body position.

Q. As far as your time periods on standing, would that likewise be a 10 to 15 minute range?

A. I am doubtful that hs could do any more than that both from my examination of him and from his own personal statements.

The doctor expressed his belief that claimant might be able to perform the dispatcher job as described in the Crawford Rehabilitation Report; he stated the extensive periods of sitting prescribed might present problems for claimant, however. He relayed that claimant would be physically able to climb stairs "at great time and energy and pain [sic] expense to himself." On cross-examination, the doctor agreed that claimant's functional status stabilized during Dr. Roland's care and subsequent care dealt more with subjective symptoms. The doctor reiterated that claimant had reached his healing period by June 17, 1983.

Defendants' exhibit A are certain medical reports all of which were reviewed in rendering this decision.

Of significance are the following: A June 17, 1983 letter of Dr. Patrick opining claimant had reached his healing period. A letter of William R. Boulden, M.D., of January 3, 1983 stating as follows:

> Therefore, using the AMA guideline due to function lost strength, based on sciatic nerve damage, we have rated him out with a 55% impairment of the left lower extremity. We have not taken into account any range of motion or ankle motion or knee motion loss which Dr. Roland had done in the past, since we do not feel these are the problems, and my examination show these to have pretty much returned back to normal, but his main problem is the sciatic nerve damage, and therefore, the rating is as stated previously. Therefore, in conclusion, he has a 25% permanent impairment of his back which is the body of a whole rating of 25% based on the facts of severe degenerative arthritis of the lumbar spine, with degenerative SI joints and subluxation of both SI joints. He also has permanent impairment of the left lower extremity of 55% based on the sciatic nerve damage from the accident. This is not a body of the whole rating.

A September 8, 1982 letter of Dr. Patrick to Liberty Mutual opining: "I don't feel that Mr. Bland will likely ever return to work. He even has difficulty sitting for long periods of time secondary to the significant injury he had to his lower back and sacroiliac joints...."

Defendants' exhibit B is a copy of claimant's Department of Transportation recertification physical exam dated November 28, 1978. Defendants' exhibit C is an unidentified note, dated November 28, 1978, regarding claimant's blood pressure as of that date. Claimant's objection's to exhibits B and C are sustained.

Defendants' exhibit D is a copy of claimant's employment application with defendant.

Defendants' exhibit F and G are excerpts from Krusen's Handbook of Physical Medicine and Rehabilitation and Foundations of the Vocational Rehabilitation Process respectively. Claimant's objections to same are overruled and the evidence is admitted for whatever probative value it may have.

Defendants' exhibit E is the deposition of William R. Boulden, M.D. The doctor opined that, under the AMA tables, claimant has a 47 percent dysfunction of his extremity which he agreed converts to 19 percent of the body as a whole. He stated that using the American Academy of Orthopedic Surgeons guides he rated claimant's back as 25 percent dysfunctional. He stated that such rating combined claimant's seperate problems of severe degenerative arthritic and subluxation of his sacroiliac joints. The doctor opined claimant could only work in positions where he could alternate standing, walking and sitting while doing none of these for prolonged periods.

APPLICABLE LAW AND ANALYSIS

The first issue to be decided is whether a causal relationship exits between claimant's injury and his disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 13, 1981 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 medical evidence introduced clearly established that claimant's disability is related to his injury. Indeed, the undersigned is unable to glean even a scintilla of evidence suggesting doubt exists regarding this issue and it is difficult to discern why it remained in dispute at hearing. Claimant has sustained his burden.

Next to be decided is the nature and extent of claimant's benefit entitlement.

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).

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, 902 (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, 1121, 125 N.W.2d 251, 257 (1963) 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. * * * *

Also to be considered is the following decision of this agency:

> Although the Iowa Supreme Court has indicated that age is a factor to be considered in determining industrial disability, it does not indicate what the effect of young age, middle age or older age is supposed to be. Obviously, it is a factor that cannot be considered separately but must be considered in conjunction with the other factors. For example, the effects of a minor back injury upon a young person with extensive formal education would limit the scope of his potential employment-less than that of a middle-aged person with no formal education.
>
> How to apply age as a factor when a person is nearing the end of his normal working life is a dilemma. When considering the age factor, it is apparent that the scope of employment for which claimant is fitted is narrowed simply because of the reluctance of employers to initially employ persons of advanced years. Therefore, the advanced age alone without the combination of an injury is limiting. Lack of education or at least a showing of diminished educability is in and of itself also a limiting factor for entry into many fields of employment....
>
> The Michigan Supreme Court has stated regarding retirement:
>
> > Compensation benefits are geared to weekly wage loss. It is consistent with the concept of tying weekly compensation benefits to weekly wage loss to factor into the benefit program the statistically established generalization that workers, even if not disabled, retire between 60 and 75 and no longer earn weekly wages. There is no discrimination against disabled workers over 65 in taking into account the wage loss they would "presumptively" suffer due to normal retirement. Cruz v. Chevrolet Grey Iron Div. of Gen. Motors, 247 N.W.2d 764, 775(Mich. 1976).
>
> It is held that the approaching of later years when it can be anticipated that under normal circumstances a worker would be retiring is, without some clear indication to the contrary, a factor which can be considered in determining the loss of earning capacity or industrial disability which is causally related to the injury.

Christopher S. Becke vs. Turner-Busch, Inc, and American Mutual Liability Insurance Company. Thirty-fourth Biennial Report 34, 36.

It is apparent claimant will never again be able to be gainfully employed. He has multiple injuries involving his hip and extremity; he has unresolved paralysis of the extremity. His difficulty in performing basic body manuevers was apparent at hearing. Also apparent was the fact that claimant is not, by education or inclination, suited for retraining for work of a nonmanual nature. However, claimant is now 63 years old.

He currently receives social security retirement benefits. At time of injury, he was 61. It is very likely that, even had this mischance not happened, claimant's work life would have ended at 65 or soon thereafter. This fact has been considered in determining the extent of claimant's industrial disability. When it is coupled with his physical impairment, his work experience, and his education, it is found that claimant has sustained a permanent partial disability of 75 percent of the body as a whole.

The issue of claimant's healing period is also readily resolved. Dr. Patrick opined in his letter of June 17, 1983 that claimant had then reached his healing period at that time. He reiterated this belief in his deposition of September 23, 1983. Nothing disputes the reasonableness of the doctor's determination. Therefore, claimant's healing period extends from his injury date to June 17, 1983.

Likewise, claimant is entitled to payment of his medical travel expenses under section 85.39.

FINDINGS OF FACT

WHEREFORE it is found:

Claimant sustained a injury while working for defendant February 13, 1981.

Claimant suffered severe injuries to his left hip and leg as well as injuries to his internal organs and was hospitalized for forty-three (43) days.

Claimant continues to have problems with his leg and hip; he walks with a paralytic gait, uses canes, and cannot tolerate more than minimal periods of walking, standing, and sitting.

Claimant's life activities both of a personal and an occupational nature are severely curtailed by his injury.

Claimant has minimal education and has difficulty thinking abstractly. Claimant has been unable to return to work.

Claimant's work history includes heavy manual labor only.

Claimant is not a good candidate for vocational rehabilitation training.

Claimant was sixty-three (63) years old at time of hearing and receiving social security retirement benefits. Claimant was sixty-one (61) at his injury date.

Claimant reached his maximum medical improvement June 17, 1983.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

Claimant has established that his injury of February 13, 1981 is the cause of the disability on which he bases his claim.

Claimant is entitled to healing period benefits from his injury date to June 17, 1983.

Claimant has sustained a permanent partial disability of seventy-five percent (75%) of the body as a whole.

Claimant is entitled to payment of costs for travel incurred for medical treatment.

ORDER

THEREFORE, it is ordered:

Defendants pay claimant permanent partial disability for three hundred seventy-five (375) weeks at the rate of two hundred seventy-five and 09/100 dollars ($275.09).

Defendants pay claimant healing period benefits at the rate of two hundred seventy-five and 09/100 dollars ($275.09) from his injury date to June 17, 1983.

Defendants pay any accrued sums in a lump sum.

Defendants pay claimant mileage expenses as set out in claimant's exhibit 7 totaling four hundred thirty-eight (438) miles at the following rate: one hundred fifty-five (155) miles before July 1, 1982 at the rate of twenty-two cents ($.22) per mile and two hundred eighty-four (284) miles after July 1, 1982 at the rate of twenty-four cents ($.24) per mile for a total of one hundred two and 26/100 dollars ($102.26).

Defendants pay interest pursuant to Iowa Code section 85.30 as amended.

Defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

Defendants file a final report when this award is paid.

Signed and filed this ____ day of April, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD BOE,	:	
Claimant,	:	File No. 660419
vs.	:	A R B I T R A T I O N
CONSOLIDATED PACKING CORP.,	:	D E C I S I O N
Employer,	:	
and	:	
IDEAL MUTUAL INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Richard Boe, the claimant, against his employer, Consolidated Packaging Company, and the insurance carrier, Ideal Mutual Insurance Company, to recover benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on April 4, 1980. This matter came on for hearing before the undersigned at the Henry County Courthouse in Mount Pleasant, Iowa on October 13, 1982. The record was considered fully submitted on October 28, 1982.

On May 4, 1981 defendants filed a first report of injury concerning the April 4, 1980 injury. On May 11, 1981 defendants filed a denial of liability.

The record consists of the testimony of the claimant, of Paul Wilkerson, and of Talbott Young; claimant's exhibit 1, a packet of medical reports; claimant's exhibit 2, a statement from Burlington Medical Center; claimant's exhibit 4, a June 14, 1982 letter from defense counsel to claimant's counsel; defendants' exhibits 1-4, pictures of the broke beater; and defendants' exhibit 5, a record of claimant's salary payments from June 6 (pay period ending) through August 29, 1980. Defendants filed a trial brief. Objection to claimant's exhibit 4 was overruled at the time of the hearing. Ruling was reserved on objections to claimant's exhibit 1 and defendants' 5. Such objections are now overruled.

ISSUES

The issues to be determined include whether the injury arose out of and in the course of employment; whether the alleged disability is directly traceable to the injury; the nature and extent of the disability; and whether claimant is entitled to payment of the Burlington Medical Center bill.

At the time of the hearing the parties agreed that the applicable rate of weekly compensation is $170.99 and that claimant's time loss claim extended from June 16, 1980 to August 12, 1980.

REVIEW OF THE RECORD

Claimant, who had worked for defendant employer for three and a half years as a drafter, testified that on or about April 4, 1980 he was assigned a temporary job pulling paper slabs from a pile and feeding them into a broke beater. Claimant recalled that the machinery malfunctioned causing a massive accumulation of backed up paper to fill a large area. Extra help was secured to assist in the cleanup. Claimant described how his hands began to ache and to swell from moving the paper by means of a pitchfork for two to three hours. Claimant explained that although he had no prior problems with his hands, he had never before performed that type of work. Claimant acknowledged that he is 6' 3" and weighed 255 pounds at the time of the injury, but he denied being strong.

Claimant returned to drafting the following workday. His hands continued to be swollen, and after two more weeks he noticed difficulty in uncurling his fingers. Claimant testified it was at that point he went to first aid and thereafter reported his problem to Ken Rubin, his supervisor.

In a letter dated March 8, 1982, Harry L. Benson, D.C., reported that he saw the claimant on May 2, 1980 for complaints of neck and arm pain referable to work on April 4, 1980. He diagnosed claimant's problem as right radial nerve root irritation with brachial neuritis. Dr. Benson noted that after six adjustments, he released claimant from his care. He assumed that the claimant had recovered from the condition because the claimant did not return for further treatment.

Miles Archibald, M.D., saw the claimant in early May of 1980. He received a history of the injury as being an episode of heavy lifting and of doing generally heavy work on April 4, 1980. Dr. Archibald treated the claimant with compound steroids which relieved the pain but not the numbness.

Koert Robert Smith, board certified orthopedic surgeon, testified that he first saw the claimant on June 4, 1980 as a referral from Dr. Archibald. According to Dr. Smith, claimant reported having had hand pain and numbness for two months following an episode of unusually heavy work. Dr. Smith knew that claimant's regular work entailed drafting; he had no specific facts regarding the work performed on the date of injury.

Dr. Smith testified that nerve conduction studies performed by Burton Stone, M.D., revealed that claimant's condition was bilateral carpal tunnel syndrome. Dr. Smith performed a carpal tunnel release on the right on June 17, 1980 and on the left on July 1, 1980.

With regard to the issue of whether the bilateral carpal tunnel syndrome arose out of the work activitiy on April 4, 1980, Dr. Smith opined that the history he received from the claimant was sufficient to conclude there was a direct connection:

> A. Based on the history I have, he indicated that he had no symptoms until he was engaged in heavier work; and that he had persistent symptoms after that. I think that that's enough information to either say that that work caused it, or the other possibility--and maybe even more likely--is that he had the pre-existing tendency to develop that problem and the work aggravated that pre-existing tendency.
>
> Q. Is it accurate for me to assume that in rendering this opinion, you have assumed he had no prior complaints or symptoms that could be related to carpal tunnel syndrome other than that those which developed about two weeks before you--I'm sorry, it was about, I guess, it was about two months before you saw him on June 4th; have you assumed that?
>
> A. I've assumed that he had no or minimal symptoms prior to that time after the increase in heaviness of his work; that he either at that point developed symptoms or had a significant worsening of his symptoms.
>
> Q. Okay. He's claimed here that I believe it was early April of 1982, these developed; and I'm going-- I'm not going to nitpick on the history. I assume that's quite close to the way you have recalled it or recorded it.
>
> But in addition to that assumption as to the time frame when the symptoms arose, have you also assumed there was no unusual activity not work-related on his part to precipitate such symptoms?
>
> A. Yes.
>
> (Smith deposition, p.p. 10-11.)

Dr. Smith gave a similar explanation in a letter dated May 3, 1982 and addressed to defense counsel:

> With respect to heavy labor causing carpal tunnel syndrome, I feel that certain persons have a tendency or a predilection to developing carpal tunnel symptoms, but certainly any heavy or repetitive use of the wrists and forearms can aggravate and worsen symptoms of carpal tunnel syndrome and ultimately require surgery. I doubt that a specific activity, other than an acute sudden fracture, actually causes the problem, but again, it certainly aggravates a pre-existing condition or predilection to getting the problem..
>
> (Claimant's exhibit 2.)

Claimant continued to see Dr. Archibald and Dr. Smith for postoperative complaints of hand stiffness and soreness, more on the right than on the left. The stiffness was alleviated as the day progressed--as claimant used his hands. The possibility of systemic arthritis was ruled out by laboratory studies. Claimant was given Naprosyn on a p.r.n. basis for pain.

At the time of the hearing, claimant continued to complain of dropping light objects and of weather sensitivity. He testified that although no one criticized his ability to draw after he returned to work, he voluntarily quit his employment with defendant employer in April of 1981.

Dr. Smith testified that when he last saw the claimant on July 19, 1982, claimant complained of stiffness in the morning, of sensitivity to cold and of some loss of grip. While he thought claimant's symptoms were probably permanent and were traceable to the work injury, Dr. Smith observed that the claimant had no functional impairment based on any available approved guidelines. He explained that even though pain may be disabling, it is not a criteria of impairment except as it relates to specific peripheral nerve injury and as a component of nerve deficit. Although bilateral carpal tunnel syndrome does involve peripheral nerves on each side and although the components of the nerve injury are motor and sensory, claimant had no clinical findings of permanent numbness nor of detectable weakness. Claimant had full range of motion of his elbows, wrists and forearms, and neurological evaluation was normal. Nerve conduction studies performed by Dr. Stone on July 23, 1982 revealed no objective evidence of residual nerve injury.

Claimant testified that he received his full salary, not workers' compensation benefits, for the time he was off work undergoing surgery and recuperating. Claimant related that when he asked company officials about receiving workers' compensation, he was initially advised he would receive more money if the matter were not handled as a workers' compensation claim. Claimant alleged he was later warned that the company would take a "dim view" on raising his salary if he pursued the matter under workers' compensation, because his claim would raise the company's premiums.

With regard to medical expenses, claimant testified that the defendant employer's general insurance carrier had paid all expenses except for the statement from the Burlington Medical Center for tests conductèd at the request of Dr. Smith to rule out systemic arthritis as a possible explanation for claimant's ongoing symptoms. (Claimant's exhibit 1.) Claimant testified that the company initially sent him to Dr. Smith. In a letter dated June 14, 1982 and addressed to claimant's counsel, defense counsel states that claimant was no longer authorized to return to Dr. Smith for treatment of the alleged work injury. (Claimant's exhibit 4.)

Paul Wilkerson, general manager for defendant employer, testified that he assigned salaried personnel to union jobs while the union members were at a vote meeting on the date of injury. Mr. Wilkerson indicated that claimant's work at the broke beater entailed picking up paper sheets or slabs, measuring 10 feet by 20 feet and weighing 26 pounds, and placing the material into a circular tub. A pitchfork is used some of the time. He identified defendants' exhibits 1-4 as pictures portraying the type of work claimant was required to do on the date of injury. Mr. Wilkerson recalled that the union members left about 8:30 and at approximately 8:50 he went out to the mill. He described how the claimant was surrounded by paper that had accumulated on the floor and observed that the claimant was working hard to clean up the mess. Mr. Wilkerson stated that he told the claimant to pick up the smaller paper tailings coming off the machine while he went to get more people for the cleanup. He estimated claimant was alone for ten to fifteen minutes. He remembered the claimant working until 11:00 a.m., doing tasks like sweeping the floor with the pitchfork. He had no recollection of the claimant complaining about hand discomfort at that time.

Mr. Wilkerson denied telling the claimant that filing a workers' compensation claim would have a detrimental effect on the claimant's next raise in salary. He noted that the claimant received two salary increases subsequent to the incident. Mr. Wilkerson recalled nothing that would indicate the claimant was not drafting as well after the injuries as claimant had been before the incident. Upon cross-examination, Mr. Wilkerson acknowledged that he did not ask the personnel manager or anyone with similar company responsibilities if the claimant had been warned not to file a workers' compensation claim. He agreed that claimant's salary increases occurred prior to claimant filing the present claim since the latter event occurred after the claimant left employment with defendant employer.

Talbott Young, director of human resources for defendant employer, was at defendant's Iowa plant for the contract negotiations on the date of injury. Mr. Talbott testified that he had no discussion with the claimant about benefits, but it was his understanding from talking to a Mr. Orr that the claimant elected to take a continuation of salary in lieu of workers' compensation because the former would mean more pay. Upon cross-examination, he agreed that he could not guarantee that claimant was not threatened as claimant stated, but added that to continue the salary was the instruction he had given Mr. Orr.

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, 246 Iowa 402, 68 N.W.2d 63.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 4, 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).

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).

Loss of two members in a single accident is a scheduled disability. Code section 85.34(2)(s); Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983). 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). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating 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 (1936). Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983). 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

While defendants are correct in pointing out that the medical history Dr. Smith received from the claimant was incomplete, the record read as a whole supports finding that claimant's bilateral carpal tunnel syndrome arose out of his employment activity on April 4, 1980 and that his time off work and continuing symptoms are traceable to the work injury. That claimant had no complaints of hand discomfort before the date of injury but did upon and after performing the broke beater and cleanup work is undisputed. Again, while the medical histories were inadequate in their description of the type of work performed on the date of injury, they are seemingly consistent in noting that the work performed was unusual for the claimant. Although Mr. Wilkerson's description of the work did not exactly match claimant's version, the difference was not remarkable and the witness did verify that claimant was working hard. That claimant sought chiropractic care for neck and hand pain within a month after the incident and around the same time period sought medical care for his hand complaints is significant, especially since there appears to have been no intervening injury or aggravation.

Defendants suggest that claimant's complaints are referrable to a preexisting condition. The medical record is far from being conclusive on the question of whether the claimant was predisposed to developing carpal tunnel syndrome. Dr. Smith suggests but does not confirm such theory. (Dr. Benson's records indicated that he treated the claimant for back and leg complaints, but no hand discomfort, prior to the date of injury. On February 29, 1980 such symptoms were referrable by history to playing volleyball.) In any event, the distinction is of no consequence since the record would indicate that the work activity amounted to a material aggravation of any underlying condition and therefore should be viewed as a compensable injury under Iowa law.

With regard to the nature and extent of the injury, the claimant contends he is entitled to an award of permanent disability because he suffers from disabling pain. While Dr. Smith acknowledged that the claimant's ongoing symptoms will probably be permanent, he verified that claimant's complaints are not corroborated by objective clinical findings and accordingly cannot be given a functional impairment rating. Claimant did not otherwise demonstrate a loss of use as contemplated by Code section 85.34(2)(s). Indeed, the record suggests that at least the complaint of stiffness is actually alleviated when claimant starts to use his hands.

Claimant did establish that the work injury resulted in the period of temporary disability, as specified by the parties. However, because defendants paid claimant his full salary (sick pay) in lieu of processing this matter under workers' compensation, claimant actually received more monetary benefits. Without commenting on the manner in which this case was handled other than to observe that the evidence presented lacked probative value even under the liberal rules of evidence applicable to workers' compensation proceedings, the undersigned notes that the imposition of the sanction found in Code section 86.13 (applied to conduct occurring after July 1, 1982) is not appropriate under the facts of this case.

With regard to the statement from the Burlington Medical Center, the record indicates that the charges were for testing that was ordered by Dr. Smith to rule out any possibility that claimant's ongoing complaints were related to the development of systemic arthritis subsequent to the injury and surgical releases. Code section 85.27 contemplates that such testing might be conducted in the overall treatment of a compensable injury.

Parenthetically, it should be noted that the defendants' refusal to authorize further care by Dr. Smith was of no import in light of their failure to pursue this matter under the Workers' Compensation Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

FINDING 1. Claimant, a drafter for defendant employer, was assigned to a production job (pulling paper slabs and feeding them into a broke beater) for a few hours on April 4, 1980. A machinery malfunction caused a massive accumulation of backed up paper requiring a concerted cleanup operation. Claimant used a pitchfork to move the paper sheets.

FINDING 2. Claimant had no complaints of hand swelling or soreness prior to April 4, 1980; claimant's hands began to ache and swell as claimant performed the production work on the date of injury; claimant's hands remained swollen and became stiff during the following weeks.

FINDING 3. The medical evidence indicated that claimant suffered from a bilateral carpal tunnel syndrome and that the work activity on April 4, 1980 either caused the syndrome per se or materially aggravated a preexisting condition.

CONCLUSION A. Claimant sustained a bilateral carpal tunnel syndrome arising out of and in the course of his employment on April 4, 1980.

FINDING 4. As stipulated by the parties, claimant was off work from June 16, 1980 to August 12, 1980, during which time he underwent carpal tunnel releases on both wrists but in separate operations.

FINDING 5. The medical evidence indicated that the claimant has no functional impairment as a result of the work injury; claimant's subjective complaints of hand stiffness in the morning, of sensitivity to cold and of some loss of grip are not supported by any clinical findings of motor or sensory deficit; claimant did not otherwise demonstrate any compensable loss of use as contemplated by Code section 85.34(2)(s).

CONCLUSION B. Claimant sustained his burden of proving that he was temporarily disabled from June 16, 1980 to August 12, 1980 as a result of the work injury; claimant did not sustain his burden of proving that he sustained a loss of use of his hands as a result of the April 4, 1980 injury.

FINDING 6. While claimant was off work, he received his full salary (sick pay) in lieu of compensation.

CONCLUSION C. Pursuant to Industrial Commissioner's Rule 500-8.4, defendants are entitled to a credit for the number of weeks they paid claimant his benefits.

CONCLUSION D. Under the facts of the case there was no delay in commencement of payment (after July 1, 1982) as contemplated by Code section 86.13.

FINDING 7. The postoperative diagnostic testing for systemic arthritis constituted reasonable care in treating claimant's ongoing complaints.

CONCLUSION E. Pursuant to Code section 85.27, claimant is entitled to payment of the offered medical statement.

ORDER

THEREFORE, IT IS ORDERED that the defendants pay the claimant temporary total disability from June 16, 1980 to August 12, 1980 at the rate of one hundred seventy and 99/100 dollars ($170.99) per week. However, credit is to be given to defendants for the amount of salary previously paid in lieu of compensation for this injury.

Defendants are further ordered to pay unto the claimant the following medical expense:

Burlington Medical Center $67.65

Costs of the proceeding 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 28th day of July, 1983.

LEE M. JACKWIG
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VICTORIA E. BRITTON (DAVID L. BRITTON, deceased),	:	
Claimant,	:	File No. 600733
vs.	:	P A R T I A L
PRESCOTT & SONS,	:	C O M M U T A T I O N
Employer,	:	D E C I S I O N
and	:	
UNITED STATES FIDELITY & GUARANTY COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding filed by Victoria E. Britton, widow of David L. Britton, for partial commutation of benefits she is receiving as a result of the work related death of David L. Britton on June 11, 1979. This matter came on for hearing before the undersigned at the Woodbury County courthouse in Sioux City, Iowa on June 19, 1984. The rate of compensation as indicated by the memorandum of agreement is $256.08.

The record consists of the testimony of Victoria E. Britton and defendants' exhibit A.

ISSUE

The sole issue for hearing was whether claimant should receive a $25,000 partial commutation of benefits.

EVIDENCE PRESENTED

Victoria Britton testified that she is 30 years old, has two children and lives with an individual in Corpus Cristie, Texas by the name of Richard Fowler. She stated that she is seeking a $25,000 commutation of benefits in order to repay an investor in an insurance scheme that went awry. According to Mrs. Britton, the investor paid Mr. Fowler $25,000 to be placed in escrow. Mr. Fowler in turn delivered the money to Mrs. Britton who claimed

she did not know the money was to be escrowed so she spent it. She revealed that Mr. Fowler gave her the money in order that his creditors could not attach it. She stated that the dissatisfied investor is now threatening her and Mr. Fowler with criminal and civil action. She indicated that Mr. Fowler was the "brains" behind this scheme.

Mrs. Britton further testified that since her husband's death in June 1979 she has invested $68,000 in a house appraised at $58,000; that she has lost between $30,000 and $40,000 on the insurance scheme (not including the $25,000 in escrow money); and has purchased some $20,000 in jewelry. She revealed that she and Mr. Fowler apparently had the money to repay the escrow funds in June 1983 but not realizing they would have to repay it, they purchased a house.

Mrs. Britton contended that she could "get by" without the compensation for two years though it might be tight. She alleged she is now earning some money from a drapery business and that Mr. Fowler also contributes income. Claimant stated she has not saved any money for the purpose of repaying the escrow money.

APPLICABLE LAW

There are two conditions which must be met in order for a commutation of an award to be made: (1) the period of time during which compensation is payable must be definitely determined; (2) it must be shown to the satisfaction of the industrial commissioner that such commutation will be in the best interest of the person or persons entitled to the compensation. Section 85.45, Code of Iowa.

Assuming condition one is met, the determination of whether to allow commutation must turn on the statutory guidelines, best interest of claimant, and the focus should be on the claimant's personal, family and financial circumstances and the reasonableness of the claimant's plan for using the lump sum proceeds. Diamond v. Parsons Co., 256 Iowa 915, 129 N.W.2d 608 (Iowa 1964). Ultimately the Diamond analysis involves a benefit-detriment balancing of factors, with the claimant's preference and the benefits of receiving a lump sum against the potential detriments that would result if the claimant invested unwisely, spent foolishly or otherwise wasted the fund so that it no longer provided the wage substitute intended by the Iowa law. Dameron v. Neumann Brothers, Inc., 339 N.W.2d 160, 164 (Iowa 1983).

ANALYSIS

Since her husband's death in 1979, Mrs. Britton has lost somewhere around $40,000 on an insurance deal, about $10,000 on real estate, and has made a $20,000 investment in jewelry which produces no income. She now seeks to mortgage her childrens' future to pay a $25,000 debt owed by her boyfriend to keep criminal charges from being preferred against him. If we assume that Mrs. Britton is telling the truth that she did not know the $25,000 from the investor was to be escrowed, it is difficult to see how she could be held criminally liable. The money was delivered to Fowler not to her. Fowler committed the breach of trust, not Mrs. Britton. Indeed, it is Fowler who would be the primary beneficiary of any commutation award.

Mrs. Britton has demonstrated a total lack of investment knowledge. She has depleted her husband's estate to virtually nothing and still wants to throw $25,000 at a dead horse. Her arguments that expenses would be saved by commutation is tenuous at best. First, repaying the money would not guarantee no criminal charges would be filed. Second, if she does indeed owe the money civilly she need not incur unreasonable expenses defending a suit; she could confess judgment.

Finally, and most importantly, it is the children of David Britton who will receive no benefit at all from this commutation. Mrs. Britton contends that worry over the current "escrow" problem detracts from her attention to the children. This is no doubt true; however, two years without the compensation benefits would very likely create its own worries and distractions especially in light of Mrs. Britton's demonstrated inability to manage her financial affairs.

Mrs. Britton has failed to satisfy this deputy industrial commissioner that a partial commutation is in her best interest.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

1. Victoria Britton is 30 years old and has two children ages six and four.

2. Victoria Britton has demonstrated poor judgment in her financial affairs, having lost at least $40,000 in the last five years.

3. Neither Victoria Britton nor her children will benefit from a partial commutation.

4. Victoria Britton plans to pay a debt principally owed by Richard Fowler with the proceeds from the lump sum commutation.

5. It would not be in the best interest of Victoria Britton or her children to order a partial commutation.

CONCLUSION OF LAW

WHEREFORE, it is concluded that the application for partial commutation would not be in claimant's best interest and should be denied.

ORDER

IT IS THEREFORE ORDERED that claimant's application for partial commutation be and is hereby denied.

IT IS FURTHER ORDERED that the costs of this action be taxed to the defendants.

Signed and filed this 22nd day of June, 1984.

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LOUELLA BROWN,	:	
	:	FILE NOS. 627617 & 498456
Claimant,	:	
	:	R E V I E W -
vs.	:	
	:	R E O P E N I N G
JOHN DEERE WATERLOO TRACTOR WORKS,	:	D E C I S I O N
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

This is a proceeding in review-reopening brought by Louella Brown, the claimant, against John Deere Waterloo Tractor Works, her employer and holder of a certificate of exemption as contemplated by section 87.11, Code 1980, to recover additional benefits under the Iowa Workers' Compensation Act by virtue of two admitted industrial injuries which occurred on January 11, 1978 and February 6, 1980 respectively. This matter was heard in Waterloo on June 15, 1983 and considered as fully submitted at the conclusion of the hearing.

On January 8, 1981, the parties signed an agreement for settlement which read, in part, as follows: (Commissioner's exhibit 8)

> 1. That the Claimant sustained two injuries arising out of and in the course of her employment by Employer, as alleged by her Petitions on file herein, one injury on January 11, 1978 and another injury on February 6, 1980.
>
> 2. That the applicable Worker's Compensation weekly benefit rates are $203.20 per week for the January 11, 1978 injury and $198.69 per week for the February 6, 1980 injury.
>
> 3. That this agreement is based upon the Claimant's condition as of October 14, 1980.
>
> 4. That the weekly benefits previously paid to Claimant by Employer shall constitute full and complete payment of any and all temporary total disability or healing period benefits due to Claimant for both of said injuries as of October 14, 1980.
>
> 5. That the Employer shall pay any proper expenses pursuant to Iowa Code Section 85.27 which are unpaid.
>
> 6. That the following medical reports are attached hereto and made a part hereof: reports from the Nebraska Pain Management Center dated March 24, 1980 and April 30, 1980; a report from the Franciscan Hospital Rehabilitation Center dated June 6, 1980; a report from Dr. John R. Walker dated August 27, 1980; Mayo Clinic notes of Dr. Stauffer from September 28, 1979 to October 3, 1979, and a report of Dr. John S. Koch dated July 2, 1980.
>
> 7. That the Claimant presently has the following work restrictions at her employment with Employer: (1) 20 pound weight lifting restriction; (2) no continuous or repetitive bending or twisting; (3) no prolonged standing. By this, the parties mean that Claimant should be able to sit 50% of the working time; (4) a maximum of a forty hour work week.
>
> 8. That based upon all of the foregoing, Claimant has suffered and is entitled to compensation for a 15% permanent industrial disability to her body as a whole from her January 11, 1978 injury and a 5% permanent industrial disability to her body as a whole for the February 6, 1980 injury. That based thereon, Employer shall pay Claimant weekly benefits as follows:

15% x 500 weeks = 75 weeks @ $203.21 per week =	$15,240.75
5% x 500 weeks = 25 weeks @ $198.69 per week =	$ 4,967.25
TOTAL:	$20,208.00

Said $20,208.00 shall be paid to Claimant in a lump sum, without either accrued interest or any discount for unaccrued payments.

The issue now is whether or not claimant has established by a preponderance of the evidence that she has undergone a change of condition since January 8, 1981 and that such condition is casually connected to the industrial injuries under review.

The parties stipulated that claimant's entitlement in the event of an award is $198.69 per week for the January 11, 1978 injury and $203.21 per week for the February 6, 1980 injury.

Based upon the undersigned's notes, this record contains the oral, live testimony of the claimant, Robert Wright, Frankie Brown, Lilly Thomas, Richard Meyer and William Fricke, together with Commissioner's exhibits 1-8 and claimant's exhibit 1.

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

Claimant, age 34, married with one dependent child, began her employment duties for the defendant on September 11, 1977. As found in the agreement for settlement claimant sustained two industrial injuries during 1978 and 1980. Claimant has been on layoff status since December 4, 1981. Her duties prior to her layoff appear to have been tailor-made to conform to the physical limitations prescribed by Dr. Corton (Comm. ex. 7). Since December 4, 1981 claimant sought assistance from Dr. David F. Poe, who reported on January 7, 1982, in part, as follows:

> Louella Brown - - This young woman is medically disabled with several compensation injuries in 1978 and 1979 at John Deere. She was given a 20% permanent partial disability rating in the Fall of 1980 by Dr. Stouffer, Dr. Koch and Dr. Walker in Waterloo. She was able to return to work on a light duty status but since Thursday last week has had more pain in her low back and right calf. She has been seen by Dr. John Walker and surgery recommended. She has been seen at several pain clinics including Omaha.
>
> Her pain is low back, midline, radicular into the right buttock and right calf. She has a negative straight-leg-raising and a normal neurologic exam. She has limited forward flexion with the fingertips 12 inches from the floor. She has several atypical signs with aggravation of her pain by forward flexion and axial compression of the spine. Peripheral vascular exam is normal. She has good motor and sensory function. Reflexes are normal.
>
> I reviewed her x-rays which show no evidence of fracture, subluxation or spondylolytic defect. There is no change in bony density.
>
> This woman is 100% disabled with backache at the present time. This may have been aggravated by her recent employment or with some injuries at home. I think her situation is that of an aggravation of a longstanding problem and that her status is an ongoing pain syndrome. I think this would best be managed with a pain clinic approach and I would offer her the possibility of Dr. Piburn's group in Waterloo or the pain clinic in Iowa City or Rochester. I do not feel that she is a candidate for orthopedic surgery and have shared this feeling with her. She may return to Dr. Walker for possible surgery or call us for an appointment with the pain clinic people. I would consider her 100% disabled at the present time - unable to do even the lightest work until things have quieted down.

On February 10, 1982 P. Miles Skultety, M.D., a neurosurgeon associated with the Omaha Pain Clinic run by the University of Nebraska Medical Center, reported, in part, as follows: (Comm. ex. 5, page 6 and 7)

> When I asked her to describe her pain at the present time, she reported that she has a constant low back pain which extends down the back of the right leg. This pain is dull and aching and with any kind of movement it becomes sharp. She actually stated that she is better walking than she is standing still. Any bending aggravates the pain. She can bend one or two times but any more makes it worse. When the pain gets very bad she also has some pain in the left leg. In addition, she has a more or less constant pain at the cervicodorsal junction and in the right shoulder with intermittent pain in the right side of the neck. If she holds her arm abducted at the shoulder and flexed to the elbow the whole arm becomes numb. Lastly, she stated that she has head pain in the front of her head which sometimes makes her "sick all over".
>
> She indicated that she had been doing her exercises every day and they do seem to help. When I inquired about medication she stated that she has been taking approximately 10 aspirin per day and review of the record showed that she had been on various medications since discharge from the Pain Unit.
>
> When I inquired about her activity, she said she hasn't been working since December 7. She said that she has great difficulty doing anything around the house since such things as lifting a skillet causes pain. She does her own housework but it is very limited and she basically has to have help. I note in going over the records, especially the one from the Franciscan Center, that she complained about the fact that her husband did not help her when she needed it.
>
> I asked her if there were any jobs that she had been given that she could do without having increased pain. She said that there was one when she was "checking little parts". She said that she still had pain doing that but it caused her the least trouble. She said when she was working she was literally exhausted when she got home and couldn't do anything.
>
> It is fairly obvious that Mrs. Brown has no concept about the attitudinal portion of the Pain Management program which in essence indicates that a person is to get on with their job and not allow the pain to interfere with it. This has hardly been Mrs. Brown's pattern. I don't feel that putting her back in the Pain Unit is going to give her this understanding the second time around nor do I think that she will benefit from any other Pain Unit since she is obviously incapable of making the necessary decisions. It was interesting to note the psychological evaluation at the Franciscan Center which noted her very passive behavior which we were aware of. I was surprised at the relatively low IQ ratings which came out of their intellectual evaluation. On the other hand, it is fairly obvious that Mrs. Brown certainly does not have an appropriate background to accept or understand what it is she must do to overcome her problem. It is fairly obvious that the company has certainly worked with her and it would be nice if there were some kind of job that she could do that would not aggravate her problem. Whether there is such a job or not, I frankly don't know. I wish we could be of help but I do not feel it would be worth the time or money to take Mrs. Brown back into the Pain Unit.

Dr. R. V. Corton, M.D., the defendant's plant physician was of the opinion that claimant was capable of performing the work assigned just prior to claimant's layoff. (Comm. ex. 5, p. 1) It should be noted, however, that claimant's work assignment consisting of rust removal from parts to which claimant was placed in September 1981 following her hospitalization seems to have been customized to meet her physical limitations and restrictions. (Comm. ex. 4, p. 24)

Of particular interest is Dr. Corton's entry of October 24, 1981. (Comm. ex. 4, p. 25)

> Is complaining that with her job she has too much bending, and she is now developing pains, not only down her right lower extremity but into the left, which she hasn't had previously. I had Naomi Babcock over, and we visisted [sic] about the problem. Apparently, there is a lack of communication between Louella and her supervisor, and a misunderstanding about her restriction. Attempts to correct this are being made.

In mid 1981, John Walker, M.D., an orthopedic surgeon had been recommending a laminectomy. Dr. Walker repeated that request in his letter of April 2, 1982 to the defendant. (Comm. ex. 5, p.9)

Dr. Walker also recommends a second level cervical fusion be done at the fifth and sixth level feeling there is a nerve root lesion. (Comm. ex. 5, p. 38)

On October 1, 1982 the claimant underwent an orthopedic examination at the Mayo Clinic. Dr. Richard N. Stauffer reported that he disagreed with Dr. Walker and did not recommend surgery. He reported, in part, as follows: (Comm. ex. 5, p. 30)

> X-rays of the cervical spine are entirely negative. The neurologist finds absolutely no evidence of any neurologic deficit or neurogenic component to her pain. It is the consensus here that the patient's problem chiefly is her inability to deal with or handle pain in any sort of effective way. Her coping mechanisms are minimal. I see no reason why she could not work at a sedentary type of job. She should have a job which does not involve any prolonged standing or walking (greater than 20 minutes at a time) and no bending, twisting or lifing [sic] of more than 20 pounds and no repetitive lifting.

Finally on April 18, 1983 Dr. Walker performed a cervical fusion of C5 and C6 and his findings during surgery confirmed his diagnosis. (Comm. ex. 6, p. 18)

It seems clear that this spinal abnormality had as its source the admitted industrial injury of February 6, 1980 when a load of copper tubing hit claimant's machine and some of the tubing struck her on the head and ear.

The claimant has the burden of proving by a preponderance of the evidence that the injuries of January 11, 1978 and February 6, 1980 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).

In applying the foregoing legal principles to the case at hand it is clear that the claimant has established a change in her condition since the approval of the agreement for settlement of January 8, 1981. The findings of Dr. Walker during surgery confirm that claimant's complaints of neck pain have prevented her from being able to perform acts of gainful employment since December 7, 1981 up to and including the date of the hearing.

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

1. That this agency has jurisdiction of the persons and the subject matter.

2. That on January 8, 1981 the parties entered into an agreement for settlement concerning claimant's two admitted industrial injuries.

3. That on December 7, 1981, claimant produced medical evidence that she was unable to perform acts of gainful employment due to neck pain.

4. That on April 18, 1983 medical evidence was produced, following cervical surgery, that claimant had indeed undergone a change of condition.

5. That claimant has been unable to work from December 7, 1981 to June 15, 1983.

6. That the rate of weekly entitlement is $198.69.

7. That claimant's hospital and doctor bills incurred as a result of the recent surgery are payable by the defendant.

THEREFORE, IT IS ORDERED that defendant pay the claimant a seventy-nine (79) week period of temporary total disability at one hundred ninety-eight and 69/100 dollars ($198.69) per week together with interest from the date due.

IT IS FURTHERED ORDERED that defendant pay the unpaid portion of the hospital and medical expenses incurred by the claimant as a result of the April 7, 1983 surgery.

Defendant is to file an activity report within twenty (20) days.

Costs are charged to the defendant in accordance with Industrial Commissioner Rule 500-4.33.

Signed and filed this 26th day of January, 1984.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM BRUNDIGE, Claimant, vs. BEIER GLASS COMPANY, Employer, and AETNA LIFE & CASUALTY COMPANY, Insurance Carrier, Defendants.	File No. 399467 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant, a journeyman glazier, sustained industrial injuries on February 23, 1973, March 8, 1974 and April 9, 1975 while employed by Beier Glass Company. Claimant filed an application for arbitration on September 15, 1975. In an arbitration decision filed January 20, 1977 the deputy found any claim based upon the 1973 injury to be barred by the two-year statute of limitations pursuant to Iowa Code section 85.26(1), and that the 1974 and 1975 injuries resulted in insufficient lost time to entitle claimant to compensation. The deputy also found, however, that claimant had a spondylolisthesis which had been aggravated by his employment conditions and that defendants should incur the cost of claimant's medical treatment.

On September 1, 1978 claimant filed a petition for review-reopening of the 1977 arbitration award claiming entitlement to permanent disability and healing period benefits. In a review-reopening decision filed October 15, 1979 the deputy ruled that although the 1977 arbitration had established that claimant's injuries arose out of and in the course of his employment, denial of benefits other than medical payments precluded applicability of the three-year review-reopening limitation of Iowa Code section 85.26(2). Claimant's petition was therefore found to be barred by the two year statute of limitations on original actions. This decision was overturned on appeal by the commissioner. The district court reversed the commissioner's decision. This question was ultimately appealed to the Iowa Supreme Court which affirmed the the deputy's ruling and remanded the case "for determination of whether claimant's condition warrants change in the benefits initially awarded." See, Brundige v. Beier Glass Company, 329 N.W.2d 280 (Iowa 1983). Upon remand a review-reopening decision was filed October 21, 1983 wherein claimant's work activity of April 9, 1975 was found to have materially aggravated his preexisting condition of spondylolisthesis, resulting in an industrial disability of 60 percent of the body as a whole. Defendants were ordered to pay unto claimant 300 weeks of permanent partial disability benefits at the maximum rate of $89.00 per week. Defendants now appeal the October 23, 1983 review-reopening decision.

The record on appeal consists of the January 19, 1979 hearing transcript containing the testimony of claimant; the depositions of Adrian J. Wolbrink, M.D., and Thomas Summers, M.D.; claimant's exhibits 1 through 6; and the briefs and filings of all parties on appeal.

ISSUES

1. Whether claimant sustained his burden of proving a causal connection between his injury of April 9, 1975 and his subsequent change of condition.

2. Whether the deputy's award of 60 percent industrial disability is arbitrary, capricious, and contrary to the established standards of law and fact.

REVIEW OF THE EVIDENCE

Claimant, who was 39 years old at the time of the 1979 review-reopening hearing, has worked as a glazier since approximately 1965. Claimant described a glazier's work as involving heavy lifting, reaching, bending, and climbing. He denied experiencing any problems with his back prior to 1973. (Transcript, pp. 5-7)

On February 23, 1973 claimant hit his head on the underside of an iron beam while working. He testified that he suffered from headaches for several days thereafter and was unable to stand or straighten up. Claimant was off work for five months as a result of the 1973 incident. (Tr., pp. 7-8) Claimant was examined by Thomas Summers, M.D., on April 11, 1973 with complaints of lower back pain. A diagnosis of spondylolisthesis was made after x-rays revealed that the fifth lumbar vertebrae was displaced slightly forward on the sacrum. Dr. Summers believed claimant to be 25 percent disabled due to pain which was substantial enough to keep him from working. (Summers Deposition, pp. 3-15)

On March 8, 1974 claimant was struck on the head when a 175 - 200 pound plate glass window broke while being removed from its fittings. Claimant testified that he treated himself with bed rest, a heating pad, and warm soaks. (Tr., pp. 8-9, 27-28) Claimant was also treated by M. E. Kraushaar, M.D., who reported on August 8, 1974 as follows:

> A short time ago the patient was helping remove a large 6x8 foot piece of broken plate-glass when a portion of it fell, approximately two-feet distance, and struck him on the top of the head. It knocked him to the ground and he was stunned momentarily and complains of sort of a numb aching sensation on the top of his head right now and he hasn't any nausea or dizziness. He does have a break in the scalp of approximately 2 cms. in length which is not clear-through the skin, is not gaping, is not bleeding and there is no surrounding contusion or swelling or palpable crepitation or abnormalities. It is the type of skin-wound that will heal by itself without treatment, if kept clean. He shows a slight bit of nystagmus with gaze to the right but his pupils are equal and funduscopic examination was normal. He has no peripheral symptoms or findings except he seems to feel a little sore in his neck.
>
> I feel he has had a concussion to a minor-degree and advised him and his wife on going home and resting quietly, not stirring around much, not eating much and if he has any increased symptoms of nausea, headache or dizziness or anything at all, they are to call me. If he feels better, then he can use his judgment on how soon he can go back to work. (Claimant's Exhibit 5)

Claimant testified that he hurt his back while working again in July 1974. He recalled that he was helping to carry a 300 pound thermopane windows when he began to experience severe back pains. Claimant testified that he was off work for about one week following this incident. (Tr., pp. 9-10)

Claimant again experienced severe back pain on April 9, 1975 while helping to carry another 300 pound thermopane window. Claimant testified that he was again off work for about one week, but did not seek medical treatment immediately following the April 9, 1975 incident. (Tr., pp. 9-10, 28)

Claimant continued to work for Beier Glass Company until it went out of business in October 1977. Since that time claimant has maintained his own glass installation business out of his home. Claimant indicated that his abilities to function as a glazier have deteriorated since the April 9, 1975 incident. He testified that he is currently unable to sit or stand for lengthy periods without pain and numbness in his back radiating into both legs. Claimant is also unable to climb or lift without severe back pain. As a result claimant is unable to handle heavy plate glass or do installation work which would require climbing up a ladder. Claimant testified that while most of a glazier's profits would normally come from installation of plate glass windows, he is limited to work on home and storm windows which can be brought to his shop. Claimant testified that during the last year that he worked as a glazier he earned $14,000. Claimant's 1978 tax returns showed earnings of only $10,000, which claimant noted were due to the combined efforts of his son, his wife, and himself. (Tr., pp. 10-18).

In November 1975 claimant sought medical treatment for his back condition from Roy O. Sebek, M.D. In a report prepared May 12, 1976, Dr. Sebek wrote, in part:

> X-rays were taken of the thoracic spine in AP and Lateral views and the lumbar spine in AP and lateral views lying. X-rays showed a spondylolysis at the fifth-lumbar, first-sacral level and a spondylolisthesis at the fifth-lumbar, first-sacral level with a quarter of an inch shifting forward. The fifth-lumbar, first sacral disc has been degenerated with time, otherwise no fractures, dislocations or disease processes are noted in the lumbar spine. The thoracic spine was normal with no fractures, dislocations or disease processes.
>
> It was my impression that this patient had a spondylolysis with a spondylolisthesis and a degenerated disc at the fifth-lumbar, first-sacral level and had worn out this area to the point where he was producing lumbar nerve irritation which was going down into his legs from his back.
>
> He was seen first on November 4, 1975. He was seen next on November 21, 1975. He stated that his pain comes and goes. It depends on how much heavy

lifting or long sitting he does. He was taking Norgesic 1 at 8 and 8. He was seen next on December 19, 1975. He noted more pain with sitting. He was seen next on January 19, 1976. He had been improving until last week he noted a dull ache over the left low back. He noted no leg pain or pain up his back. He was to continue his program. He was seen next on March 30, 1976. He noted more leg pain in the last two to three weeks. He works putting in glass. He had done no lifting lately. He was seen next on April 13, 1976. His pain was active. He noted some pain relief with heat. Tenderness was noted over the fourth-lumbar, fifth-lumbar, first-sacral level and the right and left sacro iliac joints.

This patient gives a typical history of one who continues to work along when he has spondylolysis and spondylolisthesis and gradually degenerates the fifth-lumbar intervertebral disc. He starts working. It seems they always get a job doing heavy lifting and as he works and he gets an occasional or mild injury, he has pain and then he carefully uses himself for a while and the pain eases up. As time progresses his injuries continue to be more difficult to be relieved and he finally gets to the point where he will continue to have pain. (Cl. Ex. 2)

Claimant was examined by Adrian J. Wolbrink, M.D., on August 9, 1978 at the request of claimant's counsel. In a report dated August 28, 1978 Dr. Wolbrink indicated that claimant had experienced difficulty with paresthesias in his legs after 15 to 20 minutes of sitting, back pain upon walking, and difficulty climbing, bending or lifting, Dr. Wolbrink wrote:

In my opinion, Mr. Brundige has spondylolisthesis with forward slip of the lumbar spine. At present, he has at least 20 percent permanent impairment due to his back problem. The spondylolisthesis was a developmental condition existing prior to the above-mentioned accident. However, it is my opinion that the symptoms have increased, and the patient states following the accident that at least 5 percent of the 20 percent permanent impairment is due to the aggravating incident received in the injury mentioned above. (Cl. Ex. 6)

During his deposition taken May 1979 Dr. Wolbrink testified as follows:

Q. Doctor, do you have an opinion as to whether the trauma that we have related to you and the four industrial injuries that he sustained that the Deputy Industrial Commissioner, Mr. Mueller, found in the arbitration decision whether or not they played a role in aggravating the spondylolysis and played a role in bringing on the spondylolisthesis or not?

A. Yes, I do.

Q. What is your opinion, Doctor?

A. Well, a strain as described by Mr. Brundige could well increase the symptoms in a person with spondylolisthesis.
(Wolbrink Dep., pp. 16-17)

Dr. Summers, during his deposition taken February 1979, also indicated that the type of incident described by claimant as having occurred on April 9, 1975 could possibly operate to aggravate the condition of spondylolisthesis as was suffered by claimant. (Summers Dep., pp. 17-19)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injuries 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).

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).

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, 253 Iowa 369, 112 N.W.2d 299 (1961); 100 C.J.S. 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, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963) 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

The record clearly indicates that claimant has suffered from spondylolisthesis since at least 1973 (see testimony of Dr. Summers). The testimony of Dr. Summers and Dr. Wolbrink was to the effect that an incident of strain, such as was described by claimant as having occurred on April 9, 1975 would be sufficient to aggravate a preexisting condition of spondylolisthesis to an extent of partial disablement. Dr. Wolbrink went so far as to indicate in his August 1978 report that the April 9, 1975 incident had, in fact, contributed to claimant's present disability. Dr. Sebek, who began treating claimant in November 1975 indicated that heavy work such as had been performed by claimant caused degeneration of intervertebral discs in persons suffering from spondylolisthesis. Dr. Sebek charted a gradual decline in claimant's condition from November 1975 through May 1976 when his report was prepared. The record contains no evidence of any incident following April 9, 1975 which may have significantly contributed to claimant's present condition. For the foregoing reasons it is concluded that the record contains evidence sufficient to establish a causal connection to exist between the incident of April 9, 1975 and claimant's subsequent change of condition.

Claimant was 39 years old at the time of the hearing and did not graduate from high school. Most of his adult life claimant has worked as a glazier, and he does not appear to have training for employment in any other occupation. Due to his current physical limitations of restricted bending, lifting, reaching and climbing it appears that claimant will be unable to find further work as a journeyman glazier. Although claimant is able to maintain a small window repair business, the record indicates that his earning capacity has dropped significantly from the time when he could work as a journeyman glazier ($14,000 per year individually as compared to $10,000 for the combined efforts of claimant, his wife, and his son). Taking all of the above factors into consideration, the deputy's finding of an industrial disability of 60 percent of the body as a whole is reasonable.

FINDINGS OF FACT

1. Claimant was 39 years old at the time of the last review-reopening hearing.

2. Claimant did not graduate from high school.

3. Claimant began working as a glazier in 1965.

4. Claimant has suffered from a condition of spondylolisthesis since at least 1973.

5. On April 9, 1975 claimant strained his back while carrying a large thermopane window while working.

6. The incident of April 9, 1975 materially aggravated claimant's preexisting back condition.

7. Claimant presently is restricted in his abilities to climb, bend, lift, and reach.

8. Claimant is no longer capable of performing the duties of a journeyman glazier.

8. Claimant has sustained an industrial disability of 60 percent of the body as a whole.

9. The applicable workers' compensation rate is $89.00 per week.

CONCLUSIONS OF LAW

Claimant has sustained the burden of proving a causal connection between his injury of April 9, 1975 and his subsequent change of condition.

Claimant has sustained the burden of proving an industrial disability of 60 percent of the body as a whole.

WHEREFORE, the deputy's review-reopening decision filed October 21, 1983 is affirmed.

THEREFORE, it is ordered:

That defendants pay unto claimant three hundred (300) weeks of permanent partial disability benefits at the rate of eighty-nine dollars ($89.00) per week.

That interest is to accrue from the date each payment was to come due.

That costs are taxed to defendants pursuant to Industrial Commissioner Rule 500-4.33.

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

Signed and filed this 26th day of March, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES T. BRUNEAU, Claimant, vs. INSULATION SERVICES, INC., Employer, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Defendants.	File No. 534317 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 James T. Bruneau, the claimant, against his employer, Insulation Services, Inc., and the insurance carrier, United States Fidelity and Guaranty Company, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on February 5, 1979.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Woodbury County Courthouse in Sioux City, Iowa on July 29, 1983. The record was considered fully submitted on that date.

An examination of the industrial commissioner's file indicates that a first report of injury was filed February 22, 1979. A memorandum of agreement was also filed on that date. In a decision filed November 7, 1980 the undersigned deputy made an award of a running healing period. This decision was affirmed in an appeal decision filed March 23, 1981. It appears the district court may have remanded the original proceeding for determination of whether the claimant should have a CT scan. Subsequently, a second review-reopening proceeding was filed.

The record in this case consists of the testimony of claimant, the claimant's brother, Phil Osborne, Don Vander Vegt, Barbara Bruneau; claimant's exhibits 1 through 6; and defendants' exhibits A through G. Official notice is taken of the entire contents of the industrial commissioner's file and all of the exhibits and the transcript of the prior proceedings. Additionally, a request for admissions filed in November 1982 and the answers responding thereto and attachments are considered part of the record in this case.

ISSUES

The issues to be resolved are whether there exists a causal relationship between the injury and the resulting disability, as well as the extent of that disability. There is also an additional issue of healing period penalty under section 86.13 of the Code.

REVIEW OF THE EVIDENCE

At the time of hearing the parties agreed that all medical bills have been paid. They further agree that this is a maximum rate case. The parties were further able to stipulate that the claimant has not returned to any form of gainful employment since the injury date.

The claimant's brother testified in these proceedings. This gentleman is a union representative for the sheet metal workers in the Sioux City area. He is aware of the physical activities required of sheet metal workers. He indicates that this activity includes lifting, climbing, and roof work. It also involves a substantial amount of heavy work. From the testimony it appears that this witness has performed the aforementioned tasks over the last twelve year period. He confirms that the claimant was also pursuing the occupation of sheet metal worker when he was injured.

This witness confirms that since February 5, 1979 there has been plenty of work available in the Sioux City area for sheet metal workers. He confirms that all sheet metal workers in Sioux City have been fully employed. In fact, some out-of-town people have come to Sioux City to help handle the workload. In terms of percentages, he confirms that at least eighty percent of the available sheet metal workers have been employed on a full-time basis. This is apparently close to full employment in this trade considering the movement of workers and and the numbers that may be in other professions.

This witness indicated that between the period of July 1980 through that date in 1982 the sheet metal workers were earning $17.10 per hour. They now have been forced to take a wage cut and are earning $14.10 per hour.

This witness has observed the claimant since his injury and is aware of claimant's physical problems. He is of the opinion that claimant could not work and pursue the sheet metal trade. He re-confirms, however, that if the claimant were available for work there would be work available.

On cross-examination, this witness conceded that there were various types of sheet metal work, some of which involved construction work. Other types involved architectural or ornamental sheet metal work. He confirms that some sheet metal work may be described as shop work, but he indicates that this is the hardest phase of the work.

James T. Bruneau, the claimant, testified that he is 44 years of age and a resident of Sioux City, Iowa.

As of the last hearing in July 1980 the claimant confirms that Horst C. Blume, M.D., was his physician. He further notes that Dr. Blume continues to treat him to date.

Claimant confirms that as of the last hearing he had not had surgery but was in traction. Since the last hearing he has continued to be treated by Dr. Blume. He received a CT scan in Minneapolis. A surgical procedure was performed in May 1981. The claimant indicates that between the last hearing and the surgery of 1981 he has never refused to have a CT scan and he has never refused to have a surgical procedure.

The claimant confirms that he has not returned to any form of work since the date of the last hearing, July 8, 1980. The claimant further confirms that between the date of injury, February 5, 1979, and the date of this hearing he has sustained no other injuries to his back.

Post-surgery, it appears from the record claimant was on pain medication and continued to be treated by Dr. Blume. Claimant was last examined by Dr. Blume the day before hearing. On that date the claimant had complaints of radiating pain into the left leg. Medication has been administered to relieve this pain with some success. The claimant notes, however, that the medication wears off and continuing discomfort is noted. Claimant indicates that he has good days and bad days, depending upon the pain. He also notes difficulty in sleeping.

It appears from the record that the claimant has complaints of side effects from the medication he is taking. He "spaces out" and does not remember what he has said to people. He feels, however, that the medication is required so that he can live with pain he experiences. The pain is primarily located in the left leg, the back, hip and the lower back on the left side.

Mr. Bruneau testified that his workers' compensation benefits were terminated in August 1982. He is of the opinion that the benefits were cut off because he is alleged to have refused a myelogram and surgery as prescribed by Maurice P. Margules, M.D. Claimant confirms that Dr. Margules examined him and he never refused this examination. Claimant indicates that Dr. Margules suggested a myelogram. Claimant, however, had had a very bad experience with a prior myelogram administered by Dr. Blume. As a consequence, the claimant declined to go through another myelographic procedure. It appears from the record that severe headaches were experienced as a consequence of the prior myelographic procedure. Mr. Bruneau confirms that Dr. Margules suggested possible future surgical procedures. The claimant is not aware of what these involved.

Since the date of the prior hearing claimant states that his condition has worsened. Prior to the last hearing the claimant was able to walk up stairs without pain. Now he is unable to perform this activity. Prior to the last hearing he did not have the burning pain which he now experiences. The burning pain is located in the surgical site and in the left hip. Prior to the last hearing the claimant indicates that he could walk approximately eight blocks. Today he can only walk two blocks. He is only able to stand for a brief period of time and the burning sensation on the left returns. The claimant concedes that the medication that he is on alleviates the pain. However, he notes that if he is overactive in any fashion he will suffer later. Mr. Bruneau indicates that without the medication he would be unable to sit in the courtroom and testify. He admits that a back brace has been prescribed, but complains that the back brace rides over an area on the right hip where a bone was taken out for purposes of the fusion. This rubbing sensation causes additional discomfort.

The claimant stated that he is unable to stoop because of weakness in the left leg. He confirms that he is able to lift with his arms but cannot lift with the use of his back. He is unable to bend as this activity pulls on the fusion site. He is also unable to twist. At times the left leg will go out and he will lose his balance. He is unable to kneel.

Claimant confirms that Dr. Blume has treated him approximately eighty percent of the time. Dr. Rojas has also seen him on occasion.

On cross-examination, the claimant confirms that he occasionally has a beer in a local tavern in Sioux City. He also acknowledges that occasionally he drives an automobile. Claimant reiterates that if he were able to work he would be working. He indicates that it is boring not being able to be productive. He admits that he is unable to handle the pain without medication.

He confirms that he was involved in a minor incident where he slipped on some ice post-injury. He cracked the seventh rib on the right side. Dr. Blume treated this situation. It does not appear from the record that this in any way re-injured the claimant's low back.

On redirect examination, the claimant indicates that Dr. Margules never treated him. He was never instructed by the employer-insurance carrier that Dr. Margules was the treating physician. It also appears from the record that the employer-insurance carrier never objected to Dr. Blume's involvement in this case.

Phil Osborne, a resident of Sioux City, Iowa, and a vocational rehabilitation counselor for the state of Iowa, testified on behalf of the claimant. Since the date of the last hearing this witness has interviewed the claimant on three different occasions. He has also had an opportunity to review all of the medical data contained in this record. This witness has no recommendations regarding placement of the claimant. He is unable to evaluate the claimant with regard to potential jobs. This witness has recommended an evaluation but the claimant did not believe he could sit still for 45 minutes and take the various evaluation tests. An evaluation was to be conducted in Des Moines and the claimant did not feel he could travel that distance.

On cross-examination, this witness indicates that he would not restrict the claimant from sedentary type work. He thinks the claimant can do light work.

On redirect examination, this witness acknowledges that he did not know of an employer who would hire the claimant with all of his medical problems.

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

Barbara Bruneau, the claimant's spouse, testified on his behalf. She has had the opportiunity to observe the claimant since the last hearing and since his intervening surgical procedure. She indicates that he is more uncomfortable now and more irritable. She confirms that he has sleeping difficulties.

Don Vander Vegt, a vocational rehabilitation specialist, testified in these proceedings on behalf of the defense. He has had an opportunity to examine the various medical reports contained in this record and has also heard all the testimony at hearing. He also is of the opinion that claimant can do sedentary or light work.

On cross examination, this witness concedes that he was not hired to place the claimant. He also conceded that he has never talked to the claimant personally, but simply evaluated written materials and listened to his testimony.

This witness further indicates that he has not checked with any employers in the Sioux City area regarding actual placement of Mr. Bruneau. He concedes that the reactions of the employers will be unpredictable because of claimant's medical history.

Horst G. Blume, M.D., reports in his letter of December 3, 1982, marked defendants' exhibit C:

> Significant improvement from the injury occurred after the patient underwent surgery but he still has back pain that is being treated with nerve blocks with the Medi-Jector with temporary results. Since this treatment with the nerve blocks has been going on for a number of months for his remaining back condition, I do not think that further significant improvement is anticipated.

In an earlier report dated November 5, 1982 and marked defendants' exhibit F, Dr. Blume notes:

> [It] is my opinion that Mr. Bruneau's permanent partial disability to the body as a whole is 20%....
>
> The reason for arriving at this percentage is that the patient still has pain in his low back whenever he does some strenuous physical activity and this pain condition remains until he has an opportunity to rest. Any lifting of more than 30-40 lbs. on a regular basis could increase the patient's back pain condition. Since the patient has been working in the past as an ironworker, with his work involving a lot of lifting, climbing, stooping, bending, etc., I do not think he is a fit candidate to return to this type of activity. I do recommend vocational rehabilitation assessment and re-training.

Dr. Blume further notes:

> Although it has been over a year since the surgery was performed (5/27/81), which is normally the period of time needed for recovery from this type of surgery, in this particular case the patient is unable to return to work because of his remaining low back pain which inhibits his activity. I could not assess his disability until now but at this time the patient's condition has stabilized so that I can evaluate his disability, and the percentage is outlined above.

Dr. Maurice Margulese conducted an independent evaluation of the claimant on behalf of the employer-insurance carrier. He reports in his letter of April 27, 1982, contained as part of defendants' exhibit F, that the claimant has "a much greater disability than 10% of the body as a whole. He is certainly not employable in anything but possibly a totally sedentary type of employment, if even this."

The balance of the exhibits have been reviewed and 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 February 5, 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).

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. * * * *

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, 255 Iowa 1112, 125 N.W.2d 251.

ANALYSIS

As previously noted, the employer and insurance carrier filed a memorandum of agreement in this proceeding. By that unilateral act they acknowledge that on the date of injury, February 5, 1979, the claimant was their employee. They further acknowledge that on that date the claimant sustained a personal injury as contemplated by the Iowa Workers' Compensation Act which both arose out of and in the course of his employment with them.

As previously noted, a prior hearing had been held in this case. As a consequence of that prior hearing a running healing period award was made pursuant to the terms of section 85.34(1). It appears that the claimant was paid healing period benefits up to August 25, 1982, when the benefits were terminated. From the record it appears that this termination was based upon the claimant's unwillingness to undergo a myelographic procedure as outlined by Dr. Margulese, the independent evaluator. At the time of this termination the claimant, according to the medical testimony of Dr. Blume, was continuing in a state of healing from his prior surgery performed by Dr. Blume in May 1981.

As in the previous decision, Dr. Blume will be considered the treating physician in this matter and as a consequence substantial weight will be accorded his testimony.

His reports previously alluded to indicate, in the opinion of the undersigned, that the healing period in this case runs through December 3, 1982.

Dr. Margules has further expressed the opinion that the claimant has a permanent "disability" of twenty percent. Based upon the reports of Dr. Blume as a whole, the undersigned will interpret this as a twenty percent permanent functional impairment. It is interesting that Dr. Margules, the independent medical evaluator, is of the opinion that claimant has something greater than a ten percent impairment.

The claimant was closely observed at the time of hearing to be credible in his testimony. The record reveals that this gentleman was productive as an ironworker prior to February 5, 1979. As a consequence of the work-related injury which he sustained on that date, his physical abilities and, consequently, his capacity to earn have been hampered and diminished. The record is clear from the claimant's brother's testimony concerning the physical requirements necessary to be an ironworker. The physicians appear to be clear in their testimony that the claimant can no longer perform the functions required of that profession. The ironworker, during early 1980, would be earning in excess of $17.00 per hour. Based upon this deputy's experience in workers' compensation litigation, it is his opinion that any sedentary work the claimant might be involved in would pay significantly less than $17.00 per hour.

Based upon the medical data, it appears that the only avenues of employment which might possibly be open to the claimant are sedentary or light work jobs. Even Dr. Margules is somewhat skeptical concerning the claimant's ability to perform those types of work activities.

The medical data, accompanied by the claimant's testimony, clearly reveals that he is in a state of debilitating pain which is experienced on a continuous basis. While it is true that some relief may have been experienced through the use of medication, any relief is on a sporadic basis at best. Consequential pain can be as disabling as the injury itself.

Based upon the record as a whole and taking into consideration all of the aforecited industrial disability considerations, it is the opinion of the undersigned that the claimant has sustained an industrial disability to the extent of sixty percent of the body as a whole.

FINDINGS OF FACT

That on February 5, 1979 the claimant was an employee of the defendant.

That on February 5, 1979 the claimant sustained a personal injury which both arose out of and in the course of his employment.

That the healing period extends from February 5, 1979 through December 3, 1982.

That Dr. Blume is the treating physician in this case.

That the claimant underwent a surgical procedure at the hands of Dr. Blume on May 27, 1981.

That the claimant, according to Dr. Blume, has a twenty percent (20%) permanent functional impairment as a consequence of the work injury.

That claimant has physical restrictions brought on by the work injury.

That claimant is in a state of almost constant pain due to the work injury.

That the claimant is found to have an industrial disability to the extent of sixty percent (60%) of the body as a whole.

CONCLUSIONS OF LAW

That the claimant has sustained his burden of proof and has established a causal relationship between the injury of February 5, 1979, his healing period and resulting disability.

ORDER

THEREFORE, IT IS ORDERED that the defendants shall pay unto claimant healing period benefits for the period February 5, 1979 through December 3, 1982 at the rate of two hundred sixty-five dollars ($265.00) per week.

That the defendants shall pay unto claimant three hundred (300) weeks of permanent partial disability benefits at the rate of two hundred forty-four dollars ($244.00) per week.

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

Horst G. Blume	$165.90
Topfs Mister Drug	671.00

That the defendants are given credit for benefits previously paid.

That interest shall accrue from December 3, 1982 pursuant to section 85.30 of the Code.

That the costs of this action are taxed to 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 _____ day of October, 1983.

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GLADYS BURGGRAFF,
Claimant,
vs.
GRAHAMS,
Employer,
and
WAUSAU INSURANCE COMPANIES,
Insurance Carrier,
Defendants.

File No. 632634
R E V I E W -
R E O P E N I N G
D E C I S I O N

This is a proceeding in review-reopening brought by the claimant, Gladys Burggraff, against her employer, Grahams, and the employer's insurance carrier, Wausau Insurance Companies, as a result of an injury of March 26, 1980. The parties filed a stipulation of facts, and the case was considered as submitted for decision on October 6, 1983.

FACTS PRESENTED

The stipulation of facts will suffice as a statement of the circumstances surrounding the question raised. Reference to exhibits have been deleted, and the issue in this case is as stated in the stipulation:

1. On March 26, 1980 claimant sustained an injury which arose out of and in the course of her employment. Temporary total disability benefits were paid to claimant from March 27, 1980 through September 8, 1980.

2. Claimant was initially treated for her injury by J. E. Lavigne, M.D. for a "partial tear right posterior cruciate". She was referred to Marvin Dubansky, M.D., an orthopedic surgeon on May 13, 1980. On October 23, 1981 Dr. Dubansky rated claimant's disability to be 10% impairment of the lower extremity based upon "...a suspect for a rupture of the medical meniscus".

3. In a letter dated December 3, 1981 Gerry Kirkwood offered to pay claimant 10% for the leg. This letter was sent to claimant's attorney.

4. Claimant's attorney responded in a letter dated December 11, 1981 and indicated that there was permanent damage to the venous valve.

5. On December 22, 1981 Ms. Kirkwood wrote to Dr. Creagh and inquired about permanent disability.

6. On December 29, 1981 Dr. Creagh prepared a report indicating that he concurred with Dr. Dubansky's rating of 10% to the leg.

7. In a letter dated January 7, 1982 Ms. Kirkwood again offered to pay 10% of the leg to claimant through her attorney.

8. As a result of no response from claimant's attorney, Ms. Kirkwood wrote to claimant's attorney on February 23, 1982.

9. A response to Ms. Kirkwood's letter was made by claimant's attorney in a letter dated April 7, 1983 where he requested Ms. Kirkwood to issue a check payable to claimant and him.

10. On April 12, 1983 a check was issued payable to claimant and her attorney.

11. In a letter dated April 26, 1983 claimant's attorney returned the check and requested interest on the permanent partial disability from February 1981 [the date after the healing period when the final week of permanent partial disability would have accrued].

12. On May 2, 1983 Ms. Kirkwood disagreed with the demand of interest by claimant's attorney and enclosed the check for permanent partial disability.

13. The check was returned in a letter from claimant's attorney dated May 6, 1983.

14. On May 12, 1983 Ms. Kirkwood advised claimant's attorney that she would pay interest for the period from the date of the physical impairment rating by Dr. Dubansky to the date she offered tender of the 10% of the leg.

15. On May 17, 1983, claimant's attorney filed a Petition for Review-Reopening on the issue of interest.

16. The issue to be determined by the Industrial Commissioner in this case is the amount of interest due on the permanent partial disability indicated in this case.

17. The parties agree that this matter may be submitted on the basis of this Stipulation....

APPLICABLE LAW

Section 85.30, Code of Iowa states as follows:

> Compensation payments shall be made each week beginning on the eleventh day after the injury, and each week there-after 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 judgements and decrees [currently 10%].

In Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979), the dispute in arbitration was whether or not claimant sustained an injury which arose out of and in the course of the employment. In deciding that the injury was compensable, the court examined the question of when interest should commence and remarked the that the Elevator's theory that interest would commence at the time of the district court's affirmance of the agency's decision "would defeat the apparent purpose of section 85.30, as well as jeopardize the goal of other sections which evidence legislative desires to secure compensation for injured employees and their dependence at the earliest time." (p. 180) The court went on to rule that the interest began on the date the first installment came due, 11 days after the injury. In Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957), the issue was whether or not claimant in a review-reopening case should receive additional compensation. In ruling that the increased amount of compensation should be paid, the court ruled also that the interest was payable only from the date of the increased award. Vorthman v. Keith E. Myers Enterprises, 296 N.W.2d 772 (Iowa 1980) stands for the general proposition that interest is allowed on a claim from the date the claim is liquidated. That case is not a workers' compensation case.

ANALYSIS

It appears that in Farmers Elevator the court considered the damages to be liquidated as of 11 days after the injury. That is basically the situation in any arbitration case where the issue concerns the question of whether the injury arose out of and in the course of the employment. It should be pointed out that the Bousfield was not overruled by Farmers Elevator, perhaps because it stands for a very different principle. In Bousfield, the court ruled that interest did not begin to accrue until the date of the increased award which is the same time that the claim became a known quantity or, in other words, became liquidated. The Bousfield rationale will be followed here.

Reviewing the facts again, it is clear that, at first, the parties did not agree as to the amount of compensation due. On January 7, 1982, the defendant insurance company offered to pay the scheduled value of a 10 percent permanent partial impairment to the leg. The offer was repeated by letter of February 23, 1982. No response was forthcoming by claimant until April 7, 1983 when claimant's attorney requested a check payable to

claimant and to the attorney. It is clear that at that time, April 7, 1983, the claim became liquidated.

Figuring the interest owed on a weekly basis as the compensation became due, the 22 weeks started April 7, 1983 and ended August 7, 1983 (22 weeks). The interest on that amount at 10 percent is $39.86. The principle (22 X $90.19 per week) is $1,984.18. Interest on that principle between August 8, 1983 and November 30, 1983, the date of this decision, is $62.51, making a total interest due of $101.37.

The stipulation filed by the parties is adopted as the finding of facts.

CONCLUSION OF LAW

Defendants owe interest of ten (10) percent per year on twenty-two (22) weeks compensation at the rate of ninety and 19/100 dollars ($90.19) per week beginning April 7, 1983 which to date amounts to one hundred one and 37/100 dollars ($101.37).

ORDER

THEREFORE, defendants are hereby ordered to pay interest at ten (10) per cent per year for twenty-two (22) weeks compensation at ninety and 19/100 dollars ($90.19) per week beginning April 7, 1983.

Signed and filed at Des Moines, Iowa this 30th day of November, 1983.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT A. BUTCHER,	:	
Claimant,	:	
vs.	:	
VALLEY SHEET METAL,	:	
Employer,	:	File No. 522032
and	:	A P P E A L
GREAT AMERICAN INSURANCE COMPANY,	:	D E C I S I O N
Insurance Carrier,	:	
and	:	
SECOND INJURY FUND OF IOWA,	:	
State of Iowa, Defendants.	:	

STATEMENT OF THE CASE

Defendants appeal from a proposed review-reopening decision wherein claimant was awarded 117 weeks of healing period benefits and 22 weeks of permanent partial disability benefits.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Dwight Lewis, Shirley Butcher, and Clement Joseph Novotny; the deposition of claimant; claimant's exhibits 1 and 4 through 15; Second Injury Fund's interrogatories and claimant's answers thereto filed November 6, 1981; and the briefs and filings of all parties on appeal. Claimant's exhibits 2 and 3 were offered, but defendants' objections thereto for failure to comply with Industrial Commissioner Rule 500-4.17 were sustained by the deputy.

ISSUES

1. Whether the deputy erred in permitting the introduction of medical reports filed as answers to interrogatories propounded by the Second Injury Fund when claimant failed to comply with Industrial Commissioner Rule 500-4.17.

2. Whether the deputy erred in permitting the medical bill of Dr. Roland into evidence after objections to the introduction of exhibits 2 and 3, regarding a physical therapy report and Dr. Roland's report, had been sustained.

3. Whether the deputy erred in finding that claimant's blackout spells arose out of and in the course of his employment, and further, that the medical expenses relating to the blackout spells should be paid by defendants.

4. Whether the deputy erred in failing to find that claimant had the duty to mitigate his damages by seeking prompt medical attention from Dr. Taylor in order to reduce the healing period in connection with the blackout spells.

5. Whether the deputy erred in finding a causal connection between claimant's fall and his back injury, and further, by ordering defendants to provide a list of three orthopedic surgeons from which claimant is to choose one for treatment.

6. Whether the deputy erred in the determination of which medical bills should be paid by defendants.

7. Whether the deputy erred in finding claimant's weekly benefit rate for permanent partial disability to be $245.00 when the record revealed gross earnings of $390.42 per week.

REVIEW OF THE EVIDENCE

Claimant, age 46 at the time of the hearing, completed 11 1/2 years of school and has subsequently received a high school diploma through GED. (Transcript, pp. 35-36, 106) After playing professional baseball for three years, during which he also took an apprenticeship in sheet metal, claimant became a journeyman sheet metal worker in 1962. Claimant testified that he was paid the union wage scale and worked out of the union work pool. He testified that his work required that he stand a great deal, lift heavy objects, climb stairs and ladders, and squat. (Tr., pp. 37-40)

Claimant entered the U.S. Navy in April of 1968 where he received combat training as a seal team member. He testified that he was shot in the right knee while serving in Viet Nam in 1969. Surgery was performed on the knee in Japan, and claimant resumed his tour in Viet Nam six to eight weeks later. Claimant was discharged from the service in September of 1970. (Tr., pp. 40-41) He returned to his occupation as a sheet metal worker and stated that he experienced no after effects from the healed wound to his right knee. He divorced his wife soon after leaving the service and remarried in August of 1973. Claimant has one child by his present wife as well as three children from his wife's previous marriage. (Tr., pp. 40-42)

Claimant testified that he suffered another injury to his right knee in 1978 when he slipped on ice and fell beneath his car. Surgery was performed on the right knee in March of 1978, and claimant returned to work in April of 1978. Claimant testified that by the fall of 1978 his right knee felt as good as it ever had. (Tr., pp. 44-45)

Claimant was installing duct work on the inside of a construction project on October 9, 1978 when he tripped over an electrical cord and struck his forehead on the floor. He testified that when he stood up he had a headache and experienced pain in his left leg and lower back. Claimant denied ever experiencing back problems or problems with his left leg or knee prior to October of 1978. He was seen by Dr. Gray on the afternoon of his accident. Claimant later was seen by Philip C. Lehman, M.D., who had previously performed surgery on claimant's right knee.

Dr. Lehman, in a September 21, 1979 letter to claimant's counsel, reported that he examined claimant's knee on October 18, 1978 at which time x-rays did not reveal any serious problems. He saw claimant again on November 8, 1978, and felt that an arthroscopic examination should be carried out due to continued severe pain in the left knee. An anthrogram was done on the knee on November 16, 1978, followed by an arthroscopic examination done on November 17, 1978. The examination revealed a totally displaced lateral meniscus causing an excoriation of the anterior lateral femoral condyle which Dr. Lehman removed that day. Dr. Lehman reported that claimant was up in two or three days, and wore a knee splint for about ten days. Claimant's wound had healed by November 28, 1978, and he was started on quadriceps exercises. It was the opinion of Dr. Lehman that even though claimant's knee was healing satisfactorily, he would have increased arthritis in the knee. (Answer to Interrogatory 17, Item 3)

Claimant testified that he attempted to perform the exercises prescribed by Dr. Lehman to strengthen his knee, but had a great deal of difficulty due to the pain they caused in his lower back. (Tr., pp. 51-52) Dr. Lehman reported that on December 6, 1978 claimant stated that his knee was doing well, but he had been having increasing pain in the back. Upon examining claimant, Dr. Lehman found localized tenderness over the L5-S1 interspace and some osteoarthritic changes of L4-5 and L5-S1, but no evidence of spondylolisthesis. The doctor felt that claimant had osteoarthritis of the back caused by walking with a stiff knee. Dr. Lehman reported seeing claimant on January 10, 1979, at which time claimant's back still bothered him, but no signs of ruptured disc were apparent. (Answer to Interrogatory 17, Item 3) Claimant was admitted to Iowa Methodist Medical Center on March 21, 1979 where a lumbar myelogram by Donald W. Blair, M.D. Dr. Blair reported some blunting of the nerve root on the right which he felt to represent a possible mild disc herniation. In a discharge summary dated March 28, 1979 Dr. Blair reported a final diagnosis of a herniated disc lumbosacral right. (Answer to Interrogatory 17, Item 6)

Claimant testified that following the surgery to his left knee he began to experience problems with his right knee also. He attributed the problems with his right knee to an exaggerated style of walking while the left knee was healing. In December of 1978 claimant contacted his union business agent to inquire about his prospects for returning to work, describing to the agent the problems that he had been having with his knees and back. Claimant recalled that in late December of 1978 or early January of 1979 the agent informed him that there were no sheet metal worker jobs available to workers with his physical limitations. (Tr., pp. 52-55)

Claimant began to experience blackout spells in January of 1979, several weeks after he had last spoken with the union business agent. Claimant stated that he would blackout without warning and each occurrence would last from one to three minutes in duration. He testified that he would simply fall to the floor if a blackout occurred while he was standing. Claimant recalled that Dr. Lehman did not believe it feasible to treat either of his knees until the blackout spells were remedied and he stopped reinjuring his knees each time he fell. (Tr., pp. 51-56)

At the request of his counsel, claimant began keeping a record in April of 1979 as to the frequency with which his blackouts occurred. Claimant's exhibit 1 indicates that from April of 1979 through January of 1981 claimant blacked out from

8 to 36 times each month, with the average figure being approximately 22 times each month. Claimant experienced no blackouts from February of 1981 through May of 1981. He experienced a total of 16 blackouts from June of 1981 through June of 1982, when the arbitration hearing was held. (Cl. Ex. 1)

Claimant entered the hospital in February of 1979 under the care of F. M. Hudson, M.D., to determine if a blood clot was the cause of his blackout spells. The testing proved negative and claimant was referred to R. L. Rodnitzky, M.D., in Iowa City for neurological testing. (Tr., pp. 58-60) Dr. Rodnitzky reported that claimant was seen as a neurology outpatient on March 9, 1979, but that no neurological abnormalities were discovered. (Answer to Interrogatory 17, Item 5) Claimant was tested for vascular disease in May of 1979 by Dr. Dorner, the results again yielding no clues as to the cause of the blackouts. He was then referred to Michael J. Richards, M.D., who performed a halter monitor test on July 12, 1979, also with negative results. (Cl. Ex. 5) Claimant visited Mayo Clinic in September of 1979 where a complete medical workup was done in an attempt to discover the cause of the blackout spells and headaches. Claimant's back was also examined at Mayo Clinic. Upon failing to find an organic cause for claimant's blackouts, he was referred by Mayo Clinic to St. Mary's in October of 1979 where he was examined for a possible mental causation of the blackouts. After his stay at St. Mary's claimant was simply told that he had syncopal conversion reaction, and received no treatment. (Tr., pp. 68-72)

Claimant testified that the insurance carrier refused to pay for the testing which he underwent at Mayo Clinic and St. Mary's. He also testified that the insurance carrier refused payment for the halter monitor test administered by Dr. Richards as well as two office visits to that physician in November and December of 1979. (Tr., pp. 65-66, 72-73)

Claimant applied for social security disability benefits in November of 1979, and as part of the application process was examined by Michael J. Taylor, M.D., a psychiatrist. Claimant's application was rejected in December of 1979. He discovered in early 1980, however, that his wife's Blue Cross-Blue Shield policy would pay for any treatment costs which he might incur for up to 30 days every six months. As a result, claimant contacted Dr. Taylor concerning treatment for his blackout spells. (Tr., pp. 75-79) Dr. Taylor summarized his findings in his work with claimant in several reports to claimant's counsel. On August 27, 1980 Dr. Taylor reported:

> I write to summarize for you the extensive experience that I have had in attempting to diagnose and treat Mr. Butcher's blackout spells. My conclusions regarding the nature of these spells, the cause of the spells, and my reasons for reaching these conclusions can best be understood, I feel, by chronologically outlining for you my experience with Mr. Butcher.
>
> I first saw Mr. Butcher in January of 1980 for the purpose of doing an evaluation for Disability Determination Services. A copy of that report is enclosed. My basic conclusion in that report was that, while the etiology of Mr. Butcher's blackout spells had not been determined, they, quite clearly, prevented him from doing even routine, repetitive, unskilled work and I felt that, at that time, the prognosis for any significant improvement in the next 12 months was extremely poor.
>
> In June of 1980, Mr. Butcher initiated contact with me, stating that he was willing, at his own expense, to receive treatment from me in an attempt to find the cause of the blackout spells and find a treatment for them. While Mr. Butcher had no funds to pay for outpatient care, it was discovered that his wife's Blue Cross/Blue Shield would pay for inpatient care and, because so many diagnostic tests were going to be required, the most expeditious course seemed to be admission to the hospital for evaluation and, it was hoped, treatment. Mr. Butcher was admitted to Iowa Lutheran Hospital on June 4, 1980, and discharged from the hospital June 25, 1980. A copy of my discharge summary from that hospitalization is enclosed. At the beginning of that hospitalization, I was of the strong opinion that there was an organic etiology for Mr. Butcher's blackout spells and that that etiology had not yet been discovered. As is obvious from the discharge summary, a thorough evaluation of Mr. Butcher to rule out endocrinologic, cerebral-vascular, cardiovascular, and neurologic causes for his spells failed to reveal any organic etiology. I felt, at the time of his discharge from the hospital, that we had investigated every possible organic factor and that the only other possible explanation for Mr. Butcher's symptoms was that they were, somehow, emotionally-based. Because his insurance benefits were about to expire and because Mr. Butcher again expressed a willingness to pay for outpatient care out of his own pocket, we agreed to, at least, two outpatient visits following his discharge from the hospital to try to get some information about what emotional factors might be playing a role in his blackout spells.
>
> At the time Mr. Butcher was admitted to the hospital, I strongly suspected, as mentioned above, that there was an organic cause for his blackout spells and that these spells were totally unrelated to his industrial accident in October of 1978. At the time of his discharge, while it was more apparent that emotional factors were playing a significant role, I was still inclined to attach little causal relationship between the fall in October of 1978 and his current situation.
>
> Since his release from the hospital, I have seen Mr. Butcher for four one-hour sessions. Those visits took place on June 30, July 11, July 21, and August 4, 1980. As a result of those visits, and,
>
> Over the past two months, as Mr. Butcher and I have discussed his emotional response to the fall in October of 1978, it appears that he had little emotional reaction to the fall until December of 1978, when he first learned from his employer, that he would not be allowed to return to work in his usual occupation. In early January of 1979, Mr. Butcher was told that, not only would he not be allowed to do any work that involved climbing but that his employer was unwilling to employ him in any capacity. Mr. Butcher's response to this information, which he viewed as very unfair, was extreme anger and frustration. It was quite clear to me that Mr. Butcher had repressed a great deal of these feelings and, it wasn't until the third hour that we had spent discussing this situation, that he was able to verbalize the feelings and show affect consistent with these feelings. Within 24 hours of first learning (in January) that he would not be allowed to return to work, and while feeling very angry, Mr. Butcher experienced his first dizzy spell. Within the next two or three days, whenever Mr. Butcher would think for any significant period of time about what he perceived to be the unjust way that he was being treated by his former employer, he would again experience dizzy spells. Within three days, the dizzy spells progressed to the blackout spells which Mr. Butcher has continued to experience.
>
> It is my firm opinion that the dizzy spells, which then progressed to the blackout spells, are clearly and directly related to Mr. Butcher's discomfort with the significant angry feelings that he continues to experience when he thinks about how he came to lose his job. It has now been clearly demonstrated to me that, whenever Mr. Butcher begins to remember those first few days after he found that he would not be able to return to work, he has a blackout spell. This has been demonstrated in my office. So far, on an outpatient basis, I have not been able to get Mr. Butcher to deal with the angry feelings that he has - he always blacks out before it is possible to do so. At this point, I am highly optimistic that Mr. Butcher's blackout spells can be successfully treated. I have some doubt as to whether or not this can be accomplished on an outpatient basis - inpatient care for approximately one week would, in my opinion, be, by far, the most expeditious way to remove these symptoms. Since Mr. Butcher is out of insurance benefits, it seems to me that it would be well to the benefit of the Worker's [sic] Compensation carrier to pay the charges for this hospitalization. Again, I am highly confident that we could attain symptom resolution with one week's hospitalization.
>
> To summarize, then, what has obviously been a complex history, it is my opinion that Mr. Butcher's blackout spells are directly related to the fall that he experienced in October of 1978. It is my firm opinion that Mr. Butcher has been disabled fom any type of competitive employment since the fall and continues to be so disabled at the present time. It is my equally-firm opinion that Mr. Butcher's disability is not permanent and that, with appropriate treatment, his blackout spells could be eliminated. (Answer to Interrogatory 17, Item 15)

On February 11, 1981 Dr. Taylor again reported to claimant's counsel:

> I apologize for my delay in providing you with an updated report as to Mr. Butcher's progress. My records indicate that the last written communication that we had was in September of 1980, when I attempted to clarify for you and for the representative of the Workmens' [sic] Comp carrier the relationship between the fall that Mr. Butcher suffered and the subsequent symptoms that he has experienced. Because of the comp carrier's unwillingness to provide any further treatment and because of Mr. Butcher's financial situation, I was not able to rehospitalize Mr. Butcher, to provide definitive treatment, until January of 1981, when his wife's insurance would, once again, cover that hospitalization.
>
> Mr. Butcher was hospitalized, under my care, at Iowa Lutheran Hospital from January 5 through January 14, 1981. The information gathered during that hospitalization provides further and, in my opinion, irrefutable, verification that Mr. Butcher's black-out spells were directly related to his inability to return to work because of the fall. On the second day of his hospitalization, Mr. Butcher was given an Amytal interview during which his feelings, regarding the fall and his being told that he could not return to work, were discussed under the influence of Amytal. He then went through a series of covert desensitization exercises. That treatment appears, thus far, to have been successful. Mr. Butcher is having no further black-out spells and his depressive symptoms are gradually decreasing.
>
> We have, therefore, the following set of facts which seems to eliminate all doubt as to the cause of his symptoms. Mr. Butcher was told that he could not return to work because of his injury. He had a great deal of angry feelings in response to

receiving this information. It was, initially, my working hypothesis that it was his angry feelings that were the cause of the black-out spells. The treatment program was initiated which was based upon that hypothesis. That treatment program was carried out and Mr. Butcher's black-out spells disappeared. I can see no other possible explanation for the fact that Mr. Butcher's black-out spells have disappeared. The litigation certainly has not been settled. He received no financial reward for having the black-out spells disappear. In short, Mr. Butcher's black-out spells disappeared because the causal relationship between the fall and the spells was correctly identified and an appropriate treatment regimen was initiated.

I can think of no more clear-cut evidence for the causal relationship between the fall and Mr. Butcher's symptoms than now exist. (Answer to Interrogatory 17, Item 18)

Finally, on September 22, 1981 Dr. Taylor reported:

There is ample medical documentation in file, including records from the Mayo Clinic and from Iowa Methodist Medical Center, to document onset of Mr. Butcher's condition in January of 1979. (This is when he first experienced his blackout spells.) From a period of January of 1979 through his hospitalization in January of 1981, Mr. Butcher's condition was, essentially, unchanged and was as described in my September 17, 1980, letter to Mr. Behrens.

An additional impairment developed in September of 1980. Mr. Butcher developed a severe depression which was manifested by significant initial and terminal sleep disturbance, decreased appetite with associated 20-pound weight loss, difficulty concentrating, increased irritability, decreased interest, increased anxiety, feelings of hopelessness, feelings of helplessness, and vague suicidal ideation. That impairment has responded fairly well to antidepressant medications and, during the period of January, 1979 through January, 1981, there were probably only about four months out of that period of time where Mr. Butcher was further impaired by his depression. Quite obviously, however, his syncopal episodes remained unchanged. Mr. Butcher stopped having syncopal episodes on or about January 10, 1981. It would be my estimation that, at that point, his psychiatric disability ended.

....

In your September 8, 1981, letter, you ask me to comment on statements made by reviewing physicians in Maryland. I spent considerable time talking with the physicians in Maryland about this situation. They never seemed to have a clear understanding of the situation. It is clear, to me, that Bob could not control these blackouts. He, frequently, injured himself, primarily bumping his head. I have seen such injuries on, at least, three occasions. The reviewing physician's statement about which you comment is totally unfounded.

In order to minimize cost to Mr. Butcher, since he had no way to pay for his visits to my office, a vast majority of my contact with him, outside the hospital, has been by telephone. I saw him, in the hospital, from January 5 through January 24, 1981. I saw him, again, during his hospitalization from August 24 through September 4, 1981. (Answer to Interrogatory 17, Item 20)

Billing records from Iowa Lutheran Hospital indicate that claimant's medical expenses for each of his visits were paid by Blue Cross-Blue Shield. (Cl. Exs. 10, 11 and 12)

Claimant was seen by Dr. Lehman on February 23, 1981 for an orthopaedic examination and evaluation. In a February 26, 1981 letter to claimant's counsel, Dr. Lehman reported:

Examination of the knees reveals he has severe crepitation of the right knee, particularly. This is mild on the left. He has severe chondromalacia of both patellae. The knees are not swollen at the time of examination. There is not any ligamentous instability. He has normal sensation of both lower extremities, back, and buttock areas. He has localized tenderness over the L4-5 and L5-S1 interspaces. There is not any tenderness over the sciatic notch. He has decreased sensation over the entire left side of the back as compared to the right side.

X-ray examination of the lumbar spine and both knees reveals minimal arthritic changes of the lumbar spine. He has far-advanced osteoarthritic signs of the right knee, having a loose body in the popliteal area which is probably attached to the synovium. He has spurs both medially and laterally at the tibial plateaus. He also has large spur formation of both patellae. I might add that the right knee also has narrowing of the joint spaces both medially and laterally. The left knee reveals less deterioration of the joint. There are not any spurs, however, he does have spur formation over the patella, superior pole.

Diagnoses are the following: (1) Severe osteoarthritis of the right knee after meniscectomy. (2) Mild arthritis of the left knee after meniscectomy. (3) Mild arthritis of the back with a possible disc protrusion.

....

It is my opinion that he has 20 percent permanent disability of the right knee after meniscectomy combined with the arthritis. I would say the left knee is approximately 50 per cent permanent-partial disability because of the arthritis and meniscectomy. The back as a whole is approximately 10 per cent because of persistent pain. It is a possibility that a laminectomy could help; however, he does not have any findings to indicate this at the present time. (Answer to Interrogatory 17, Item 17)

Bernard F. Morrey, M.D., an orthopedic surgeon at Mayo Clinic, reported on February 19, 1980 as follows:

I have been asked to render an opinion concerning the impairment of this patient with respect to his knees.

On the basis of his pevious surgery and our examination, I would estimate that he has a 15 percent disability on the left and a 30 percent disability of the right knee as a result of surgery and instability. (Answer to Interrogatory 17, Item 13)

Donald W. Blair, M.D., an orthopedic surgeon, reported in a November 7, 1979 letter to the insurance carrier as follows:

In reply to your letter of October 18th, this patient has not been seen since May 7, 1979 and his complaints in the preceeding few months had been related to his back as well as "black out" episodes.

This man did have a lateral menisectomy of the left knee, secondary to trauma on October 9, 1978. Consultations on this man were related to his back complaints on February 20, 1979 and subsequent reference to the knee is not made in my notes.

It would be my impression from the limited information available that he had an uncomplicated lateral menisectomy of the left knee and with an anticipated residual impairment of the left lower extremity of 5%. Time off work for the menisectomy would usually be 6-8 weeks. We do know, however, that he was not back to work by that time because of his other problems. (Answer to Interrogatory 17, Item 8)

Dwight Lewis, who works for the State Department of Public Instruction as a vocational rehabilitation counselor, testified that claimant was attending classes at Area Eleven Community College at the time of the review-reopening decision. Lewis testified that claimant was learning to be an estimator in the conditioned air program. He noted that upon graduation from the course claimant's job prospects appear to be good, and that one sheet metal company had already expressed interest in hiring claimant as a conditioned air estimator. (Tr., pp. 26-29)

Clement Joseph Novotny, the owner of Valley Sheet Metal, testified that he normally employs five or six full time sheet metal workers, but that sometimes that number increases to twelve or fourteen depending upon the speed of construction. Novotny testified that claimant was hired out of the union pool on a temporary basis. Claimant had worked for Valley Sheet Metal six and one-half weeks at the time of his injury and earned $11.38 per hour. Novotny testified that he had up to two months of work remaining for claimant at the time he was injured. (Tr., pp. 151-157)

APPLICABLE LAW

Iowa Industrial Commissioner Rule 500-4.17 provides:

Each party to a contested case shall serve all written doctors' or practitioners' reports in the possession of the party upon each other party at least thirty days prior to the date of hearing. A party obtaining a medical report within thirty days of a hearing immediately shall serve upon each other party a copy of the report. Notwithstanding 4.14(86), the reports need not be filed with the industrial commissioner; however, each party shall file a notice that such service has been made in the industrial commissioner's office, identifying the reports sent by the name of the doctor or practitioner and date of report. Any party failing to comply with this provision shall be subject to 4.36(86).

This rule is intended to implement sections 86.8 and 86.18, The Code.

Iowa Industrial Commissioner Rule 500-4.18 provides:

In any contested case a signed narrative report of a doctor or practitioner setting forth the history, diagnosis, findings and conclusions of the doctor or practitioner and which is relevant to the contested case shall be considered evidence on which a reasonably prudent person is accustomed to rely in the conduct of serious affairs. The industrial commissioner takes official notice that such narrative reports are used daily by the insurance industry, attorneys, doctors and practitioners and the industrial commissioner's office in decision-making concerning injuries under the jurisdiction of the industrial commissioner.

Any party against whom the report may be used shall have the right, at the party's own initial expense of cross-examination of the doctor or practitioner. Nothing in this rule shall prevent direct testimony of the doctor or practitioner.

This rule is intended to implement sections 86.8 and 86.18 and to interpret section 17A.14, The Code.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on October 10, 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).

"* * * [T]he term 'injury' as used in the Workmen's Compensation Act, * * is broader than mere reference to some objective physical break or wound to the body, but includes also the consequences therefrom, including mental ailments or nervous conditions." Deaver v. Armstrong Rubber Co., 170 N.W.2d 455 (Iowa 1969).

"[T]here is also respectable authority to the effect that when there has been a compensable accident, and claimant's injury related disability is increased or prolonged by a trauma connected neurosis or hysterical paralysis, all disability, including effects of any such nervous disorder, is compensable. Gosek v. Garmer and Stiles Co., 158 N.W.2d 731 (Iowa 1968).

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, 188 N.W.2d 283, Musselman, 261 Iowa 352, 154 N.W.2d 128.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 10, 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). 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).

Iowa 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, podiatric, physical rehabilitation, nursing ambulance and hospital services....
>
> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee....

Iowa Code section 85.36 provides, in part:

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had he worked the customary hours for the full pay period in which he was injured, as regularly required by his employer for the work or employment for which he was employed, computed or determined as follows and then rounded to the nearest dollar:
>
> ....
>
> 6. In the case of an employee who is paid on a daily, or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of said employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury.
>
> 7. In the case of an employee who has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, his weekly earnings shall be computed under subsection 6, taking the earnings, not including overtime or premium pay, for such purpose to be the amount he would have earned had he been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.

ANALYSIS

The first issue on appeal is whether the deputy erred in permitting the introduction of answers to interrogatories propounded by the Second Injury Fund. Defendants specifically assail the introduction of medical reports filed in response to interrogatory 17 wherein claimant was requested to provide all medical reports, opinions, and ratings concerning his injuries and disability. Defendants argue that because claimant did not give notice as to which of the reports contained in the response to interrogatory 17 would be introduced at the hearing he has not complied with Rule 500-4.17, and has denied defendants the opportunity to depose potential medical witnesses and to arrange for an independent examination of claimant. Defendants' argument fails, however, because Rule 500-4.17 does not require that the party serving medical reports specifically identify which reports will or will not be offered into evidence. The rule merely requires that all relevant doctors' and practitioners' reports be served upon each opposing party and that notice of such service be filed with this office. Defendants were served a set of the medical reports which were claimant's response to interrogatory 17, and notice of such service was received in this office on November 6, 1981. Defendants were in no way prejudiced from deposing potential medical witnesses or otherwise engaging in discovery, as they received the medical records in question over seven months before the hearing. In addition, defendants' failure to anticipate which reports would be submitted into evidence in no way deprived them the opportunity to arrange for an independent medical examination of claimant. The record does not reflect any refusal on the part of claimant to attend any such scheduled examination. No error is found in the introduction of the medical reports filed in response to interrogatory 17.

The second issue on appeal is whether the deputy erred in permitting the medical bill of Dr. Roland into evidence after objections to the introduction of exhibits 2 and 3 had been sustained. The excluded exhibits (a report from Dr. Roland and a physical therapy report) were properly omitted as this office received no notice of the reports having been served as is required by Rule 500-4.17. The bill from Dr. Roland, however, is not classified as a medical report and is not subject to Rule 500-4.17. Claimant testified to the existence of the bill and the refusal of payment on the part of defendants. As there is no lack of foundation for entry of the bill into evidence, no error is found.

The third issue on appeal is whether the deputy erred in finding that claimant's blackout spells arose out of and in the course of his employment and that medical expenses relating to the blackouts should be paid by defendants. As noted in the applicable law portion of this decision, mental ailments or nervous conditions which are a direct consequence of a physical injury may be compensable. The physical injury in this case was an impaired left knee and back pain which resulted from claimant tripping on an electrical cord. Such an injury is doubtlessly a natural incident inherent in any type of construction work, and thus arose out of the employment. The injury occurred during normal working hours while claimant performed his job duties, thus it occurred in the course of the employment. Dr. Taylor's reports indicate a clear connection between claimant's inability to return to his work due to his physical impairments as a result of such injury and the blackout spells. As claimant's blackout spells certainly appear to be a direct consequence of his inability to work due to physical injuries which arose out of and in the course of his employment, the deputy properly found the blackout spells to be compensable and that the medical expenses in relation thereto should be paid by defendants.

The fourth issue on appeal is whether the deputy erred in failing to find that claimant had the duty to mitigate his damages by seeking prompt medical attention from Dr. Taylor. The record indicates that the insurance carrier was unwilling to pay for claimant's medical expenses starting with those incurred at Mayo Clinic, and that claimant was unable to afford to pay medical expenses himself. Claimant was able to receive treatment from Dr. Taylor only upon learning that his wife's Blue Cross-Blue Shield policy would pay for limited treatment as an inpatient. Claimant appears to have sought treatment from Dr. Taylor on a schedule which was regulated by limitations of his own funds and his wife's Blue Cross-Blue Shield policy. In view of the insurance carrier's unwillingness to pay many of his previous medical expenses, it was not unreasonable for claimant to assume that those expenses incurred with Dr. Taylor would be paid by the insurance carrier. The progression of the reports from Dr. Taylor would further indicate that the workers' compensation carrier had been afforded an opportunity to provide the care of Dr. Taylor which they had refused. Given the insurance carriers apparent abandonment of claimant, the inability of claimant to pay for treatment himself, and the limited scope of treatment available through his wife's Blue Cross-Blue Shield policy, it does not appear that claimant could have received treatment at an earlier date. In any event no rule is known which requires the claimant at his own expense to obtain treatment to reduce his disability. The fact that he did works to the benefit not the detriment of the workers' compensation carrier and they should not now be heard to complain. If treatment had not been rendered until the workers' compensation carrier agreed to pay it would have been delayed further.

The fifth issue on appeal is whether the deputy erred in finding a causal connection between claimant's fall and his back injury, and further, by ordering defendants to provide a list of three orthopedic surgeons from which claimant choose treatment. Claimant testified that his back hurt immediately after he fell on October 9, 1978, and that he had experienced no back problems prior to that date. The February 23, 1981 report from Dr. Lehman indicated that claimant possibly suffered from a disc protrusion and might be a future candidate for a laminectomy. Given these facts it is not unreasonable to conclude that a causal connection exists between the incident of October 9, 1978 and claimant's subsequent back pain. Under Iowa Code section 85.27 claimant is entitled to reasonable medical services which may be chosen by the employer. Allowing claimant to choose from a list of three physicians chosen by the employer, however, is not an unreasonable approach to insuring that claimant is provided adequate medical care. No error is found in the deputy finding of a causal connection between his fall and back injury, or in ordering that defendants provide a list of three orthopedic surgeons.

The sixth issue on appeal is whether the deputy erred in the determination of which medical bills should be paid by defendants. Defendants contend that some of the bills which they were ordered to pay represented treatment of maladies which were not represented treatment of maladies which were not found by the deputy to be compensable. Upon review of the medical bills submitted into evidence, it appears that defendants were ordered to pay for an x-ray of claimant's right knee taken by Dr. Lehman. The right knee was not found to be compensable and treatment therefore should not be charged to defendants. All of the remaining medical bills, however, appear to have been incurred

in efforts to treat claimant's left knee, back, and to discover the cause of his blackouts. Simply because much of the testing for the cause of claimant's blackout spells was negative does not relieve defendants from responsibility of payment. The finding of fact with regard to this issue will modify the order to disallow payment for Dr. Lehman's treatment to claimant's right knee.

The final issue on appeal is whether the deputy erred in finding claimant's weekly benefit rate for permanent partial disability to be $245.00 when the record revealed gross earnings of $390.42 per week. Iowa Code section 85.36(7) provides that an employee who has not worked for an employer for 13 weeks immediately preceeding an injury shall have his gross earnings determined by calculating what he would have earned had he worked when work was available to other employees during the 13 weeks prior to the injury. Clement Joseph Novotny testified that he normally employed five or six full time employees and hires temporary help as needed. Claimant worked for Valley Sheet Metal only six and one-half weeks before his injury, and is therefore entitled to have his gross earnings determined by the amount that a full time employee could have earned during the 13 weeks prior to October 8, 1978. A full time work week based upon the union scale wage of $11.38 per hour equals $455.20 per week. Claimant supports a family of six, including one child of his own, as well as three children by his spouse's first marriage. He is therefore entitled to six exemptions. The deputy's determination that claimant is entitled to permanent partial disability benefits of $245 was proper and is hereby affirmed.

FINDINGS OF FACT

1. Claimant worked as a sheet metal worker, earning the union pay scale wage of $11.38 per hour.

2. Claimant had not experienced back or left knee problems prior to October 9, 1978.

3. Claimant suffered injuries to his back and left knee on October 9, 1978 in an accident which arose out of and in the course of his employment.

4. Claimant underwent surgery to his left knee on November 17, 1978.

5. Claimant was unable to perform knee strengthening exercises because of his back pain.

6. Claimant suffered a mild disc herniation as a result of the October 9, 1978 accident.

7. Claimant was notified in December of 1978 or January of 1979 that sheet metal work was unavailable to him because of his back and left knee disabilities.

8. Claimant began expriencing blackout spells in January of 1979.

9. Claimant blacked out an average of 22 times each month from January of 1979 through January of 1981.

10. Claimant was unable to do work of any type during the period of his blackout spells.

11. Claimant received no aid from the insurance carrier in helping him to identify the cause of the blackout spells after July of 1979.

12. Claimant eventually received treatment for the blackout spells starting in January of 1980 when he discovered that his wife's Blue Cross-Blue Shield insurance policy would pay for limited treatment.

13. Claimant's blackout spells were determined to have been the result of anxiety over having been denied work as a sheet metal worker.

14. Claimant's blackout spells were eventually controlled by January of 1981.

15. Claimant was not able to shorten the period of his blackout spells due to the insurance carrier's abandonment of his case.

16. Claimant's blackout spells resulted out of physical injuries sustained in the October 8, 1978 accident.

17. Claimant's back injuries are causally related to his accident of October 9, 1978.

18. Claimant's right knee was x-rayed by Dr. Lehman, but is not found to be compensable.

19. Claimant worked for Valley Sheet Metal for six and one-half weeks.

20. Claimant supports a family of six persons, and is entitled to six exemptions.

21. Claimant's gross wage is determined to be $455.20 per week.

22. Claimant reached his maximum healing progress on January 10, 1981.

23. Claimant has sustained a permanent functional impairment of ten percent of the left leg.

24. Claimant is in need of further orthopedic care for his back injury.

CONCLUSIONS OF LAW

Claimant has sustained the burden of proving that a 10 percent disability to his left knee which arose out of and in the course of his employment.

Claimant has sustained the burden of proving that his blackout spells arose out and in the course of his employment.

Claimant has sustained the burden of proving a causal connection between the disability to his left knee, his blackout spells, and back difficulties.

WHEREFORE, the deputy's decision is affirmed except as modified in the order of medical expenses to be paid by defendants.

THEREFORE, it is ordered:

That the defendant, Great American Insurance Company, pay the claimant healing period benefits of a one hundred seventeen (117) week duration at the weekly rate of two hundred sixty-five dollars ($265) with a credit to be taken for those amounts previously paid. Statutory interest at the rate of ten percent (10%) per annum shall apply to those tardy payments due from the date of injury.

It is further ordered that beginning on January 11, 1981 defendant, Great American Insurance Company, shall pay the claimant a twenty-two (22) week period of permanent partial disability at the weekly rate of two hundred forty-four dollars ($244) per week together with ten percent (10%) statutory interest from the date due.

It is further ordered that within ten (10) days from the date of this decision, defendant, Great American Insurance Company, shall submit to the claimant a list of three (3) licensed orthopedic surgeons based in Des Moines, Iowa, from which list claimant shall choose one within ten (10) days who shall treat him and/or report his findings which shall be made a part of these proceedings. If the parties cannot agree upon a course of action based upon the orthopedic surgeon's report a review-reopening should be filed.

That defendant, Great American Insurance Company, pay the claimant the following medical expenses he has incurred as necessary to treat his injuries:

Drugs	$ 776.84
J. P. Morrey, M.D.	85.00
Lutheran Hospital	9,454.12
Polk County	122.00
Mayo Clinic	2,650.85
M. J. Richards, M.D.	30.00
Methodist Hospital	150.00
G. C. Roland, M.D.	908.00
M. J. Taylor, M.D.	1,545.00

Costs of these proceedings are charged to defendants pursuant to Industrial Commissioner Rule 500-4.33.

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

Signed and filed this 31st day of August, 1983.

Appealed to District Court;
Affirmed
Appealed to Supreme Court;
Remanded for Settlement

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN CAHALAN,
Claimant,
vs.
OSCAR MAYER,
Employer,
Self-Insured,
Defendant.

File No. 682417
A P P E A L
D E C I S I O N

STATEMENT OF THE CASE

In an arbitration decision claimant was found to have an occupational disease, but was denied benefits because disablement had not been established. Claimant filed an application for rehearing which was granted. The rehearing decision modified the earlier decision to provide for a period of temporary disability benefits, but did not find any permanent disability. Claimant now appeals from a proposed rehearing decision.

The record on appeal consists of the hearing transcript which contains the testimony of claimant and Connie Steffanus; claimant's exhibits 1 through 6; defendant's exhibits A and B; the depositions of Connie Steffanus and Richard T. Beaty, D.O.; and the briefs and filings of all parties on appeal.

ISSUE

Whether the deputy erred in failing to hold that claimant had proved disablement within the purview of Chapter 85A, and accordingly in failing to grant a permanent partial disability award to claimant.

REVIEW OF THE EVIDENCE

Claimant, who was 47 years old at the time of the hearing, began working at Oscar Mayer & Co. soon after graduating from high school in 1953. He testified that during the 20 years prior to 1981 he had worked in the "blade boning" department where meat is separated from bone and fat. Claimant had "boned" hams for approximately 10 years before switching to loins for the next 10 years. He explained that loin boning entails positioning a 20 to 40 pound loin on a table and cutting it up with a hand held knife. Claimant stated that a large loin would produce roughly 100 to 140 cuts, and that he handled an average of 16 loins per hour. He estimated that during his years as a loin boner he produced an average of 2000 cuts per hour. Claimant testified that hams, which he had boned previously, weighed between 20 and 40 pounds and would normally produce 60 to 80 cuts apiece. (Transcript, pp. 12-16)

Claimant suffered a dislocated shoulder in 1966 which caused him to be off work for six months. He testified that the full range of motion returned in his shoulder joint, and he did not experience soreness after returning to work. (Tr., pp. 16, 30-31)

Claimant testified that he experienced no more problems in performing his job until the spring of 1980 when his right shoulder began to ache. He recalled that he first noticed the ache during the evenings after he had worked. Despite the pain becoming progressively worse and more frequent, claimant was able to continue working through the fall of 1980 by periodically using up chunks of vacation time. He stated that the pain in his shoulder would subside when he was away from work, but would quickly return whenever he resumed his boning job. Claimant testified that by January of 1981 he sometimes was unable to keep hold of a boning knife and had difficulty opening doors with his right hand. (Tr., pp. 16-17)

Claimant sought medical aide from J.A. de Blois, D.O., in late January of 1981 and was referred to Richard T. Beaty, D.O., in February of 1981. Claimant underwent therapy at the Riverside Rehabilitation Center, and testified that the pain in his shoulder was absent while he was off work. (Tr., pp. 18-20) In a certificate for return to work Dr. Beaty indicated that claimant had been under his care from February 20, 1981 to March 30, 1981, and was able to return to one-handed duty on March 31, 1981. (Claimant's Exhibit 6)

Claimant was examined on May 28, 1981 by J. H. Sunderbruch, M.D., who acts as the Oscar Mayer company physician. In a May 28, 1981 letter to the Oscar Mayer personnel department, Dr. Sunderbruch reported that claimant had a strain on his right shoulder cuff. The doctor recommended that he be placed in a department which would not require him to make repeated motions with his shoulder and arm, as was required of boners. (Cl. Ex. 1)

Oscar Mayer permanently closed the blade boning department where claimant had worked on June 5, 1981. Connie Steffanus, assistant plant personnel manager, explained that whenever an employee is layed off work in his department that employee becomes entitled to "bump" an employee with less seniority anywhere in the plant. She further explained that bumping is done in order of seniority, and that once a choice of jobs has been exercised it may not be changed because the next person in seniority may have already made their job choice. (Tr., pp. 61-62, 69)

Steffanus also explained that there are several options available when an employee is unable to perform his or her regular job due to health reasons. When an employee becomes unable to perform due to his health, a "once-in-a-lifetime bump" may be exercised against a junior employee within the same department in order to secure a job which that employee could perform with his physical limitations. Steffanus noted that an employee might also secure work under section 71 of the union agreement. Section 71 provides that Oscar Mayer will provide light-duty jobs to employees who have records of long and faithful service, and who have an impaired employee form completed by both their own doctor and the company doctor. (Tr., pp. 55-56) Finally, Steffnaus indicated that health impaired employees have in the past been given "make work" jobs, designated as 590-100 positions, but such jobs were completely eliminated in January of 1982. (Tr., p. 65)

Steffanus testified that prior to the June 5, 1981 closing of the blade boning department, meetings were arranged whereby individual employees met with a plant representative and a union official to discuss their situations. She stated that the options discussed at the meetings were retirement, layoff, or bumping a junior employee elsewhere in the plant. Claimant apparently had been on sick leave since January 20, 1981, but did attend his meeting on April 13, 1981 at which time he chose to bump. Steffanus testified that claimant did not indicate which department he wished to bump into until a May 14, 1981 meeting which was again attended by representatives from the personnel department and the union. At that time claimant chose to bump into the pre-rigger department. (Tr., pp. 73-76)

Claimant testified that at the time of the May 14, 1981 meeting when he indicated his preference for pre-rigger, he did not know what jobs were actually available to him, and his decision was forced to be a hurry-up affair. (Tr., p. 89) It was claimant's understanding that he would initially return to work under section 71 status, and would then be guaranteed a position in pre-rigger when his shoulder had healed. (Tr., pp. 48-49)

Connie Steffanus testified that the plant and union officials at the May 14, 1981 meeting reviewed with claimant what jobs were available. (Tr., pp. 75-76) She also testified that plant tours were conducted in February of 1981 to educate the soon to be displaced boning department workers as to what jobs would be available. Steffanus admitted, however, that claimant had not received a plant tour in February because he was on sick leave at that time. (Tr., p. 90)

Steffanus testified that the bump into the pre-rigger department exercised by claimant was never given effect because he lacked seniority to move anyone already in that department out of their jobs. She reiterated the rule that once a bump selection had been made it would not be modified. As a result, claimant was not permitted to make a second bump selection into a department where he could establish seniority. Steffnaus testified that at the time claimant indicated pre-rigger as his bump choice, 36 positions in nine different departments had been available to him which could have been performed even with an impaired shoulder. (Tr., pp. 61-64,76)

When claimant eventually returned to work on June 8, 1981 he was assigned to the plastics department, which was a section 71 position. He worked as a fluid tray stacker through June 14, 1981, but called Oscar Mayer on June 15, 1981 indicating that his shoulder was bothering him again. (Tr., pp. 77-78; Steffanus Deposition, pp. 9-10) Claimant testified that the work involved repeatedly stacking trays at a fast pace, and his shoulder acted up in the same manner as when he had been boning. (Tr., pp. 20-21) Claimant was on sick leave for awhile, until he was recalled to work in pre-rigger for one day in place of a vacationing employee. Claimant also operated an elevator for two weeks while the regular operator was on vacation. Beginning August 28, 1981 claimant was given light-duty in the sanitation department where he did a variety of jobs which fell into the "make work" category, but relinquished that position on January 8, 1982 when the 590-100 job classification was eliminated. (Steffanus Dep., pp. 9-13)

Claimant remained on sick leave from January 9, 1982 through July 29, 1982, the date of the arbitration hearing. He testified that he wished to continue working at Oscar Mayer & Co. Claimant has not looked for employment elsewhere. (Tr., pp. 24-25)

In an August 24, 1981 letter to claimant's counsel, Dr. Beaty indicated that claimant had exhibited a full range of motion in his shoulder. He stated that claimant's disability according to AMA guidelines would be 0%. In a February 1, 1982 letter to claimant's counsel, Dr. Beaty wrote:

> In response to you [sic] letter of January 19, 1982, I have again seen Mr. Cahalan on 1-18-82. At that time he states he has persisted in having pain in his right shoulder with repetitive motions and movements with the right shoulder. There was basically no change in the patient's physical examination from his previous examination. As I stated in my previous letter, the patient has cybexed examinations which reveal a full range of motion. The patient therefore, cannot be given a rating with regards to limitation of motion. Based on the fact that he has had recurrent symptomatology any time that he engages in repetitive motions with this extremity, I believe that this might be rated. This of course is a subjective rating based on pain and I would rate a functional disability at approximately 5% which is probably reasonable if one is trying to settle this claim. (Cl. Ex. 5)

During a deposition taken July 28, 1982 Dr. Beaty indicated that the condition of claimant's shoulder was permanent. It was Dr. Beaty's belief that the pain claimant experienced was the result of chronic wear and tear from his job activity. (Beaty Dep., pp. 10-11)

Claimant was also examined by Raymond W. Dasso, M.D., at the advise of his counsel. In a December 23, 1981 letter to claimant's counsel, Dr. Dasso wrote:

> I feel that Mr. John Cahalan is able to do light work with no lifting over 40 pounds and no repetitive movements of the right shoulder. I feel that he should be on these restrictions for two years and that he should be re-examined in two years to determine what his light work restrictions will be at that time. (Cl. Ex. 5)

APPLICABLE LAW

Iowa Code section 85A.4 provides:

> 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 provides:

> 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.
>
> If, however, an employee incurs an occupational disease for which he would be entitled to receive compensation if he were disabled as provided herein, but is able to continue in employment and requires medical treatment for said disease, then he shall receive reasonable medical services therefor.

Iowa Code section 85A.8 provides:

> 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 (Iowa 1980) the Iowa Supreme Court at 192 stated:

> Disability from injuries covered by chapter 85 has been defined by case law as "industrial disability," or a reduction in earning capacity. E.g., Olson v. Goodyear Service Stores, 255 Iowa 1112, 1120, 125 N.W.2d 251, 256 (1963). Among the criteria considered in determining industrial disability are the claimant's "age, education, qualifications, experience and his inability, because of the injury, to engage in employment for which he is fitted." Id. at 1121, 125 N.W.2d at 257. Functional disability, while a consideration, has not been the final criterion. Id.....There is no reason to believe that these criteria should not also be applicable in determining the claimant's capacity to perform his work or to earn equal wages in other suitable employment, the standards for determining disability under section 85A.4, at least in cases where claimant proves that he has been unable to continue working for reasons related to his disease. See §85A.17, The Code. These reasons may not always be directly related to functional impairment. For example, a defendant-employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. (cases cited) Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief should be granted.

ANALYSIS

The sole issue to be determined upon appeal of this case is whether the deputy erred in failing to find that claimant had proved disablement, and accordingly in failing to grant a permanent partial disability award to claimant. The deputy's finding that claimant did establish an occupational disease has not been contested by either party and will not be considered herein.

To prove disablement under Iowa Code section 85A.4 claimant must establish either that he has, as a result of his occupational disease, become either incapacitated from performing his work or from earning equal wages in other suitable employment. The record appears to be void of any testimony or evidence concerning claimant's ability to earn equal wages with an employer other than Oscar Mayer. Claimant, in fact, testified that he has not sought out employment elsewhere, rather he wishes to continue working for Oscar Mayer & Co. Our focus, therefore, is upon whether claimant has been incapacitated from performing his work due to his occupational disease.

A number of problems exist with claimant's argument that he is disabled because he is incapacitated from performing his work due to his shoulder ailments. We are inclined to agree with the deputy that the work referred to in section 85A.4 is generic in nature. The term "work" as it applies to claimant in this case, refers not to the specific job of loin boning, rather it goes to the performance of necessary jobs in the meat processing industry in general. Claimant had no difficulty performing the work of a vacationing employee in the pre-rigger department. Furthermore, Connie Steffanus indicated that there were 36 permanent positions available for claimant to bump into following the close of the blade boning department which he would have been capable of performing even with a shoulder impairment. The fact that claimant did not have a work position at Oscar Mayer at the time of the arbitration hearing appears to stem not from claimant's inability to work in the plant or Oscar Mayer's refusal to provide work, rather from confusion among claimant, union representatives, and Oscar Mayer personnel representatives as to what jobs were available to claimant following the close of the blade boning department. Claimant attempted to bump into the pre-rigger department in which he lacked the seniority to do so, while he could have secured a position in a number of other departments. The rather harsh rule that once bumps are exercised they are irrevokable, and the failure of the union and plant representatives to explain to claimant that his bump into pre-rigger could not be given effect are labor issues for which no remedy exists in the workers' compensation laws. In addition, no evidence was presented as to whether claimant could have pursued a once-in-a-lifetime bump in the blade boning department prior to its closing in June of 1981. As such, we cannot conclude that claimant's shoulder ailment caused him to be incapacitated from performing his work as contemplated by section 85A.4.

Claimant correctly cites McSpadden v. Big Ben Coal Co., as identifying the criteria applicable in determining disability under section 85A.4 where the claimant proves he has been unable to continue working for reasons related to his disease. Those various criteria (age, experience, education, qualifications, ability to find suitable work), however, need not be considered at this time in light of the finding that claimant's disease did not cause him to be unable to work. Claimant was provided the opportunity to bump into a permanent position at Oscar Mayer following the close of the blade boning department. Again, his predicament at the time of the hearing of not having a permanent position at Oscar Mayer appears to be the result of labor/management confusion and did not stem from his shoulder ailment.

As concerns the deputy's finding of a five percent functional impairment, it is a misconception that a finding of functional impairment necessitates a finding of industrial disability. Furthermore, in an occupational disease claim it must be shown that the inability to perform his work or earn equal wages in other suitable employment is related to his disease. This is not the same as reduction in earning capacity which is applicable to an injury situation under chapter 85.

FINDINGS OF FACT

1. Claimant began working for Oscar Mayer & Co. in 1953.

2. Claimant's last 20 years with Oscar Mayer & Co. were in the boning department.

3. Claimant's job entailed making rapid and repetitive motions with his right arm and shoulder while cutting hams and loins.

4. Claimant was unable to continue his work in the boning department in January of 1981 due to shoulder pain.

5. Claimant experienced no shoulder pain while not working.

6. Claimant has an occupational disease caused by the rapid and repetitive motions with his right arm and shoulder.

7. Claimant was restricted from working from February 20, 1981 through March 30, 1981, and was released for one-handed duty on March 31, 1981.

8. Oscar Mayer & Co. closed the boning department on June 5, 1981.

9. Claimant met with an Oscar Mayer representative and a union official on April 13, 1981 to discuss claimant's options of retirement, layoff, or bumping another worker upon the closing of the boning department.

10. Claimant chose to bump into the pre-rigger department on May 14, 1981.

11. Claimant lacked sufficient seniority to effectuate a bump into pre-rigger.

12. Claimant had had sufficient seniority to bump into 36 jobs in nine different departments on May 14, 1981.

13. Claimant was denied a second opportunity to bump because other workers had already made their bump selections.

14. Claimant was capable of filling in for vacationing employees in several departments.

15. Claimant has not looked for employment outside of Oscar Mayer & Co.

16. Claimant has not been incapacitated from performing work in the beef packing industry due to his occupational disease.

CONCLUSION OF LAW

Claimant has not met the burden of establishing disablement as a result of his occupational disease.

WHEREFORE, the deputy's decision filed September 10, 1982 as modified by the rehearing decision filed September 22, 1982 is affirmed.

THEREFORE, it is ordered that defendant pay unto claimant weekly compensation at a rate to be agreed upon by the parties based on a gross weekly wage of three hundred ninety-nine dollars ($399) for the period from February 20, 1981 through March 30, 1981.

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

Signed and filed this 29th day of July, 1983.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES L. CARTER :
:
Claimant, :
:
vs. :
: File No. 669851
CONTINENTAL TELEPHONE CO., :
: A P P E A L
Employer, :
: D E C I S I O N
and :
:
THE TRAVELERS INSURANCE COMPANY, :
:
Insurance Carrier, :
Defendants. :

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision wherein the deputy found that claimant's action was barred by the statute of limitations (Iowa Code section 85.26).

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Harold Wright, Bob Edwards, Joe McCartney, Ed Hoover and Shelby Swain; claimant's exhibits 1 through 7; the depositions of claimant and Randall R. Maharry, M.D.; and the briefs and filings of all parties on appeal.

ISSUES

1. Whether claimant's action is barred by the statute of limitations.

2. Whether defendants chose to forego their statute of limitations defense.

3. Whether defendants are estopped from asserting the statute of limitations as a defense.

REVIEW OF THE EVIDENCE

At the time of the hearing the parties stipulated the applicable workers' compensation rate, in the event of an award, to be $187.55 per week. The parties also stipulated that the time off work was 34 days. (Transcript, p. 4)

Claimant originally began working for Continental Telephone Company in 1957, his employment interrupted only while he operated a service station for several years during the early 1960's. Claimant testified to having a history of skin irritations, dating back to 1964 when a rash appeared on his hands and feet. (Tr., pp. 8-12) Records from The Gilfillan Clinic in Bloomfield indicate that claimant was treated for fungus of the feet and hands in 1963. (Claimant's Exhibit 1)

In February of 1975 claimant's hands and feet broke out after being exposed to fumes emanating from batteries which he was moving. Claimant was instructed to keep away from batteries and other chemical fumes. (Tr., pp. 13-14) A first report of injury form dated February 25, 1979 indicates that claimant missed one day of work due to the irritations. (Cl. Ex. 1)

In July of 1977 claimant developed a skin rash while on a fishing vacation. Claimant recounted having been exposed to fishing boots, insecticide and car wax. Upon returning home, claimant was not permitted to return to work until three weeks later, after his skin condition had cleared up. (Tr., pp. 15-16) Anthony S. Owca, M.D., determined on August 3, 1977 that claimant suffered from contact dermatitis and dyshidrosis. Claimant was found to be allergic to merthiolate, anti-freeze, grease, oil, water solvent, zephiran and herbicides. (Cl. Ex. 1)

In September of 1978 claimant developed water blisters on his hands and feet. Claimant had at that time been working in the central equipment office where preventitive maintenance was performed on switches and relays. He began missing work on September 26, 1979 and was requested by Continental to visit the company doctor in October of 1978. (Tr., pp. 9-10, 17) Claimant was seen by H. W. Honeywell, D.O., on October 16, 1978. Dr. Honeywell diagnosed claimant as suffering from contact dermatitis, noting that the rash had spread all over claimant's body. Twice during the month of October 1978 Dr. Honeywell released claimant to return to work, the result on both occasions being that the skin rash became even more severe. (Cl. Ex. 1)

In a November 1, 1978 letter addressed to Continental, Dr. Honeywell stated that claimant's skin rash "is something that he has contacted while on the job." The doctor suggested that claimant not return to work until further testing could be carried out in an attempt to determine the etiology of claimant's condition. (Cl. Ex. 1) Claimant was referred to Harry B. Elmets, D.O., who performed a series of patch tests to determine the cause of claimant's reactions. Positive reactions were revealed for Balsum of Peru, Mercapto Mix, and M.B.T. (Cl. Ex. 1) In a letter dated December 29, 1978, Dr. Honeywell again wrote Continental concerning claimant's ability to return to work:

> This correspondence is to inform you of the status at this time of an employee of your company, James Carter. As stated in previous correspondence with you, Mr. Carter presented himself to our office with an allergic dermatitis which was determined as caused by a substance he came into contact with while on the job. Once the dermatitis had been controlled he was referred to a dermatologist in Des Moines, Iowa, Dr. Harry B. Elmets, to determine the cause of the reaction. Dr. Elmets findings are enclosed.
>
> Due to the patient's recurrence of the condition while on the job and after his return once again to the job, and the findings of Dr. Elmets, we feel Mr. Carter should not return to his previous job where he would once again come into contact with the same materials that caused the severe condition in the past. (Cl. Ex. 1)

Claimant testified that he was aware in 1978 of the correspondence from Dr. Honeywell, and had read each of the letters addressed to Continental. He further testified that he was transferred from the central equipment office to a job in the service center, despite there being no vacant positions in that department at the time. (Tr., pp. 55-56) A change of status report effective March 12, 1979 indicates that claimant was transferred to a clerk position in the service centers due to health reasons. (Cl. Ex. 2) Claimant had been earning $7.45 per hour prior to his transfer, but was paid $5.17 per hour for working in the service center. (Tr., p. 25)

Claimant testified that in August of 1980 an acquaintance informed him that he should have received workers' compensation benefits for the job related dermatitis he had contacted in 1978. Claimant inquired about a possible claim with Ed Hoover, a plant manager, who in turn contacted Joe McCartney, a safety and security coordinator at Continental. (Tr., pp. 34-37) McCartney contacted Shelby Swain, a representative of the insurance carrier, who indicated that he did not believe there to be a compensable claim under the facts as had been related to him. (Tr., pp. 117-118)

The opinion of Shelby Swain was relayed through McDonald to claimant in August of 1980. A meeting with these three men in attendance was held on January 23, 1981, at which time Swain reiterated his opinion that there was no compensable claim. (Tr., pp. 118-119) In a January 28, 1981 letter to Continental, Swain outlined his position as to why claimant did not have a compensable claim. In addition to discussing the potential claim's possible outcome based upon the merits, Swain also noted that there was possibly a statute of limitations problem. At one point in the letter, Swain wrote: "It is my opinion that either way the claimant is barred from now making a claim for Workers' Compensation benefits. I do not, however, want to make a decision to pay or not pay the claimant based on any statutes." (Cl. Ex. 7) Swain testified at the hearing that while he prefers not to have to invoke the statute of limitations in workers' compensation cases, he had no intention to waive such a defense. Swain also testified that at no time did he ever attempt to delay an answer to claimant in order to allow the statute to run. (Tr., pp. 119-124)

Claimant's original notice and petition was filed with the office of the Iowa Industrial Commissioner on July 17, 1981.

APPLICABLE LAW

Iowa Code section 85.26(1) provides, in part: "An original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed...."

In Orr v. Lewis Central School District, 288 N.W.2d 256, 261 (Iowa 1980) the court stated: "The limitation period under section 85.26, ... began to run when the employee discovered or in the exercise of reasonable diligence should have discovered the nature, seriousness and probable compensable character of the 'injury causing ... death or disability for which benefits [were] claimed'."

In Paveglio v. Firestone Tire & Rubber Co., 167 N.W.2d 636, 638 (Iowa 1969) the court set forth the four essential elements which must be proven in order to assert estoppel of the statute of limitations:

> "'A. Palse representation or concealment of material facts,
>
> "'B. Lack of knowledge of the true facts on the part of the person to whom the misrepresentation or concealment is made,
>
> "'C. Intent of the party making the representation that the party to whom it is made shall rely thereon,
>
> "'D. Reliance on such fraudulent statement or concealment by the party to whom made resulting in his prejudice.'"

A person cannot claim concealment if he has knowledge. Dierking v. Bellas Hess Superstore, 258 N.W.2d 312, 316 (Iowa 1977); Gruener v. City of Cedar Falls, 189 N.W.2d 577, 581 (Iowa 1971).

ANALYSIS

The first issue on appeal is whether claimant's action is barred by the statute of limitations. The initial determination to be made is at what point in time claimant should, in the exercise of reasonable diligence, have discovered the nature, seriousness, and probable compensable character of his dermatitis. Claimant's action must then have been filed within two years from that point in time. The record in this case indicates that claimant had such knowledge no later than March of 1979. Claimant admitted that he had read each of the letters sent to Continental from Dr. Honeywell prior to the time of his job transfer in March of 1979. While each of these letters to some extent implied that claimant's dermatitis was work related, the final letter (dated December 39, 1979) left no doubt as to Dr. Honeywell's opinion. That letter specifically stated that claimant's dermatitis was caused by a substance he came into contact with while on the job, and further, that claimant should not return to his previous job. The letter was not couched in indefinite language and was clearly sufficient to put the reader on notice of the nature, seriousness, and compensable character

of claimant's condition. Claimant had read Dr. Honeywell's letter at an undeterminable point prior to his transfer on March 12, 1979. Therefore, March 12, 1981 is the latest possible date by which claimant could commence his action. Because claimant filed his action on July 17, 1981, the action must be barred by the two year statute of limitations unless claimant can prove estoppel or waiver of the defense by defendants.

The second issue on appeal is whether defendants chose to forego their statute of limitations defense. Claimant contends that Shelby Swain, a representive of the insurance carrier, intended to waive the statute of limitations as a defense and to allow the outcome of claimant's case to be determined on it's merits. Review of the record does not support claimant's contention. The January 28, 1981 letter from Swain to Continental suggests that Swain did not believe that a claim by claimant could prevail. He did, at that time however, note that the statute of limitations could also operate to bar the claim completely. Swain's hearing testimony, taken as a whole seems to indicate that he did not consider the statute of limitations to be a real factor in this case because he did not believe that a valid claim would exist. At no point in the record, however, is there any clear evidence that Swain ever intended to waive the statute of limitations as a defense.

The final issue on appeal is whether defendants should be estopped from ascerting the statute of limitations as a defense. To successfully argue estoppel of the statute of limitations, claimant must prove all four elements thereof as set forth in Paveglio. The first of these elements is a false representation or concealment of material facts. Claimant attempts to argue that the concealment of material fact in this case was the failure of defendants to inform him of the existence and effect of the two year limitation period. It is believed, however, that "material facts" as intended in this first element goes to those facts which concern the merits of a case, and not to the existance of the very defense to which estoppel is being asserted. It has been established that claimant had access to the same medical correspondence and reports as did defendants. Nowhere in the record is there any indication whatsoever that defendants concealed any information from claimant as regarded his dermatitis and its possible connection to his work. The facts in defendants' possession do not appear to be any different from those which were in the possession of claimant. Therefore, no misrepresentation or concealment of material facts is found to exist and claimant's estoppel argument must fail.

FINDINGS OF FACT

1. Claimant contacted dermatitis in August or September of 1978.

2. Claimant's dermatitis may have been job related.

3. A medical report, dated December 29, 1978 and in the possession of defendants, indicated that claimant's dermatitis was related to his work and that claimant should not continue with his old job.

4. Claimant was transferred to a clerk job on March 12, 1979 for health reasons.

5. Claimant had read the December 29, 1978 medical report prior to his job transfer.

6. Claimant had become aware of the nature, seriousness, and probable compensable character of his condition no later than March 12, 1979.

7. Claimant filed his original notice and petition on July 19, 1981.

8. Defendants did not waive the statute of limitations as a defense.

9. The material facts in defendants' possession were not any different than those in claimant's possession.

10. Defendants did not attempt to misrepresent or conceal any material facts from claimant.

CONCLUSION OF LAW

Claimant's action is barred by the statute of limitations.

WHEREFORE, the deputy's decision filed December 16, 1982 is affirmed.

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

Costs of the arbitration hearing are charged to the defendants with the exception that each party is to pay its own costs for witnesses. Claimant is to pay the costs of the appeal.

Signed and filed this 11th day of August, 1983.

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

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAULINE E. CHRISTENSEN,	:	
Claimant,	:	File No. 468543
vs.	:	A P P E A L
UNIVERSITY OF NORTHERN IOWA,	:	D E C I S I O N
Employer,	:	
and	:	
STATE OF IOWA,	:	
Insurance Carrier, Defendants.	:	

By order of the industrial commissioner dated December 15, 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 review-reopening decision.

The record consists of the transcript of the hearing; claimant's exhibits 1 through 4, inclusive; defendants' exhibits A through C, inclusive, and the file from the prior hearing, all of which evidence was considered in reaching this final agency decision.

The record shows that a memorandum of agreement was filed April 15, 1977 and that an earlier review-reopening decision of February 2, 1979 awarded benefits for a running healing period. The review-reopening decision which is under review at this time awarded claimant benefits for permanent total disability under the provisions of §85.34(3) at the rate of $127.77 per week.

The outcome of this final agency decision will be the same as that reached by the hearing deputy.

ISSUE

Defendants state the appeal issue thus: "The Deputy Commissioner's finding that the claimant is permanently and totally disabled is not supported by substantial evidence or by the record when viewed as a whole and is erroneous as a matter of law."

REVIEW OF THE EVIDENCE

The review-reopening decision contains a good review of the evidence which is adopted herein. Some points of fact need to be emphasized with relation to the appeal point.

Claimant hurt herself at work when she slipped and fell on some ice on the employer's premises on February 9, 1977. As a result of that fall, she subsequently underwent three surgical procedures in her back: (1) On October 31, 1977, Dudley Noble, M.D., a qualified orthopedic surgeon, excised the fourth and fifth lumbar discs on the right side; (2) On November 15, 1978, John R. Walker, M.D., a qualified orthopedic surgeon did a hemilaminectomy on the right side of L4, a partial laminotomy of L3, a completion of a hemilaminectomy on the right side of L5, a facetectomy on the right side at L4/5, a facetectomy on the right side at L5/S1, a complete neurolysis of the right S1 nerve root, and excision of a scar on the entire lower cauda equina, a foraminotomy of the first sacral nerve root within the first intraneural canal which exists between L5 and the sacrum on the right and a combined, lateral fusion of McElroy and Hibbs including L4/5 and the sacrum; (3) and Dr. Walker performed an anterior diskectomy and fusion of Cloward on a herniated cervical disc at C6-7.

Dr. Walker testified that claimant's permanent partial impairment of the body as a whole is 38 percent, 28 percent of which would be from the low back and 10 percent for the cervical area. (Dep., 13) He also testified that he did not think claimant would ever return to her employment. (Dep., p. 16) Claimant was also examined by Martin F. Roach, M.D., a qualified orthopedic surgeon, who testified that claimant's permanent partial impairment to the low back was five percent and five percent to the cervical area for a total of 10 percent. In Dr. Roach's opinion claimant could perform light duty consisting of sedentary or office work. (Dep., pp. 10-11; also see report of May 5, 1982)

Claimant was seen by C. C. Burns, Jr., M.D., a psychiatrist, for "considerable secondary emotional symptomatology." (Report, March 29, 1982) The diagnosis was psychoneurosis with depressive and psychophysiological reactions and the impairment was stated in the report to be 20 to 45 percent. Claimant was also seen by Russell Noyes, M.D., a professor of psychiatry at the University of Iowa Hospitals and Clinics who stated in a report of August 16, 1982 that his diagnosis of claimant was depression associated with chronic pain. In his opinion claimant's permanent partial impairment was 0 to five percent.

Claimant was also seen by Donald E. Bolin, M.D., a gastroenterologist and internist because of her pain and nausea. Dr. Bolin testified that claimant's problem seemed to be depression and prescribed Elavil. He testified that he thought claimant's depression would improve but that it did not (Dep., p. 12) and would not (Dep., p. 15). He also testified that it was unlikely that claimant would ever return to useful employment (Dep., p. 16).

APPLICABLE LAW

Claimant's disability is industrial which is reduction of earning capacity and not mere functional impairment. Such disability includes considerations of functional impairment, age, education, qualifications, experience and claimant's

inability, because of the injury, to engage in employment for which she is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); 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).

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 comissioner 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).

See also Laywer & Higgs, Iowa Workers' Compensation - Law and Practice, §13-5.

ANALYSIS

Claimant is a person who, one hopes, could be rehabilitated, but that does not appear to be a very realistic outcome to this case. She is a woman who was very active before her injury and who was well educated (two years of college) and had a number of jobs including secretarial positions and some teaching at Hawkeye Tech. Contrasted to these advantages, claimant is in pain much of the time and her main treating physicians, Dr. Walker and Dr. Burns (whose testimony is taken over that of the examining physicians), assign her high permanent partial impairment ratings. Also, although Dr. Bolin's expertise is not in orthopedics or psychiatry, he did treat and his opinion that claimant will not return to work has some weight. It is clear, therefore, that the main component of claimant's industrial disability is pain and that the pain has in turn caused some psychological depression. Under the circumstances, it is not realistic to assume that claimant will return to work. The award of October 11, 1983 will therefore stand.

FINDINGS OF FACT

1. That claimant is a high school graduate and has two years of college at the University of Northern Iowa.

2. That claimant was 52 years of age at the time of the hearing.

3. That claimant has had experience in clerical, secretarial, and bookkeeping work and has taught courses in office work at Hawkeye Tech.

4. That on February 9, 1977 the claimant was an employee of defendant.

5. That on February 9, 1977 the claimant sustained a personal injury which arose out of and in the course of her employment.

6. That since February 9, 1977 the claimant has undergone three surgical procedures, including a cervical fusion and two low back procedures, one of which is a fusion.

7. That the claimant has, as a result of the injury and the subsequent surgeries, remained in a state of continuous pain since the operations in question.

8. That prior to the injury date in question claimant was physically active and able to perform all of her work functions without restriction or limitation.

9. That post-injury the claimant, due to the injury, has terminated the extensive physical activity she once performed.

10. That the claimant is unable to sit or stand for any extended period of time.

11. That it is unlikely that claimant will ever work again.

CONCLUSIONS OF LAW

Claimant sustained an injury which arose out of and in the course of her employment on February 9, 1977 and which entitled her to benefits under §85.34(3) to be paid during the period of the employee's disability.

ORDER

WHEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant under the provisions of §85.34(3), The Code, during the period of her disability at the rate of one hundred twenty-seven and 77/100 dollars ($127.77) per week, accrued payments to be made in a lump sum together with statutory interest at the rate of ten (10) percent per year from the date due, with defendants receiving credit for all payments heretofore made.

Defendants are ordered to file a final report upon completion of payments.

Defendants are further ordered to pay Dr. Walker's medical bill of twenty dollars ($20).

Costs of this action are taxed against defendants.

Signed and filed at Des Moines, Iowa this 12th day of March, 1984.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT D. CIEMINSKI, Claimant, vs. RAGAN PLUMBING & HEATING, Employer, and IOWA MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 669545 A R B I T R A T I O N D E C I S I O N

INTRODUCTION

This matter came on for hearing at the Scott County Courthouse in Davenport on April 6, 1983 at which time it was considered fully submitted.

A review of the commissioner's file reveals that an employer's first report of injury was filed on June 11, 1981. The record consists of the testimony of the claimant, claimant's exhibits 1 through 7, and defendants' exhibits A and B.

ISSUES

The issues for resolution are:

1) Whether claimant sustained an injury arising out of and in the course of employment;

2) The causal connection between the injury and the disability; and

3) The nature and extent of disability.

STATEMENT OF THE EVIDENCE

At the commencement of the hearing the parties stipulated that claimant sustained an injury arising out of and in the course of his employment on September 13, 1979 and that claimant was paid healing period through February 10, 1983 at the rate of $330.66. The parties indicated that all medical expenses have been paid and that the rate of permanent partial disability compensation is $324.00 per week. Therefore, the issues for resolution are causal connection and the nature and extent of permanent partial disability.

Claimant, age 46, is presently unemployed. Claimant was employed by defendant employer on September 13, 1979. Defendants had a maintenance contract with Chemplex, the site at which claimant was working when he was hurt. Claimant testified that he was working in a furnace repairing insulation when he was struck on the right shoulder. Although claimant continued to work for two years his symptoms got worse and worse. Claimant initially was treated by a Dr. Ives, who referred claimant to Jay Ginther, M.D., a Clinton orthopedist. Claimant saw Dr. Ginther on February 18, 1980. Physical examination revealed tenderness on directly over the A.C. joint on the right which was enlarged. The tenderness was most pronounced over the dorsal aspect of the joint rather than the anterior aspect. There was pain on abduction and extension of the arm, and also on flexion of the arm and adduction across the body. Dr. Ginther undertook treatment of the claimant and treatment consisted of injections. In July 1981 Dr. Ginther performed a rotator cuff tear and a resection of the distal clavicle. An exercise program was initiated. Claimant had an extensive healing period, terminating on February 10, 1983. He was unemployed at the time of hearing. He testified that he sought to be hired by defendant in May 1982 but that no one was being hired back by the employer.

Claimant was examind by Leo J. Miltner, M.D., on January 11, 1983. The following is an excellent recapitulation of Dr. Miltner's findings:

> Measurements of right biceps 13 1/2" and left 13". Upper forearms 12" right and 11 1/2" on left. Patient is right handed - states he has been working out doing exercises right arm, on a machine since 1982, physiotherapy with weights for right upper extremity since shortly after surgery. Uses an exercise machine at Jane Lamb Hospital. Right palm measures 9 1/2" and left 9". There is a 9" S-shaped scar, well healed, over the anterior right shoulder area where the surgical work was done. With hands clasped behind neck, patient's right shoulder shows approximately 15-18° lack of full external rotation compared with the left one. With hands in small of back, the right shoulder also lacks about 18° of internal rotation. Abduction of right shoulder is good but lacks maybe 15° of full abduction. On making a windmill with right shoulder, joint moves quite freely with only a slight minimal

crepitation. Forward flexion across the chest is very good. Minimal limitation 5-10° right shoulder. Patient says feeling sensation is normal with an occasional numb feeling right hand - rare occasions.

Dr. Miltner felt that there was "a minimum of twenty percent and a maximum of twenty-five percent permanent partial disability of this man's right shoulder."

Claimant underwent Cybes testing on February 1, 1983. Dr. Ginther described this test as studying flexion, extension, internal rotation, external rotation, abduction and adduction at three different speeds and documents the raw data of strength. The test compares the strength of the right shoulder as a percentage of the strength of the left shoulder. This test (with its eighteen sets of data) indicates that the strength of claimant's right shoulder strength was seventy-five percent of that found on the left. Dr. Ginther then made the following statement:

Weighting for those motions which are more useful in his occupation, I would estimate that his strength in his right shoulder is 70 to 75 percent that of the strength in the left shoulder. The decrease of strength of 25 to 30 percent along with a 20 to 25 percent impairment based on range of motion, using the combined values guide technique, one comes up with an impairment of 40 to 45 percent for the right shoulder.

Dr. Miltner discredits the test because of its subjectivity.

Claimant testified that he was employed as a pipe fitter. At the time of the injury, claimant was working as a boilermaker. He has been a boilermaker for fifteen years and is a foreman. He has a ninth grade education. He first worked for a railroad before becoming employed by John Deere as a welder. He became a boilermaker and was a foreman. Claimant indicates that a lot of his work is overhead. It is apparent that claimant is a "working foreman," although he can delegate a certain amount of his work.

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 September 13, 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).

3. The claimant has the burden of proving by a preponderance of the evidence that the injury of September 13, 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).

4. The case of Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949) concerned a shoulder injury. The case held that the shoulder injury was to the body as a whole.

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).

ANALYSIS

Based on the principles enunciated and the stipulation of counsel, it will be concluded that claimant sustained an injury to the body as a whole which resulted in permanent disability to the body as a whole.

The sole issue to be decided is the extent of disability. Inasmuch as the disability is to the body as a whole, claimant's age, educaton, experience and loss of earning capacity are factors to be considered. Claimant is fortunate that he has the ability to be a foreman and delegate work if possible. However, even if he is employed, claimant must still use a ladder and use his arms in pursuing his trade. Claimant is at a point in his life where career change is difficult. Claimant expressed an interest in starting his own business. Although there is some dispute as to the extent of impairment, the record fairly indicates that because of the injury, claimant will have difficulty performing work as a boilermaker. Rotator cuff injuries have severe consequences for manual laborers. Considering this, in light of the elements of industrial disability, it is determined that claimant is disabled to the extent of thirty-five percent of the body as a whole.

FINDINGS OF FACT

1. Claimant was employed by defendant employer on September 13, 1979.

2. The claimant was hurt while working on September 13, 1979.

3. Claimant sustained permanent disability because of the injury of September 13, 1979 to the extent of thirty-five percent (35%) of the body as a whole.

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 September 13, 1979.

3. Defendants will be ordered to pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability compensation at the rate of three hundred twenty-four dollars ($324.00) per week.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability compensation at the rate of three hundred twenty-four dollars ($324.00) per week.

Costs of this proceeding are taxed to defendants.

Interest shall accrue on this award from the date of this decision.

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

Signed and filed this 31st day of August, 1983.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

NANCY CLAY, Claimant, vs. WOODWARD STATE HOSPITAL, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	FILE NO. 692315 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 the claimant, Nancy Clay, against her employer, Woodward State Hospital, and its insurance carrier, the State of Iowa, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained February 8, 1980.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Iowa Industrial Commissioner's Office in Des Moines, Iowa April 11, 1983. But for briefs of both parties to be filed by April 20, 1984 and an itemization of medical expenses set forth in Exhibit 6, the record was considered fully submitted at that time. Claimant filed a timely brief; defendants did not.

A review of the industrial commissioner's file reveals that a first report of injury was filed February 12, 1982.

The record in this case consists of the testimony of claimant and of claimant's exhibits 1 through 6.

ISSUES

The issues to be determined are:

1. Whether there is a causal relationship between claimant's injury and her disability.

2. Whether claimant is entitled to benefits and the nature and extent of her entitlement.

3. Whether claimant is entitled to payment of certain medical expenses under section 85.27.

At hearing, claimant moved to amend her petition to allege entitlement to a penalty under section 86.13. The amendment is denied. Claimant, under the statute, may begin a seperation action for such penalty, however.

REVIEW OF THE EVIDENCE

At hearing, the parties agreed that the applicable rate of weekly compensation is $135.18 and that medical costs are fair and reasonable for those services rendered.

Claimant, Nancy Clay, testified in her own behalf. Claimant is 37 years old and single with a 16 year old dependent son. Claimant had poliomyelitis as an infant and walks with a decided limp though she states she has between 50 to 75 percent use of her legs. Her right leg is shorter and smaller than her left leg. At hearing, claimant was using crutches. She reported she had broken her ankle, but that she otherwise does not use crutches.

Claimant is a high school graduate who completed nine months of a twelve month secretarial course at the American Institute of Business. She is currently a merit secretary 2 employed by the Iowa Department of Human Services but is "on loan" to the governor's office. Claimant characterized her current duties as more administrative than simply clerical. Among other things, claimant assists citizens seeking the governor's help with personal problems. She contacts these persons and agencies and individuals who might assist them by telephone and by letter. She composes letters for the governor's signature. She also simply types. On cross-examination, claimant stated 25 percent of her time has been devoted to typing and that, as of April 10, 1984, 40 percent of her time would be so used until October 1984. Claimant apparently will be assisting a second secretary who has fallen behind in her duties. Claimant earns $16,400 per year currently. This includes $61.60 of biweekly extra duty pay which she receives because she is assigned to the governor's office. Claimant's base pay is $7.91 per hour. Claimant's prior work history includes work as a legal secretary and work as a general secretary at Drake University, the University of Illinois, Dog N Suds, Massey Ferguson, and the Woodward State Hospital. Claimant earned approximately $17,000 at Massey Ferguson. She left that position and went to work at the Woodward State Hospital in September 1978. Claimant earned between $5.00 and $6.00 per hour or $10,900 per year at Woodward. Claimant was injured there Friday, February 8, 1980.

Claimant reports that, on her injury date, she was walking from her office to a second office in order to speak with a co-worker. An individual stepped from a third office and tripped claimant. Claimant's right leg gave out and she fell to the floor on all fours. Claimant reports she returned to her office after the incident. Her leg hurt and she had a headache. She attributed the latter to tension from trying to deal with the incident. Claimant could not understand why someone would trip an individual with an obvious physical impairment. Claimant reported the incident occurred during her normal work hours while she was performing her normal work duties. Horse play was not involved.

Claimant experienced severe headaches during the weekend. She attributed these to an influenza and returned to work the following Monday. Claimant's right arm began to go numb. Typing aggravated this problem since claimant had to turn her head and neck constantly. Claimant experienced constant neck pain. Aspirin did not relieve her symptoms.

Claimant completed an accident report some days following her injury. She subsequently visited J. I. Royer, D.O., and Daniel J. Callan, D.O., her regular family physicians. These doctors performed osteopathic manipulation for relief of pain. Claimant reports she saw Dr. Callan more frequently. Claimant has been directed to take aspirin every two hours for relief of her symptoms. She reported she had severe, sharp, constant neck pain for two years. She now has pain at the base of her neck. She treats this with heat via a hot water bottle. Physical therapy has not been prescribed.

Claimant reports she consulted with Clifford Clay, D.O., her ex father-in-law, a number of times. Claimant sought referral to a specialist when her symptoms did not alleviate. She was directed to Thomas B. Summers, M.D. He advised that the aspirin therapy and manipulation continue. Claimant saw John L. Beattie, M.D., January 29, 1983 to ascertain whether her neck injury resulted from polio. Claimant reports x-rays taken showed the effects of her infantile polio "stopped below her shoulder blades." Claimant saw Thomas A. Carlstrom, M.D., apparently at defendants' direction. She reports he performed a ten minute examination and ordered no additional x-rays. Claimant saw a chiropractor in November 1983. She reports he refused to manipulate her neck. She did not return since she felt she could perform moist heat therapy on her own. Sinesio Misol, M.D., is treating claimant for her broken ankle. Claimant has no medical appointments for treatment of her neck now scheduled.

Claimant states her conditon has improved since her initial injury. Her pain is neither as severe nor as constant. She does not now have arm pain. She sometimes has weeks without excruciating neck pain. Claimant always experiences pain on turning her neck, however. Claimant states her aspirin therapy upsets her stomach and, therefore, she sometimes does not take the medication. Claimant has missed no work because of her injury. She reports that she can't lift groceries; she cannot roll her head over in bed; she cannot turn her neck but must turn her whole body. This fact makes both driving and typing more difficult.

Claimant reports the State withdrew authorization for medical treatment on the grounds that her problems resulted from the effects of polio. Claimant's Blue Cross and Blue Shield subsequently, paid a portion of Dr. Beattie's bill. Defendants apparently paid all earlier medical costs as well as the costs of evaluation by Doctors Summers and Carlstrom.

On cross-examination, it was established that, were claimant to leave the governor's office, her salary would decrease to $7.14 per hour. Claimant's salary decreased from $17,000 to $10,900 when she left Massey Ferguson and accepted her position at Woodward. Claimant reports she had had more responsibilities at Massey Ferguson. Claimant expressed her belief that her injury would not limit her ability to perform her previous duties with Massey Ferguson. Claimant states her current job requires her to be up and about.

Claimant asserts she first realized her neck pain could be permanent after her consultations wth Doctors Callon, Beattie, and Summers. Claimant reports her doctors have told her the injury may later develop into arthritis and prevent her from working. Claimant acknowledges her symptoms have alleviated rather than worsened since her injury, however. Claimant reports that if she left the governor's office she would need to find another job. She explains that merit protection only means the State will assist an employee in finding a position within state government but does not guarantee other employment.

Claimant clarified that she personally has only paid those medical expenses neither within her health insurance benefit coverage nor paid by the State. Defendants affirmatively allege that the State has paid Dr. Summers and Radiology P.C. in full. They allege the State did not pay amounts totalling $454.52 for Doctors Beattie, Callan and Royer's services.

Claimant's exhibit 1 is a medical report of Daniel J. Callan, D.O. A letter report of December 7, 1982 states:

> I have examined Ms. Clay supplementally on 10/15/81, 11/9/81, 11/23/81, and 12/13/81, for stiff, sore neck and headache. She had the same physical findings of cervical myositis and myospasm. She was treated with osteopathic manipulation therapy (OMT), wet heat and aspirin with some relief.
>
> My last contact, exam and treatment of Ms. Clay, was March 13, 1982. At that time she had changed jobs and was still having complaints of stiff, sore neck with cephalgia. My findings included myositis and spasm of cervical and scalp muscles, cervical lesion at C2 and C3. Treatment included OMT, warm moist compresses and aspirin.
>
> My conclusion remains, that, Ms. Clay continues to have cervical strain, chronic, leading to myositis, myospasm and cephalgia. I still feel this was caused by a work related injury and will continue to affect Ms. Clay permanently.

A letter report of October 13, 1981 recites the following history:

> The following is the medical history of Nancy Clay involving an incident at work on 2/8/80 in which she was apparently tripped and was unable to catch herself and her head hit the floor causing an acute cervical injury of the whiplash kind. It is felt that the injury is not related to her post polio deficiencies in her legs.

Claimant's exhibit 2 is a copy of a surgeon's report of J. I. Royer, D.O. While poorly reproduced, the report apparently states as an accurate description of nature and extent of injury and an objective finding that claimant has early degenerative cervical spondylosis.

Claimant's exhibit 3 are the medical reports of Thomas B. Summers, Dr. Summers' report states the following:

> CHIEF COMPLAINT: " I fell. And something in my neck hurts."
>
> PRESENT MEDICAL ILLNESS: Mrs. Clay states that she suffered accidental injury while at work at the Woodward State Hospital and School on February 8, 1980. Mrs. Clay states that she is employed in a secretarial capacity in the institution. She was walking across the hall. A fellow worker stuck out her foot and tripped Mrs. Clay. This was done intentionally but only as a 'joke', so to speak. Mrs. Clay states that at the time she 'just flipped'.
>
> Mrs. Clay attempted to catch herself with her outstretched hand. Her left knee struck the floor forcibly. She states that she fell 'so hard' that she was jarred. Not until the next morning did she have any headache.
>
> Mrs. Clay states that her head ached all over and more so toward the front.
>
> Mrs. Clay states that at the time she thought it was 'one of those things' and that she was going to get better. She elected to institute treatment using Minit Rub and medications such as aspirin and Tylenol.
>
> Mrs. Clay states that two weeks ago she placed herself under the care of an osteopathic physician, Dr. J. I. Royer, in Woodward, Iowa. She states that Dr. Royer started manipulation treatment. He also prescribed medication for muscle relaxation.
>
> Mrs. Clay states that the pain and discomfort is present in the upper neck and the back of the head under the hairline on the right side. The longer the pain continues, the more it extends into the right shoulder and into the right hand....
>
> LABORATORY STUDIES: Following examination of Mrs. Clay here in the office, arrangements were made for her to undergo diagnostic investigation in the form of x-ray examination of the cervical spine and right shoulder on an out-patient basis in the offices of Radiology, P.C. here in this city. The interpretation of the radiographic films read as follows:
>
> > "CERVICAL SPINE: Films of the cervical spine including flexion, extension lateral views were obtained. These show normal vertebral body height. There is some narrowing at the C5-6 interspace with early anterior and posterior osteophytic spurring. There is probably some spurring at the anklovertebral joints bilaterally here, but it is not far advanced. Otherwise the disc spaces are normal and no additional abnormalities are supected.
> >
> > RIGHT SHOULDER: The bones, joints and soft tissues are normal.
> >
> > IMPRESSION: Early degenerative cervical spondylosis."
>
> CLINICAL IMPRESSION: Suspected extracranial myogenic headache disorder.

> At this time, I would anticipate complete and uneventful recovery on the part of Mrs. Clay.

Claimant's exhibit 4 is the medical reports of John L. Beattie, M.D. An initial report of February 3, 1983 states:

> I have just examined the above 36 year old white female 1-29-83. A history she tripped at work at the Woodward State Hospital approximately three years ago. This injury occurred February 8, 1980. Nancy was tripped by another employee walking into an office at the state hospital from a hallway. The right leg was knocked out from under her. She fell into a cabinet and into the desk area onto her knees. After the fall she got back up and resumed her activities. The evening of the injury she developed a rather severe pain in her cervical region particularly in the right upper area. This was associated with a very severe headache. These headaches persisted and became more severe....
>
> X-rays of the cervical and thoracic spine were obtained. The report from Dr. Faltas is enclosed. Review of her x-ray reports reveals osteoarthritis of the cervical spine with narrowing of the intervertebral disc spaces of C5/C-6, which is certainly consistent with the x-ray taken by Dr. Summers, which also had a similar finding and the impression of early degenerative cervical spondylosis. Dr. Summers also suspicioned an extracranial myogenic headache disorder, which I call a muscle tension type headache.
>
> More careful examination was then done of the cervical spine and upper thoracic area. There is no measureable or demonstrable loss of motion of the cervical spine in either flexion or extension, lateral bending, or rotation. There is tenderness to palpation in the right upper cervical region in the area where the occipital nerve emerges from the skull. There is no evidence of any atrophy or any sequelae of the poliomyelitis in the upper extremities. Examination of the back does show a compensatory scoliosis, which I am certain is on the basis of her poliomyelitis. There is a definite trigger point in the right upper cervical region in the region of the occipital nerve. This sometimes originates the muscle tension type headaches which radiate over the scalp and to the forehead region.
>
> In view of the continued symptomatology and the degenerative changes present in the cervical spine, we must consider the possibility that this lady may have further cervical disc problems as she grows older. These symptoms are certainly related to and aggravated by her injury of February 8, 1980. This may better explain the pain radiating into her upper extremity, which is also associated with the tension headache. It is my opinion that this patient has a chronic disability from her cervical injury. I feel that her headaches are permanent in nature and will probably continue for an indeterminate length of time. She will probably need medications for the rest of her life to control these symptoms that have developed from this accident. One must always consider that her symptoms suggestive of cervical disc disease may worsen. The possibility of a neurosurgery procedure, such as an anterior cervical fusion, may be needed in the future.

The enclosed x-ray report also indicated a "[q]uestionable narrowing of the right C-5/C-6 intervertebral foramina." In a subsequent letter of October 10, 1983, the doctor described claimant's impairment as "mediocre to moderate" and opined she has a 30 percent permanent partial impairment.

Claimant's exhibit 5 is the medical report of Thomas A. Carlstrom, M.D., of November 19, 1983. The report states claimant has full range of motion of the neck with a fair amount of tenderness at the nuchal line, predominantly on the right. Spurling's and traction signs were negative as was Lhermitte's. Neurologic exam of the upper extremities was normal. The doctor opined that claimant is suffering from a chronic myofascial strain and that she has a permanent partial disability of two to three percent of the body as a whole as a result of her fall.

Claimant's exhibit 6 is a submission of medical statements. A statement of Dr. Callan indicates a charge of $17.00 of which claimant paid $4.40 and her Blue Cross and Blue Shield paid $12.60. A statement in the amount of $50.00 from Dr. Beattie is included. Charges of Doctors Royer and Callan through March 13, 1982 are stated as $570.12. An ordered clarification of medical expenses shows claimant's unreimbursed medical expenses for the Doctors Royer, Callan and Beattie total $233.84; payments by the State of Iowa to Doctors Royer and Callan total $187.60, and payments to Doctors Royer and Callan by Blue Shield total $198.02.

APPLICABLE LAW AND ANALYSIS

We first must decide whether a causal relationship exists between claimant's current disability and her injury of February 8, 1980.

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 8, 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).

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).

Claimant has established a causal relationship exists between her injury and her current chronic cervical strain. Both formal findings and the medical histories in evidence relate claimant's current problems to her fall on February 8, 1980. Claimant's headaches, numbness, and limitations on neck motion only arose following her injury. Evidence presented does not suggest claimant's condition resulted from the preexisting effects of her infantile poliomyelitis or from any source other than her fall. Indeed, Doctors Callon and Beattie expressly state claimant's cervical problems do not result from her poliomyelitis. Thus, claimant has carried her burden of showing a causal relationship between her injury and her current disability.

The nature and extent of claimant's benefit entitlement remains at issue. Healing period benefits are not at issue.

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).

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, 902 (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 a factor weighed in determining industrial disability. The latter can rarely be found without the former. The degree of industrial disability is not necessarily proportional to the degreee of functional impairment, however.

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 correlate 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, II Iowa Industrial Commissioner Report 39 (1981); Enstrom v. Iowa Public Services Company, II Iowa Industrial Commissioner Report 142 (1981); Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981).

Many factors enter into determination of claimant's industrial disability. Claimant is 37 years old; she is intelligent; she has some post high school training. Claimant has a responsible position in which she earns more than she earned on her injury date. Claimant's current position is temporary in that it is of a political nature and offers no assurances of continued, long-term employment. Claimant has only limited employment protection as an employee under the state's merit system. Claimant's positions, while involving other duties reguiring greater intellectual acumen, have been predominantly of a clerical nature. She has spent 25 to 40 percent or more of her time using a word processor or typewriter. Claimant cannot turn her neck; she must shift her full trunk in order to perform the physical movements required as a typist or word processor. Dr. Beattie described claimant's disability as mediocre to moderate and assigned claimant a 30 percent functional impairment rating. Dr. Carlstrom assigned claimant a two to three percent functional impairment rating. Dr. Summers opined claimant would make a full and uneventful recovery from her injury. Dr. Beattie opined claimant has a chronic cervical disability and could have greater problems as a result of her injury as she grows older. Claimant admits her symptoms have lessened since her injury, however.

Claimant is well motivated and shows a well-established pattern of overcoming potentially disabling handicaps. This has undoubtedly been a factor in her remaining employed throughout the time following her injury. However, one questions whether claimant could easily acquire future employment should her duties with the governor's office end and should she choose not to receive further formal training which would assist her in becoming less dependent on her clerical skills for employment. Her cervical immobility does impair her ability to perform

manuevers basic to her duties as a secretary. Claimant does not have the formal training generally required of persons performing nonclerical duties such as she now performs. This may well be an employment handicap for her. Claimant likely would need to search harder and more persistently than a noninjured individual for an employer who is sympathetic to her condition and willing to accomodate any difficulties created by her cervical disability as well as those created by her prior handicap. Thus, claimant's loss of earning capacity is greater than the bare fact of her current wages would indicate. For this reason, claimant is awarded permanent partial disability at the rate of 12.5 percent. The award does not consider the possiblity that claimant's problems may increase. Should this happen within the statutory period, claimant would be entitled to review of this award.

Claimant has established she is entitled to payment of her unpaid medical expenses under section 85.27. These are causally related to her injury and her disability. Defendants are entitled to a credit for those medical payments made under claimant's Blue Cross and Blue Shield plan under section 85.38. Claimant is entitled to be reimbursed for those amounts she has actually paid.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant injured herself when she was tripped by a co-worker and fell while working at the Woodward State Hospital February 8, 1980.

Claimant's injury initially manifested itself through numbness in her arms, neck pain, headaches, and cervical immobility.

Claimant has been treated with moist heat and aspirin therapy. Her arm numbness and headaches have largely subsided. She continues to experience intermittent neck pain and constant cervical immobility.

Claimant had poliomyelitis as an infant. She currently walks with a limp. Claimant's disabling cervical condition resulted from her work injury and not from her poliomyelitis.

Claimant is a high school graduate who has some formal post-secondary school training. Her work history is that of a secretary.

Approximately forty percent (40%) of claimant's current work time is spent typing or using a word processor. Claimant's cervical immobility requires her to move her whole trunk in performing manuevers necessary to type or text process.

Claimant has also successfully performed job duties requiring greater intellectual acumen. She currently aids the governor's office in assisting citizens; her duties include composing letters for the governor's signature. Claimant's lack of formal education may make transfer of these job skill more difficult.

Claimant earns $7.91 per hour in the governor's office; were she working elsewhere at her merit employment level, she would earn $7.14 per hour.

Claimant is on loan from the Department of Human Services to the governor's office. Her position with the governor's office is of indefinite duration.

Dr. Carlstrom has assigned claimant a functional impairment rating of two to three percent (2-3%); Dr. Beattie has assigned claimant a functional impairment rating of thirty percent (30%).

Claimant has a twelve point five percent (12.5%) industrial disability as a result of her work injury.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established that her injury of February 8, 1980 is the cause of the disability on which she bases her claim.

Claimant is entitled to permanent partial disability resulting from her injury of February 8, 1980 of twelve point five percent (12.5%).

Claimant is entitled to payment of her unreimbursed medical expenses from Doctors Royer, Callan, and Beattie in the amount of two hundred thirty-three and 84/100 dollars ($233.84).

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability benefits for sixty-two point five (62.5) weeks at the stipulated rate of one hundred thirty-five and 18/100 dollars (135.18).

Defendants pay accrued amounts in a lump sum.

Defendants pay claimant's unreimbursed medical expenses from Doctors Royer, Callan and Beattie in the amount of two hundred thirty-three and 84/100 dollars ($233.84).

Defendants pay interest pursuant to Iowa Code section 85.30 as amended.

Defendants pay costs pursuant to Industrial Commisioner Rule 500-4.33.

Defendants file a final report when this award is paid.

Signed and filed this 30 day of May, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JERROLD K. CLEMONS, Claimant,	:	File No. 724418
vs.	:	A R B I T R A T I O N
W. G. JAQUES COMPANY, Employer,	:	D E C I S I O N
and	:	
EMPLOYERS MUTUAL COMPANIES, Insurance Carrier, Defendants.	:	

INTRODUCTION

This matter came on for hearing on June 24, 1983 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 February 23, 1983. The record consists of the briefs and arguments of counsel; the depositions of William G. Jaques and Stephen Bradley Jaques, along with exhibits; and all answers to interrogatories.

ISSUE

The sole issue for resolution at present is whether jurisdicti of this case is had by this agency.

REVIEW OF RELEVANT FACTS

The facts in this case are rather straightforward. Claimant was and is domiciled in Missouri. Defendant employer has its business office in Des Moines, although much, if not most, of its business was done outside the state of Iowa.

William Jaques testified that he is president of W. G. Jaques Company. The firm is a geotechnical contractor and as such deals with soils, soil identification and modification. The chief concern of the business is soil modification and improvement which facilitates structural and construction projects. A fair summary would indicate that the company does business in from 25 to 30 states. More income was generated from business outside Iowa than within. William testified that there was a small cadre of permanent employees and that more employees were hired and discharged depending on work contracted. In the fall of 1981 William contacted claimant telephonically at claimant's home in Bismarck, Missouri. At this time William offered claimant a job in Weir, Kansas. The work relationship, according to William, was not to be permanent. Claimant was to be paid $10.00 per hour plus a per diem and hotel expenses. The phone call was initiated in Des Moines. Claimant was hired on the recommendation of John Reece, another contractor, and claimant replaced an employee named Baker. Claimant went to Kansas, and completed the job there, and then went to Mississippi to complete another job for the employer. After the Mississippi job was completed, William testified that claimant arrived in Des Moines "unannounced." William testified that a conversation took place during the claimant's visit that the claimant's employment was not to be considered permanent. A fair summary of William's testimony indicates that he never considered claimant to be a permanent employee. Claimant then returned to Missouri, went to Illinois and returned to his employment with John Reece, working until about February 1, 1982. During this period of time, claimant was asked by Stephen Jaques to work for Jaques but claimant continued to work for Reece.

In April 1982 Stephen Jaques, William's son, hired claimant to work for Jaques on a Tulsa, Oklahoma project. The job was interrupted by flooding in May 1982 and claimant then worked in Des Moines on grouting projects. Claimant returned to Missouri and collected unemployment. He returned to work in Tulsa on July 19, 1982 after being called by the employer's office in Des Moines. Claimant then sustained the alleged injury for which he now seeks compensation. Claimant has been receiving compensation pursuant to the Missouri Act.

APPLICABLE LAW

1. Section 85.71, Code of Iowa, states:

If an employee, while working outside the territorial limits of this state, suffers an injury on account of which he, or in the event of his death, his dependents, would have been entitled to the benefits provided by this chapter had such injury occurred within this state, such employee, or in the event of his death resulting from such injury, his dependents, shall be entitled to the benefits provided by this chapter, provided that at the time of such injury:

1. His employment is principally localized in this state, that is, his employer has a place of business in this or some other state and he regularly works in this state, or if he is domiciled in this state, or

2. He is working under a contract of hire made in this state in employment not principally localized in any state, or

3. He is working under a contract of hire made in this state in employment principally localized in another state, whose workers' compensation law is not applicable to his employer, or

4. He is working under a contract of hire made in this state for employment outside the United States.

2. Both parties have submitted excellent briefs on this case. Both parties have cited Haverly v. Union Construction Co., 236 Iowa 278, 18 N.W.2d 629 (1945). Since the submission of the instant case, the court has published George H. Wentz Inc. v. Sabasta, 337 N.W.2d 495 (Iowa 1983).

3. In Wentz, the court made specific reference to the case of Joseph L. Wilmotte & Co. v. Rosenman Bros., 258 N.W.2d 317 (Iowa 1977) wherein the court applied the "most significant relationship" test. In Wentz, the court stated that the place of contract becomes significant only when the employment is not principally localized in any state, the law of the state where the employment is principally localized is not applicable to the employer, or the unemployment is outside the United States. 337 N.W.2d at 500.

4. Generally, the place a contract is formed is where the meeting of minds occurs, or where the final act necessary to form a binding contract takes place. Burch Manufacturing Co. v. McKee, 231 Iowa 730, 735, 2 N.W.2d 98, 101 (1942), cited in Wentz. This is the lex loci contractus theory. See County Savings Bank v. Jacobson, 202 Iowa 1263, 211 N.W. 864 (1927).

5. Where the offeror and acceptor of a contract speak by telephone and do consumate a contract has not been dealt with by the Iowa court. The following quote from Vagni v. Trend/Roxbury Industries, Inc., 34th Biennial Report of the Industrial Commissioner 337 (October 31, 1979) states:

> Although the Iowa state courts have not dealt directly with the question of acceptance by telephone, there is ample authority to find that a contract is made at the place from which the accepting party speaks. (See 17A C.J.S. Contracts, §356; 17 Am. Jur.2d, Contracts, §53.) This position is analogous to the position the Iowa courts have taken in regards to acceptance of an offer by mail.
>
> It is elemenatry that an offer communicated through the mail cannot constitute a contract until it is accepted. But, when such offer is accepted and the acceptance thereof, or a letter containing the acceptance, is placed in the mail, properly stamped and directed to the one making the offer at his address, the contract as specified in the offer is then complete. In that event, the contract is made where the offer is accepted.
>
> International Transportation Ass'n. v. Des Moines Morris Plan Co., 245 N.W.244, 246 (Iowa 1932).

The federal courts have also taken the position that when a contract is accepted on the telephone, the contract is made at the place from which the accepting party speaks. In Standard Oil Co. v. Lyons, 130 F.2d 965 (8th Cir. 1942), the court of appeals found that recovery may be had under the Workmen's Compensation Act of Iowa even though the injury occurred outside of Iowa. There, an illinois employer called an Iowa resident over the telephone to offer him employment. The court stated that:

> If by this conversation Bergsted simply made an offer to give decedent employment upon his reporting for work in Illinois, the offer would be accepted by the act of reporting for work and the contract would be an Illinois contract because that would be the place where the final act necessary to consummate the contract was performed....If, however, there was a promise for a promise, an acceptance by the offeree of the offer of employment, the contract was entered into at once....In such circumstances, the place of making the contract would be the place where the offeree used the telephone. Lyons, supra, at 968.

ANALYSIS

Based upon the principles enunciated it will be concluded that this agency has jurisdiction of the subject matter. The contract of hire was made in Iowa, inasmuch as the phone calls initiating the employment relationship were from Iowa. Under the law cited, the place of making the contract was Iowa. The instance of employment during which claimant was injured was commenced as a direct result of an unsolicited (by claimant) call from the employer in Des Moines. Claimant was directed to resume employment in Tulsa.

It is clear to me that claimant was working under a contract of hire made within Iowa.

It is also clear that the employment was not principally localized in any state. As proof of this claimant worked in Kansas, Oklahoma, Mississippi and Iowa in his short tenure with this employer. Considering the factual basis of this case, it is clear to me that this agency has jurisdiction of both the parties and the subject matter. Claimant's alleged injury, although alleged to have occurred in Oklahoma, occurred under a contract of hire made in Iowa. The evidence indicates that the employment for which claimant was hired was not principally located in any state.

FINDINGS OF FACT

1. Claimant is domiciled in Missouri.

2. Defendant employer and insurer were served with process.

3. Claimant alleges an Oklahoma injury on July 19, 1982.

4. Claimant had been employed by defendant, W.G. Jaques Co., on prior occasions.

5. Claimant was contacted unilaterally by W.G. Jaques Co. prior to recommencing employment for Jaques in Oklahoma.

6. The nature of employment was that it was not principally located in any state.

CONCLUSIONS OF LAW

1. This agency has jurisdiction under section 85.71(2), Code of Iowa.

ORDER

IT IS THEREFORE ORDERED that this case be assigned for hearing on the merits pursuant to the law, rules and procedures of the agency.

Signed and filed this 15th day of November, 1983.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

THOMAS CLEMONS,	:	
Claimant,	:	File No. 702042
vs.	:	D E C I S I O N
SWIFT INDEPENDENT PACKING CO.,	:	O N
Employer,	:	85.27 B E N E F I T S
Self-Insured,	:	
Defendant	:	

This is a proceeding for benefits under Iowa Code section 85.27 brought by Thomas Clemons, claimant, against Swift Independent Packing Co., self-insured employer, defendant, relating to an injury arising out of and in the course of his employment on February 16, 1982. It came on for hearing on June 11, 1984 at the office of the Iowa Industrial Commissioner in Des Moines, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file shows a first report of injury received May 10, 1982. A memorandum of agreement was filed on the same date. A final report shows the payment of six weeks and six days of weekly benefits.

The record in this matter consists of the testimony of claimant and of Cecilia Peterson; defendant's exhibit 1, a series of medical reports from Peter D. Wirtz, M.D., and Carl O. Lester, M.D.; and defendant's exhibit 2, the deposition of Dr. Lester.

ISSUE

The sole issue in this matter is whether or not claimant should be allowed to a change of medical care.

STATEMENT OF THE CASE

Claimant testified that on February 13, 1982 he was carrying a ladder and slipped on ice twisting his right leg. He fell to the ground and bumped his knee again. He saw Dr. Keyser and was referred by him to Dr. Lester who provided him with treatment at the expense of his employer through workers' compensation. He was off work for approximately eight weeks.

At the time of hearing he had no outstanding medical expenses.

Claimant indicated both that he wishes to select his own doctor for treatment and that he wants another opinion as he is anxious to have any further treatment he can to relieve his condition. More specifically, he claimed that defendant's close association with the doctors to whom he was sent prevented an unbiased opinion and that he was concerned that Dr. Wirtz had a preconceived opinion of him. He expressed a desire to see Dr. Marvin Dubansky, a doctor with whom he neither had communicated nor consulted. He made his selection of Dr. Dubansky the weekend prior to this Monday hearing based on what others had told him.

Claimant interpreted Dr. Lester's deposition as suggesting he will need further treatment. He stated that while he found Dr. Lester competent, he believed him to be too busy. He reported being told by Dr. Lester that he would need an arthroscopy. Claimant acknowledged that he had informed the doctor that he lacked confidence in him.

Claimant admitted that Dr. Wirtz had recommended an arthroscopy on an outpatient basis; but when one was scheduled, he cancelled. He subsequently has refused to have the procedure done.

Claimant testified to familiarity with both sections 85.27 and 85.39 of the Iowa Code. He said that he understands section 85.39 is available for an independent medical examination, but that is not what he seeks at present.

Cecilia Peterson, a registered nurse who has worked for defendant employer for three years, testified to having worked with claimant's claim. As she recalled, claimant fell on February 13 and first reported the injury about the February 18. He was sent to Dr. Keyser who sent him to Dr. Lester who was authorized to perform whatever treatment he thought necessary. Claimant returned to work on April 14, 1982.

Peterson recalled no expression of dissatisfaction with Dr. Lester although claimant initially objected to seeing Dr. Keyser. Subsequent to the time of his surgery he asked about a second opinion. Apparently he was referred to the workers' compensation adjuster to discuss his options. When it was learned that claimant and Dr. Lester were unhappy, claimant was sent to Dr. Wirtz who wished to do an arthroscopy.

It was Peterson's opinion that an arthroscopy was necessary to see what additional treatment claimant might need. She gave as claimant's alternatives for performance of the arthroscopy being hospitalized and having general anesthesia or having the procedure done on an outpatient basis with a local anesthetic. She reported that the trend is toward the outpatient procedure because it cuts costs and places the patient at less risk.

The witness thought that Dr. Lester had removed himself from claimant's case. Dr. Wirtz is still authorized for treatment.

Peterson did not recall claimant's telling her at the time he cancelled his arthroscopy that he was having problems with transportation from Des Moines. Neither did she remember any swelling in claimant's knee at a particular point in time.

On March 12, 1982 Earl L. Keyser, M.D., reported seeing claimant and referring him to John W. Hughes, M.D., after an accident of approximately February 10, 1982.

Carl O. Lester, M.D., board certified orthopedic surgeon and Fellow of the American College of Surgeons, testified to first seeing claimant on February 24, 1982 at which time he took a history of claimant's falling on ice and injuring his right knee the week before and of his falling and hitting his right knee on the corner of steps seven months before. Claimant complained of pain on the inside of the knee and of the knee's giving out.

On examination, Dr. Lester found claimant's knee to be stable. There was no effusion. The space behind the knee was free of masses. X-rays were thought to be normal.

The orthopedic surgeon initially diagnosed a sprain of the medial collateral ligament or cartilage. Motrin was prescribed and claimant was kept off work.

When claimant was seen on March 4, 1982 he continued to have pain. An arthroscopy was recommended for diagnostic purposes. The arthroscopy showed minor degenerative changes in the distal femoral condyle both medially and laterally with a Grade I chondromalacia which the doctor said would be the lowest possible amount of the disease and a medial meniscus tear at the junction of the middle and posterior third of the meniscus which is the little cartilage between the two bones. There was no evidence of arthritis. The torn portion of a medial meniscus was removed through a separate opening.

Regarding causation, Dr. Lester said:

> A. I think the chondromalacia may be from an old injury, but the people thirty-nine years old that are working people and have been fairly active have chondromalacia of a long-standing nature that-- I don't think the chondromalacia itself was caused by the injury. I think the torn meniscus, the torn cartilage was probably injured by one of the falls.
>
> Q. Do you have an opinion with reference to which fall caused the medial meniscus tear?
>
> A. No. I don't think I can tell arthroscopically or by opening up the knee, if it's one month old or if it's two years old because the meniscus is avascular; it doesn't have any blood supply to the outside portion of the cartilage. And without any recent hemorrhaging it's impossible to state that. (Lester dep., p. 11 ll. 7-22)

Claimant was returned to work on April 14, 1982 apparently without restriction.

Claimant was seen for examination in May at which time his range of motion was satisfactory. Range of motion remained satisfactory on September 7, 1982 and a zero percent permanent partial disability rating was made.

Claimant was next seen on January 25, 1983 at which time he gave a history of hurting his right knee. The doctor saw no damage. The doctor considered this incident a new injury which did not change the status of claimant's knee nor his permanent disability rating.

In October the physician wrote a letter expressing his suspicion that an arthroscopy would be necessary in the near future. It was Dr. Lester's recollection that it was decided not to do an arthroscopy when swelling went down in November.

On November 4, 1983 claimant told the doctor of forty-two episodes of his knee's going out, but that he kept on working. When the doctor obtained this information, he thought an arthroscopy should be done.

Dr. Lester last examined claimant on February 9, 1984 at which time the possibility of claimant's seeing another doctor was discussed. Claimant told him that he had lost confidence in him as a doctor.

The orthopedist saw "a very good likelihood" that claimant would need an arthroscopy because of the forty-two episodes of his knee's giving way. The doctor did not see a need for knee replacement sugery nor did he change his permanent disability rating. He agreed with Dr. Wirtz's report rendered March 28, 1984.

Dr. Lester characterized claimant's present condition thusly:

> A. I think he probably has two problems. I think he has a wear and tear phenomenon in his knee that we described as a chondromalacia. I think he either has something, either a loose body or a remaining piece of cartilage that may be damaged or torn that's causing the giving out; and how much of which is causing the symptoms is, is difficult to ascertain.
>
> Theoretically the pain could be coming from the chondromalacia aspect and the giving out or catching in his knee, assuming he still has this, would be from the disease, if there is any, in the meniscus, the medial meniscus. (Lester dep., p. 20 ll. 5-17)

The doctor's records did not reflect his predicting to claimant a five percent permanent partial disability. Neither did they reflect any difficulty claimant might have had with walking on angular surfaces, kneeling or squatting.

Dr. Lester denied that either claimant or defendant had attempted to influence his permanent partial disability rating.

Peter D. Wirtz, M.D., orthopedic surgeon, in a letter dated March 12, 1984 reported an initial injury to claimant's knee in July of 1981 as he was climbing stairs and cracked his knee on a step. After this incident he had pain and swelling and felt something moving inside the joint. On February 13, 1982 he slipped on ice while he was carrying a ladder and twisted his leg. Subsequent to that incident he claimed knee pain with kneeling, squatting, stair climbing and at nighttime. Claimant told of a 1983 arthroscopy and removal of a loose body and a part of some cartilage.

On examination claimant was tender along the anterior medial aspect of the joint and along the joint line as well. Range of motion was 0 to 150 degrees. Claimant had decreased strength on the right. There was no crepitus and the Q angle was fifteen degrees bilaterally. X-rays were within normal limits. Dr. Wirtz proposed ruling out degenerative joint disease of the femoral condyle, a medial meniscus retear, and patellar surface degeneration with muscle imbalance. The doctor noted that claimant's "history is one of the patellar abnormality whereas his clinical examination is one of meniscal abnormality." Final diagnosis was to be made on the basis of an arthroscopy. Claimant was seen to have no orthopedic restrictions from working.

In a follow-up letter Dr. Wirtz said that total knee joint replacement was not relevant to claimant's case at present, but rather would be indicated for severe degenerative arthritis resulting in restriction of motion and considerable pain.

APPLICABLE LAW AND ANALYSIS

Claimant seeks a change in medical care. Iowa Code section 85.27 provides 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 therefore, 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.

As claimant properly points out, there are some contradictions in the testimony and reports of Dr. Lester. On the other hand, it seems that claimant has misinterpreted a reference to internal derangement. That reference by the doctor relates to internal derangement within the knee rather than to any other possible reference claimant might have inferred. It is apparent, however, that the doctor-patient relationship between claimant and Dr. Lester has been destroyed.

Following that breakdown defendant offered care by Dr. Wirtz. It seems claimant does not wish to see Dr. Wirtz because he feels the doctor has preconceived ideas about his condition and because Dr. Wirtz prefers to perform an arthroscopy on an outpatient basis.

Dr. Wirtz and Dr. Lester are in agreement that claimant needs further testing and that testing should be an arthroscopy. Nurse Peterson presented good reasons why an arthroscopy might be done on an outpatient basis. Claimant will have to trust his physician regarding the manner in which the arthroscopy is performed.

Dr. Wirtz is an orthopedic surgeon with an established reputation for treating knees. This deputy commissioner can find nothing in the evidence submitted in this matter which evidences any prejudice on his part. However, claimant has followed the procedure set out in Iowa Code section 85.27 which has been established for situations in which the employee becomes dissatisfied with the care offered by the employer. This deputy industrial commissioner finds nothing in defendant's handling of claimant's medical treatment which should result in its losing its statutory right to control medical care. It has offered care by two well-qualified orthopedic surgeons. On the other hand, further evaluation by Dr. Wirtz may have been

tainted by the litigation in this claim.

In a spirit of compromise, the undersigned will order defendant to provide claimant with a list of three physicians authorized to provide evaluation and further treatment should that become necessary. One of those physicians may be Dr. Wirtz should defendant wish to choose him. A list of physicians should be provided to claimant within twenty days from the signing and filing of this order.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant injured his right knee when he slipped on ice on his employer's premises on February 13, 1982.

That defendant sent claimant to Dr. Keyser.

That Dr. Keyser referred claimant to Dr. Lester, a board certified orthopedic surgeon.

That Dr. Lester performed an arthroscopy and removed a torn portion of the medial meniscus of the right knee.

That claimant had a prior injury to his knee in July of 1981 when he fell and hit the corner of some steps.

That there was a breakdown of the doctor-patient relationship between claimant and Dr. Lester.

That defendant authorized evaluation and treatment by Dr. Wirtz.

That claimant has failed to avail himself of evaluation and treatment by Dr. Wirtz.

That claimant has followed the procedure in Iowa Code section 85.27 for when an employer and employee cannot agree on medical care.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has shown the necessity for a change of care under Iowa Code section 85.27.

ORDER

THEREFORE, IT IS ORDERED:

That within twenty (20) days from the signing and filing of this order defendant provide to claimant a list of three (3) physicians authorized to evaluate and treat his condition.

That defendant pay costs of these proceedings pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 18 day of June, 1984.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM DUANE CLOUD, Claimant, vs. CONTINENTAL POWER SERVICE, Employer, and THE HARTFORD, Insurance Carrier, Defendants.	File No. 706795 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 William Duane Cloud, claimant, against Continental Power Service, employer, and Hartford Insurance Company, insurance carrier, defendants, to recover additional benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of his employment on June 25, 1982. It came on for hearing on August 10, 1983 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 July 6, 1982. A memorandum of agreement was received on July 16, 1982. A final report shows the payment of eight weeks and two days of healing period benefits as well as medical expenses.

At the time of hearing the parties stipulated to a rate of $349.04 and to a conversion date to permanent partial disability of August 23, 1982.

The record in this matter consists of the testimony of claimant, Carolyn Cloud, Kristin Cloud and Brenda Cloud; claimant's exhibit 1, the deposition of Albert Edwin Cram, M.D.; and claimant's exhibit 2, assorted medical reports. Defendants filed a brief.

ISSUES

The issues in this matter are whether there is a causal relationship between claimant's injury and his present disability, whether claimant is entitled to permanent partial disability, and whether or not claimant should be awarded benefits under Iowa Code section 85.27.

STATEMENT OF THE CASE

Forty year old married claimant, father of two children testified to a high school education with no other formal training. Prior to becoming an electrician he worked in production labor. He entered an apprenticeship program in 1963 which entailed four years of instruction. Since that time he has taken various courses through the union. He is a journeyman electrician.

He described the events surrounding June 25, 1982 thusly: He was leaning forward installing a breaker in a switch. He was working with a hot line. He had a bolt in his left hand which he was going to use to hold the back plate in place. Electricity arced. The breaker blew causing a loud explosion and a bright ball of fire which temporarily blinded him. He backed up. His clothing was afire. He ripped it off. His face, arms, hands and chest were burned.

He was taken to Muscatine General Hospital and then transferred to Iowa City where he was hospitalized for 13 days. He remained at home and took medication and stayed out of the sun and heat for an additional two months.

Claimant asserted that he has not been released by Dr. Cram whom he last saw on July 13, 1983.

As to his present problems claimant complained of burning and redness in his ears, arms, hands and face brought on by cold. He uses gloves, a ski mask and a respirator mask to shield him from the cold. He finds heat uncomfortable and wears both a hat and sunscreen to block the sun. He has trouble with both wrists. Heavy lifting or snapping movements bother him. He has a sharp pain and then a dull pain. He wears a wrist brace for hard physical labor.

Claimant, who works out of the union hall doing commercial, residential and industrial wiring, said that residential work uses lighter wire and entails the employment of power tools. He reported being taken off a job pulling medium heavy cable. He asserted his inability to use a sledge hammer efficiently and aggravation by threading pipe and other hard manual labor. He no longer climbs scaffolds because of right wrist pain. Some tasks are done with both hands or with the assistance of a partner. Heat from foundries and attic work is particularly difficult. Because he has been doing lighter duty he has not used a rosebud. He has not yet tried welding, but he will try it to see what happens. He acknowledged that some protection would be provided to him by a welding hood, mitts and a long sleeved shirt. His employer last winter gave him a position in which he could work indoors. No wages were lost because he was confined to inside work. Claimant estimated that in 95 percent of an electrician's work some time is spent outdoors.

Claimant denied any wrist problems prior to his injury. He first noted trouble in November or December after he returned to work. He takes no pain medication.

Claimant agreed that he has no keloid scarring or webbing. He notices that his skin color has changed in that it is redder or browner with darker patches on his forehead and cheeks.

Brenda Anne Cloud, claimant's 18 year old daughter who lives at home, testified that her father used to stay out in the sun to get tan. His tanning was more even than now. She said that frisbie throwing which they once enjoyed is limited by his wrist. She observed that her father puts his hands in the air because they hurt less.

Kristin Cloud, another daughter who lives at home, testified that her father played basketball and softball and threw the frisbie before his injury. Now his wrist hurts. She reported that her father wears a hat and suntan lotion to protect him from the heat.

Carolyn Cloud, claimant's spouse of 20 years, testified that claimant, since his injury, has taken more precaution against heat and cold. She believed her husband could remain in cold for the same period as before, but his tolerance for heat is decreased. Being in cold produces a blotchiness in his skin. Regarding trouble with claimant's wrist the witness said that he no longer is able to mow the lawn or to do the upkeep on the family car. He is bothered by cutting wood and he drops his tools. He awakens in the middle of the night to rub his wrists.

Records from Muscatine General Hospital show claimant was seen in the emergency room following an explosive flash. Bullae were forming over claimant's ears, malar area, nose, forehead, the thenar eminence of both hands, the upper presternal region and the volar aspect of both forearms. The vibrissae of both nares and his mustache were singed. Claimant had mild metabolic acidosis superimposed on respiratory alklosis. The burns were

treated with Silvadene, Ringer's Lactate, Morphine Sulfate, Potassium, Penicillin, Hypertet and Tetanus Toxid. Claimant was transferred to Iowa City.

Claimant was admitted to the burn clinic on June 25, 1982 and discharged on July 5, 1982. When he was seen on July 13, 1982, he had some itching, pain in open areas and depression from being unable to work. Claimant was checked again at the end of the month at which time he still had weakness and pain in his forearms. His skin broke down easily. There was mild hypertrophy in the left forearm.

In September claimant complained of itching and sensitivity to cold in the burn areas.

Claimant returned to the clinic with complaints of intermittent numbness and tingling in both hands with weakness on the right. Majak Sandberg, M.D., wrote on January 21, 1983 that "[i]t is not unusual for people who have sustained electrical injuries to have these sorts of complaints following healing of their initial injury....It is possible that he could be developing a carpal tunnel syndrome." Electromyography and nerve conduction velocities were scheduled.

Claimant apparently was concerned at the time of his Janaury visit with whether or not pneumonia or bronchitis or nose bleeds he had suffered were related to his injury. Dr. Sandberg thought it probably was not related, but that it was most likely due to dry air.

Dr. Cram reported in a letter dated January 26, 1983 that claimant's electromyography and nerve conduction studies were normal. Range of motion was full. Muscle bulk was normal. Dr. Cram was unable to explain claimant's symptoms.

Claimant was seen in the hand service of the orthopedic department. Dr. Cram's referral speaks of no objective evidence of muscle damage and no good evidence of neurological dysfunction at the time of injury and initial hospitalization. X-rays, electromyography and nerve conduction velocity failed to uncover abnormalities. On examination claimant had full range of motion in all joints in both upper extremities as well as full muscle strength. The Adson's, Froman's, Phalan's, Allen's, Tinel's and Finkelstein signs were negative bilaterally. A mild amount of swelling was observed in the first dorsal compartment bilaterally. No clear cut diagnosis such as carpal tunnel syndrome, DeQuervain's snydrome, posterior interosseous snydrome or pronator syndrome could be made. Claimant was started on Naprosyn.

When claimant was seen on March 1, 1983 he had swelling over the volar aspect of his wrist and tenderness over the first dorsal compartment. Claimant acknowledged being helped by a prescription of Naprosyn, but he discontinued the medication when he developed blood in his stools. Claimant was prescribed Feldene and Dolobid. Claimant was also given a short arm cast.

At the time of his next visit claimant spoke of pain over the volar and dorsal aspects of the right wrist. Fifty to seventy-five percent of claimant's pain was resolved. Claimant's dorsal flexion was to 60° and volar flexion was 30°. Volar flexion caused pain over the third and fourth compartments. Swelling was observed between the APL and FCR. Claimant was provided with a dorsal cock-up splint to wear for heavy activities. He was instructed to avoid those activities aggravating his wrists.

Albert Edwin Cram, M.D., general surgeon and director of the burn center at the University of Iowa, first saw claimant on June 25, 1982. Claimant had a 9.75 body surface area of burn primarily to his face and both upper extremities. Fluid resuscitation, cleansing, and dressing were done. Physical therapy was initiated and claimant was placed on a high protein high calorie diet. During the hospitalization, claimant's spouse was trained to do dressing changes.

Claimant was last seen on June 8, 1983. At that time Dr. Cram did not anticipate claimant's condition was going to change significantly. In describing what had occurred to claimant's body the physician said:

> Well, the burn injury as it heals will often leave some visible changes, that is, scars that one can see. And those changes that he has that might be apparent to a casual observer today will probably always be apparent in terms of a little change in skin coloration and that sort of thing. Burned skin, depending on the depth of the burn, loses to a greater or lesser extent some of the elasticity, so that the areas that have been burned will not be as flexible. The patient may need to warm up every day like an athlete who's had a very hard practice the day before and wakes up very stiff in the morning. Frequently all burn patients may have some of this stiffness and a need to kind of exercise when they wake up in the morning. The burned skin is less -- I shouldn't say less. I should say more sensitive to temperature, extremes of temperature. For instance, very warm weather or very cold weather creates more discomfort in the burned areas than it does in unburned areas of skin, so that this creates some difficulties for the burn patient. (Cram dep., pp. 8-9 ll. 12-25 and 1-4)

Dr. Cram acknowledged a slight possiblity of an increased risk of cancer in burn patients.

Dr. Cram assigned a five percent disability related to the burn based on loss of flexibility, increased sensitivity, possible interruption of sweat glands and elasticity. He said:

> What I'm attempting to do is to relate in my experience in taking care of burn patients the injury that he has and the skin changes that he has thus far and the symptoms that he speaks of when questioned about heat and cold and tolerance and so forth, to that on a broad spectrum of other patients and my perception of how that interferes with their ability to work. It's a very difficult thing to quantitate exactly. (Cram dep., p. 13 ll. 16-23)

The surgeon agreed that claimant does not have keloid scarring or webbing and that his range of motion is normal. No change in sweating or atrophy had been observed.

APPLICABLE LAW AND ANALYSIS

The first issue to be considered is whether or not there is a causal relationship 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 June 25, 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). However, expert medical evidence must be considered with all other evidence introduced bearing on causal connection. Burt, 247 Iowa 691, 73 N.W.2d 732.

Claimant complains of two disabling conditions. One is problems with his skin particularly in extremes of temperature. The second is trouble with his wrist. Dr. Cram found claimant's burns consistent with an electrical injury and his skin changes "definitely related to his injury."

Claimant's first complaint of intermittent numbness and tingling was not recorded until January of 1983. Dr. Cram wrote late in that month that he could not explain the etiology of claimant's symptoms in his wrist on the basis of his injury. Dr. Sandberg wrote that it is not unusual for persons with electrical injury to have complaints of intermittent numbness and tingling and suggested the possibility of a carpal tunnel syndrome developing. The connection between electrical injury and carpal tunnel syndrome is not clear from the doctor's writing. Dr. Cram, who specializes in treatment of burns referred claimant to the orthopedic department. X-rays, electromyography and nerve conduction studies failed to uncover abnormalities. Claimant was not given a definitive diagnosis. In March claimant reported experiencing pain when he began to do heavier work. At the time of hearing he testified that he did not have problems with his wrist before his injury. The case law allows consideration of claimant's testimony that he did not have the condition prior to his injury to be coupled with expert medical evidence to carry claimant's burden of causation. That expert medical evidence is not present in this record in sufficient degree to allow claimant to preponderate. Claimant's skin changes were clearly related to his injury of June 25, 1982. Any disability claimant may have due to the intermittent numbness and tingling in his upper extremities has not been shown to be causally related to his injury of June 25, 1982.

The next issue to be considered is claimant's entitlement to permanent partial disability.

Claimant suffered burns to his face, arms, hands, and chest. Claimant has impairment to his body as a whole and 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 has stated 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. See Birmingham v. Firestone Tire & Rubber Company, II Iowa Industrial Commissioner Report 39 (1981); Enstrom v. Iowa Public Services Company, II Iowa Industrial Commissioner Report 142 (1981; Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981).

Claimant is a younger person with a high school education. He has training as a journeyman electrician. He had burns over almost 10 percent of his body. Although those burns have not left him with keloid scarring, webbing or a loss of motion, they have left him with skin changes which cause loss of flexibility and elasticity and a sensitivity to extremes of temperature. Dr. Cram, a general surgeon and director of the burn center rated claimant's disability at five percent. Claimant's testimony regarding the work of an electrician pointed out the necessity of working in temperature extremes and the need for flexibility to perform work. Claimant's permanent partial industrial disability is found to be 15 percent.

The remaining issue relates to claimant's entitlement to benefits under Iowa Code section 85.27. As no evidence regarding a claim for medical benefits was presented at the time of hearing, no benefits can be awarded.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is forty years of age.

That claimant has a high school education.

That claimant is a journeyman electrician.

That when electricity arced causing an explosion, claimant suffered burns to his face, arms, hands and chest as he was working on a job site installing a breaker in a switch.

That claimant was hospitalized for treatment of burns over 9.75 percent of his body.

That claimant is bothered by extremes of both heat and cold and must take special protective measures in either.

That claimant has wrist pain and uses a brace for support.

That claimant has difficulty with certain aspects of an electrician's work.

That some portions of electrician's work are usually performed outdoors and some portions are done in hot areas such as attics and foundries.

That some heat producing tools are routinely used by electricians.

That claimant has no keloid scarring, webbing or loss of motion as a result of his burns.

That electromyography and nerve conduction studies of the upper extremities are normal.

That as a result of his burns claimant has loss flexibility and elasticity.

That claimant's family has noticed changes in his activities and temperature tolerance since his injury.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has proven by a preponderance of the evidence that his loss of elasticity and flexibility and sensitivity to extremes in temperature is causally related to his injury of June 25, 1982, but the intermittent tingling and numbness he experiences are not.

That claimant has a fifteen (15) percent permanent partial disability attributable to his injury of June 25, 1982.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant seventy-five (75) weeks of permanent partial disability at a rate of three hundred forty-nine and 04/100 dollars ($349.04) with payments to commence on August 23, 1982.

That defendants pay amounts due and owing in a lump.

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

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

Signed and filed this 16th day of September, 1983.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BETTY COLEMAN, Claimant, vs. COLEMAN INDUSTRIAL CLEANING, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	FILE NO. 622172 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 Betty Coleman against Coleman Industrial Cleaning, employer, and Liberty Mutual Insurance Company, insurance carrier.

Claimant seeks further benefits as a result of the injury which occurred on January 7, 1980. Claimant's rate of compensation is $55.24 per week as established by the stipulation of the parties and the memorandum of agreement filed in this proceeding on February 12, 1980.

The hearing commenced April 13, 1984 in the Pottawattamie County Courthouse at Council Bluffs, Iowa with Michael G. Trier, Deputy Industrial Commissioner, presiding. Claimant appeared in person with her attorney Robert Laubenthal. Defendants appeared through their attorney of record James E. Thorn. The case was completed and fully submitted upon conclusion of the hearing on April 13, 1984.

The record in this proceeding consists of the testimonies of Betty Coleman, Thomas Coleman, Ronald Coleman and Virginia Coleman. Claimant introduced exhibits 1, 2 and 3. Defendants introduced exhibits 101a-g and 102 through 122 except that during the course of the hearing it was determined that what had been marked as exhibit 119 was not one of claimant's medical records and the same was withdrawn.

ISSUES

The issues presented by the parties at the time of hearing are whether there is a causal connection between the injury claimant sustained on January 7, 1980 and her present condition. In the event a causal connection is found to exist the issues involve a determination of the nature and extent of any disability which may be related to that injury. Defendants also raised as a defense to certain medical expenses that the same were not related to the injury and were not authorized. It was stipulated that the medical expenses in question were fair and reasonable with regard to the services which were actually rendered.

REVIEW OF THE EVIDENCE

Betty Coleman testified that she is 60 years of age and married to Thomas Coleman. She related that all of her children are independent adults. She related that her husband is disabled as a result of a heart attack which occurred December 4, 1981.

Claimant testified that she completed the tenth grade in school and had no further formal education or vocational training. She stated that she married at the age of 18 and initially worked approximately 20 years at a chicken restaurant called Rose's Lodge. She performed a variety of duties there including cooking, washing kitchen utensils, making salads and taking telephone orders.

Claimant stated that she worked as a cashier at a Red Barn restaurant which she described as a fast food establishment which served chicken and hamburgers.

Claimant related working at the Beefland Packing House for a short time. Her duties there included picking meat off a conveyor, wrapping it and carrying it to a location where it was sealed in plastic. She stated that the pieces she handled weighed in the range of 10 to 15 pounds.

Claimant stated that after she left Beefland she may have possibly returned for a short time to work in the Red Barn restaurant.

Claimant stated that she was a full time housewife from approximately 1975 through 1979 when she commenced working for her son's cleaning business.

Claimant stated that she began working for her son in approximately 1979. She stated that the business had three workers and that the general nature of the work was to clean offices. The activities performed were vacuuming carpets, emptying waste baskets, cleaning restrooms, dusting desks and cleaning tile floors. She stated that there were several customers, all of which were located in the Pacesetter Building in Omaha, Nebraska.

Claimant stated that on January 7, 1980 she fell coming downstairs in the Pacesetter Building, landed on a cement floor and was knocked unconscious. Claimant stated that she had tripped over a tear in the carpet and fell down three or four stairs landing on her stomach. She stated that a co-worker, Claudia Thompson, was with her and that her daughter-in-law, Virginia Coleman, was also in the building. Claimant stated that she was transported by rescue squad to Bergen Mercy Hospital where she was examined and released.

Claimant stated that on the following day she contacted Anthony R. Pantano, M.D., who had her admitted to Lutheran Medical Center. Claimant stated that upon admission she felt terrible, could not get out of bed and required help to move due to severe back pain. She stated that when discharged she spent most of her time at home in bed for quite a while and that she "did not feel very good".

Claimant stated that she was hospitalized again in the fall of 1980 under Dr. Pantano. While there she stated that she was placed in traction, received physical therapy and medication. She felt better at the time of discharge. She stated that Dr. Pantano told her that she had a slipped disc.

Claimant testified that she presently spends a lot of time in bed watching TV. She stated that she has an electric bed similar to a hospital bed which can raise her head and feet. She stated that her husband vacuums and does the dishes at home. She stated that she sometimes cooks and dusts, but that her husband makes the beds. She stated that she no longer does any yard work or painting about the home. Claimant testified that her pain varies and is sometimes worse than others. She stated that the pain has remained in the same location since her fall. She stated that it hurts when she moves or walks and that it helps if she takes it easy. Bending and reaching cause pain and she does not feel that she can stand on her feet for any significant length of time. Claimant related that it helps if she takes it easy and that she does not have any pain if she is lying in bed. She stated that it causes pain if she sits in a living room chair. She stated that she takes medicine daily and that her medications include Darvocet, Tylenol and bufferin. She reported that she does not have neckaches but that she continues to have tension headaches.

Claimant testified that she has not gone back to work since the injury and that her son has not offered to take her back. She thinks she could possibly still dust but was uncertain. She feels that she is too old to go back to school and that she is also limited in employability because she has high blood pressure and cannot sit in a straight chair. She feels that her ability to stand without causing pain would prohibit her from working as a cashier.

Claimant related a very extensive history of medical care which has included a hysterectomy, removal of tumors on her breast, hernia repair, removal of a fractured coccyx and a carpal tunnel release. She related having chronic stomach problems, headaches and emotional disturbances for which she received medical care and treatment. She related that she slipped without falling at Beefland and strained her back for which she received compensation benefits. She also related being involved in an auto accident while going to work while working for a former employer.

Claimant stated that she had no problem doing her work at Beefland prior to the time she was injured there and that she had completely recovered from that injury when she began working for her son. At the time she commenced work for her son she could do all of her housework, lift, drive the car and perform general yard work. She stated that she felt no pain from the injury she sustained at Beefland. She stated that she had no physical problems when she started working for her son and that she would not have gone to work for him if her back had not been all right.

Claimant stated that a woman identified as Mrs. Turner from Liberty Mutual Insurance Company visited her at her home and in the hospital. She related that Mrs. Turner had sent her to Dr. Pantano and also to A. P. Manahan, M.D. She stated that she also saw other doctors and that Mrs. Turner knew she was doing so. She related that Richard P. Murphy, M.D., was brought into her case by Dr. Pantano.

She stated that Dr. Manahan did not provide any relief for her back pain. She recalled receiving a TENS unit which she did not feel was particularly effective.

Claimant identified exhibit 1 as the charges for the period of hospitalization incurred when she was hospitalized over Christmas, 1980 and exhibit 2 has the charges arising from the time Dr. Murphy was called to consult on her case. Claimant stated that she ceased physical therapy because the exercises increased her pain.

Claimant stated that she felt that the back pain increased her emotional disturbances but that she is not seeking payment from defendants related to her depression or emotional disturbance.

Claimant acknowledged that her present complaints were similar to those which she had following her injury at Beefland.

Thomas Coleman testified that he is claimant's husband of 42 years. He stated that prior to the injury at the Pacesetter Building she could do the housework, vacuum, rake the yard, do the washing and most of the cooking. He stated that since the fall his work around the home has doubled. He stated that claimant is tired and hurting and that he presumes that the problem is her back because she lays down frequently.

Ronald Coleman testified that he is claimant's son and that he is self-employed doing business as Coleman Industrial Cleaning. He stated that the business involves janitorial work and general cleaning in office buildings. He started the business in 1979 after working for his father-in-law for approximately five years in a similar business.

He stated that he was called to the hospital on the night of January 7, 1980 and that at the time of her release, claimant walked from the hospital with assistance.

Ronald Coleman stated that he has refused to allow his mother to return to work because he is afraid she will hurt herself.

He stated that he has had limited contact with his parents since the injury but that when he has seen his mother since, he has observed no difference in her walking or other movements when comparing the same with the way she moved prior to the fall. He stated that he is not well acquainted with claimant's medical history but that he knows that she has had several periods of hospitalization. He stated that she was not complaining of back pain prior to the time of the fall and that he does not dispute his father's testimony concerning claimant's complaints and activities.

Virginia Coleman testified that she is claimant's daughter-in-law and is married to Ronald Coleman. She confirmed claimant's work activities at the Pacesetter Building and stated that claimant's primary activity was emptying trash baskets but that on occasion she would have performed all of the functions. She related that she had an argument with claimant over a raise and time off shortly before claimant fell and that they were both angry.

Virginia Coleman related that the other employee notified her that claimant had fallen and, when she went to the location, she found claimant lying on a concrete floor which also had glass and metal shavings on it. She related that she saw no cuts and rode in the ambulance to the hospital where claimant was examined and released. She stated that claimant was upset about being released and about being told at the hospital they could not find anything wrong.

The witness stated that claimant appears the same now as she did before the fall, but that she does not dispute her father-in-law's testimony. She agreed that she had little contact with her mother-in-law since the fall.

Claimant's exhibit 3 is an emergency department record from Bergen Mercy Hospital of claimant's visit to the emergency room January 7, 1980. An x-ray report interpreted by Gerard J. Kelly, M.D., relates a scoliosis possibly due to muscle spasm and narrowing of the L5-S1 interspace. No other significant abnormality or evidence of recent traumatic bone or joint change was identified. The record shows claimant to have been discharged with a diagnosis of low back strain.

Exhibit 101(b) contains a discharge summary from Immanuel Medical Center in Omaha, Nebraska signed by Ronald C. Bell, M.D., which indicates that claimant was hospitalized from December 16 through 27, 1973 and was diagnosed as having an acute lumbar strain for which she received traction which improved her symptoms. A consultation report of James W. Dinsmore, M.D., dated December 20, 1973 contains the following:

> She has had some intermittent low back pain for some years now. About 5-6 days ago, she had an acute episode of low back pain, with some numbness into both legs. She was unable to be up and about and sitting considerably bothers her. Lying down does relieve her some. Coughing, sneezing, bending and lifting all seem to aggravate. No actual leg pain. It has not gotten better....

The physical examination he performed showed marked back spasm, positive straight leg raising bilaterally and no neurological deficit.

A radiology report dated December 22, 1973 interpreted by W. Benton Copple, M.D., shows well aligned vertebral bodies with normal intervertebral disc spaces, no spondylolisthesis and an overall impression of a normal lumbosacral spine.

Exhibit 101(d) is a deposition of Ronald C. Bell, M.D., taken March 6, 1975. At page 31 of the deposition he indicated that when claimant was hospitalized in December, 1973, she was suffering severe incapacitating back pain. He stated that it was of the nature that claimant was unable to move, could not get out of bed or carry on her daily functions. He related that she needed help in going to and from the bathroom due to her back pain.

Exhibit 101(e) is a deposition of James W. Dinsmore, M.D., an orthopedic surgeon, taken March 7, 1975. At page 12 of the deposition he indicates that in February or April of 1974, he estimated that claimant had a permanent partial disability of between five and ten percent of the lumbar spine and body as a whole. At page 16 of the deposition, Dr. Dinsmore relates that in 1969 he had given claimant a disability rating of 10 percent of the lumbar spine or body as a whole following removal of the fractured coccyx.

Exhibit 101(f) is a transcript of a hearing in proceedings entitled Betty Jane Coleman, claimant, vs. American Beef Packers, Inc., employer, and the St. Paul Companies, insurance carrier, such hearing having been conducted November 20, 1974. Commencing on page 17 at line 22 claimant stated:

> A. Well, I can't-- Like I said, I can't pick up my--one of my grandchildren if they come to me, and I can't stand on my feet for long periods of time. I go--like I take naps and go to bed quite often, and there has been sometimes when I've bent down just to do something on the floor, and I couldn't go to my sister's funeral. The pain is so bad everytime you take a step you just couldn't do it.

Continuing on page 18 at line 10 the record relates:

Q. Are you able to do all your household chores now, or do you have to have some help?

A. Well, I do most of them unless I have to lift something or move something heavy. I don't do anything like that.

Q. Do you feel that you will be able to be employed at this time?

A. I don't think so. I don't think I could stand on my feet for even like a four hour part-time job.

Q. In other words, four hours on your feet is too much?

A. Mm-hm (Yes).

Q. What happens if you stand on your feet like four hours, how does it effect you in anyway [sic]?

A. Well, I get-- It's back in here, in this place, it gets-- I get pain.

Q. In your low back?

A. Mm-hm (Yes)....

Continuing on pages 19 and 20 claimant indicated that raking the lawn caused discomfort and that she was unable to lift her grandchildren, two of which were two years old, one of which was one year old and the other was two months old. She felt that they were too heavy for her to lift.

Exhibit 101(g) is a copy of a review-reopening decision filed April 23, 1975 involving claimant's injury that occurred on December 14, 1973 at her employment with Beefland. The record reflects that claimant was awarded 17 1/2 percent permanent partial disability of the body as a whole in the proceeding attributable to an injury to her low back.

Exhibit 102 is a report of Edward M. Schima, M.D., dated February 2, 1979. The complaints noted include a constant headache and neck pain. The observations included what was termed a "blunted affect and mild stare". An EEG showed some moderate abnormalities. The clinical impression included depression.

Exhibit 103 relates to the diagnosis of carpal tunnel syndrome.

Exhibit 104 relates an examination of the claimant performed January 8, 1980 following the injury in question. The initial impressions noted are of a cerebral concussion and a lumbosacral strain.

Exhibit 105 consists of records from claimant's hospitalization at Lutheran Medical Center from January 8 through 29, 1980. The initial impressions on admission were that claimant has a cerebral concussion and a lumbosacral strain. While hospitalized claimant underwent duodenoscopy. A CT brain scan was normal and x-ray of claimant's lumbar spine was termed to be unremarkable. The final diagnosis added a hiatal hernia, hypertrophic gastritis of the cardia and fibrotic pyloric sphincter to those initially noted.

Exhibit 107 is a report from Timothy C. Fitzgibbons, M.D., dated March 31, 1980 wherein he relates evaluating claimant on March 6, 1980. His impression was that claimant had a resolving lumbosacral strain.

Exhibit 109 is a report from Dr. Pantano dated June 12, 1980 which indicates that claimant was able to resume regular work on February 4, 1980, that normal recovery had not been delayed, that the injury would not result in permanent defect and would not require further treatment.

Exhibit 110 is a report from Dr. Fitzgibbons dated June 12, 1980 which relates that on May 8, 1980 he felt that claimant was depressed, that her problem was unchanged and simply that of a back strain and that he felt that she could not go to work. The report also relates that he saw claimant April 22, 1980 and, at that time, felt that she should return to work in a couple of weeks.

Exhibit 111 is a report from Antonio P. Manahan, M.D., dated July 11, 1980 with additional notes dated August 15, 1980. He notes claimant's complaints of pain radiating into the right leg and occasionally in the left side. Following examination, his impression was a chronic low back pain secondary to lumbosacral strain and poor posture. He arranged physical therapy. On August 15, 1980 her complaints had not been resolved and a TENS unit had been applied with limited success. He stated that he felt that claimant was not ready to return to work at that time.

Exhibit 113 is a note from Dr. Manahan dated October 17, 1980. In it he opines that claimant has a five percent disability, that she cannot go back to the work of cleaning which she previously performed and that she needs vocational rehabilitation.

Exhibit 114 contains records from claimant's hospitalization which began December 22, 1980. The complaints noted at time of admission were pain in the left low back with radiation down the left leg but which sometimes is present in both legs. On examination decreased sensation on the dorsal aspect of the left foot was noted and straight leg raising was negative in the sitting position. Claimant also had complaints of gastric disturbance. An x-ray report dated December 29, 1980 showed a normal lumbar spine with well maintained discovertebral joint spaces. An EMG including claimant's lower extremities and paraspinal muscles at the L3-4, L4-5 and L5-S1 levels all produced results within normal limits. A skeletal scintiphoto series produced normal results.

In exhibit 115 Dr. Pantano states that following the December, 1980 hospitalization the final diagnosis was a herniated lumbar disc which decision was made in consultation with Richard Murphy, M.D.

Exhibit 116 consists of approximately 162 pages of records and reports dealing with claimant's hospitalization at Mercy Hospital in Council Bluffs commencing March 30, 1981 and running through May 1, 1981. The discharge summary notes a dismissal diagnosis of major depression, vascular headaches, low back pain, marital maladjustment and tinia inguium. The ninth page of the exhibit is a consultation report from Dr. B. Rassekh dated April 1, 1981. Part of the history in the report states: "She states the pain started in 1-1981 [sic], while at work when she fell and had back pain since then. Has had occasional back pain since but nothing like present episodes. No radicular pain although she states at times the pain will go numb." Examination revealed no muscle spasm. His impression was that claimant was suffering from disc disease and not a herniated disc. The exhibit relates that the primary purpose of the hospitalization was an emotional disturbance.

Exhibit 117 is a report from Dr. Pantano dated June 12, 1981. It states:

> Mrs. Coleman was admitted to the hospital December 22, 1980 primarily because of severe pain in her back radiating down her leg and a final diagnosis after x-rays and electromyelogram was made of "herniated lumbar disc." This was omitted from the discharge summary and I apologize.
>
> Mrs. Coleman was again hospitalized May 29, 1981 because of severe pain in her back, radiating down the legs. She was diagnosed as "positive disc syndrome." The patient was treated symptomatically with routine care and traction and was discharged from the hospital June 8, 1981.

Exhibit 118 consists of approximately 113 pages of medical records and reports dealing with claimant's admission to Mercy Hospital in Council Bluffs on July 24, 1981 and running until her discharge on August 20, 1981. The discharge summary relates a major depressive disorder, marital discord and a hiatal hernia.

Exhibit 120 is a note from Dr. Manahan dated November 29, 1983 in which he states that claimant has achieved maximum recovery. The report relates that claimant stated that she had not used the TENS unit for the last year and that she had been hospitalized a year previously for her back condition.

Exhibit 121 is the deposition of Anthony R. Pantano, M.D., taken August 18, 1983. On page 9 the doctor indicates that he felt claimant had a possible herniated disc. He related the same to her restricted motion, tenderness over the lumbosacral area, positive straight leg raising test and weakness of the extenditure of her toes and complaints of severe pain radiating down her back to her toes. He related that he called in Dr. Murphy, an orthopedic specialist, for purposes of consultation. At page 21 of the deposition he indicated that to his acknowledge claimant had not experienced low back pain prior to January, 1980 and that such was based upon reports from other physicians. On page 13 of the deposition he expresses his opinion concerning the cause of claimant's complaints of back pain as follows: "...It is my personal opinion that this is definitely correlated with the history of Dr. Hertzler's that this patient slipped and fell and injured her back at work and also had a possibility of a brain concussion."

Exhibit 122 is claimant's deposition taken April 25, 1983 which is generally consistent with her testimony at hearing.

APPLICABLE LAW

A memorandum of agreement conclusively establishes an employer-employee relationship and the occurrence of an injury arising out of and in the course of employment. Trenhaile v. Quaker Oats Company, 228 Iowa 711, 292 N.W. 799 (1940). It does not establish the nature or extent of disability. Freeman v. Luppes Transport Co., 227 N.W.2d 143 (Iowa 1975). Claimant must prove by a preponderance of the evidence the causal connection between the employment incident or activity and the injury upon which her claim is based. A possibility is insufficient, a probability is necessary. Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974). Whether a disability has a direct causal connection with the claimant's employment is essentially within the domain of expert testimony. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867, 870 (1965).

However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (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, 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).

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, 760-761 (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, 815 (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. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591, 595 (1960).

If 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, 902 (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, 257 (1963).

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).

Section 85.27 of the Code of Iowa places upon an employer the duty to furnish reasonable medical care for an injured worker, the right to select the care and the duty to monitor the care. Zimmerman v. L. L. Pelling Company, 2 Iowa Industrial Commissioner Reports 462 (Appeal Decision 1982).

ANALYSIS

Claimant is a resident of the State of Iowa. The employer's business address is located in the State of Iowa. From the evidence in the record it appears that all of claimant's work was performed in the State of Nebraska in the Pacesetter Building. Under the provisions of section 85.71(1) this agency has jurisdiction of the subject matter of this proceeding and its parties.

There appears from the record no reason to doubt that the accident happened with claimant tripping and falling as was described at hearing. The result of that fall is the principal issue in this case. The medical evidence introduced comes from a number of sources and the only concensus of opinion is that claimant was suffering from low back pain. Dr. Pantano related the pain to the fall and such is not contradicted by any other opinion evidenced in the record. Such a result could reasonably be expected to follow from a fall. The onset of symptoms was immediate and it is found and concluded that the fall is a proximate cause of claimant's low back pain.

The only impairment rating in the record of this case is that of Dr. Manahan in exhibit 120 where it is indicated that on October 17, 1980 he found claimant to have a five percent disability. Such is likewise uncontradicted by any other competent medical opinion evidenced in the record. It does not appear, however, that claimant had previous lower back complaints which she related to any injury which occurred December 14, 1973. It also appears that he was unaware that Dr. Dinsmore had previously found claimant to have a disability, as a result of that prior injury, in the range of five to ten percent. It also appears that Dr. Manahan was unaware that in 1967 Dr. Dinsmore had found claimant to have a ten percent permanent partial disability as a result of an industrial injury to her coccyx. When the records of the two proceedings are compared, claimant's present complaints are similar to the complaints which she previously related to the 1973 injury. It seems reasonable that the surgical removal of claimant's fractured coccyx would resolve the pain which it had caused. It is also reasonable to assume that if claimant did, in fact, sustain a back injury in 1973, that the passage of time would cause the symptoms to subside. Such assumptions are consistent with claimant's testimony that she was feeling good at the time she commenced work for her son's business. In view of the fact that a permanent disability rating was imposed by her physicians shortly after the 1973 injury, one would not expect, however, for her to have been totally asymptomatic. A further complicating factor is that the concensus of x-ray reports reveal nothing which indicates any injury to claimant's spine. Only the report taken at Bergen Mercy Hospital on January 7, 1980 shows narrowing at the L5-S1 interspace. Such would be consistent with a herniated disc or some other injury. All the subsequent reports indicate a normal spine with normal interspaces. Claimant has shown a positive result in straight leg raising tests on some occasions early after the injury, but such appears to have resolved with the passage of time. The reports, except for the observations made by Dr. Pantano in his deposition, failed to conduct any other clinical objective basis for claimant's continuing complaints.

Dr. Pantano related in his deposition and in one or more reports that Dr. Murphy had diagnosed a herniated disc. There is no final discharge summary or report from Dr. Murphy which indicates such. Such was entered as an admitting diagnosis on exhibit 114 at the time of claimant's December 1980 period of hospitalization but the tests which were performed during that period of hospitalization provided no confirmation of a herniated disc.

A further complicating factor in the case is claimant's emotional disturbances and the manner in which they relate to her relationship with her husband and children. It would not be entirely incredible if some part of her complaints were a result of an unrealized desire for attention, appreciation, sympathy or even revenge.

Even though Dr. Pantano opined that claimant had a herniated disc, his language was somewhat equivocal. The facts upon which he purported to base that opinion are not corroborated by the evidence in the case. It should be further noted that his opinion was based upon the assumption that claimant had been asymptomatic prior to her fall in January, 1980. His opinion concerning a herniated disc conflicts with those expressed by Drs. Hertzler, Fitzgibbons, Manahan and Rassekh. The lack of objective clinical findings and the concensus of medical opinion against a herniated disc will, in this case, result in a finding contrary to that of the primary treating physician. Under the record made, claimant's injuries from the January 7, 1980 fall are not shown to include a herniated disc.

It should be noted that, until claimant began working for her son's business, she had not been employed for any significant amount of time, if at all, after she sustained her injury in 1973. This is some indication that she was either suffering residual effects from that injury or that she had decided to cease being employed outside the home. The work she performed for her son was part-time in nature. She has not sought to return to other employment since the 1980 injury. Her subjective complaints would seem to severely limit her ability to return to gainful employment, but those complaints are greatly disproportionate to the objective clinical findings from the numerous medical tests and procedures. Claimant's education is limited. At her present age she is near the age of normal retirement and beyond the age at which one would normally expect a person to begin a new career.

When all the foregoing factors are considered, it appears that claimant's present industrial disability is in the range of 25 percent of the body as a whole. It also appears that claimant has already been paid a total of 25 percent permanent partial industrial disability when the award in the previous case and the amount already paid by defendants is combined. Claimant was admittedly less symptomatic immediately prior to this most recent injury than she was at the time of her previous award. Such would normally be expected to occur and the fact that claimant may have had an increased susceptibility to further injury following the 1973 injury are matters which properly would have been within the contemplation of the deputy at the time the disability arising from the 1973 injury was determined. It is therefore found that claimant has received all compensation for permanent partial disability to which she is entitled.

Claimant has not returned to work and the termination of her healing period must be measured by the point at which further significant improvement from the injury was not anticipated. The point at which a disability rating is imposed is sometimes used to determine the point of maximum significant improvement. As shown in exhibit 113, Dr. Manahan imposed a disability rating of five percent on October 17, 1980. His notes in exhibit 120 from his examination of claimant on November 9, 1983 indicates that he feels the claimant had, by that time, achieved the maximum recovery. Claimant's symptoms were such that she was hospitalized on December 22, 1980 where she remained until discharged January 13, 1981. She was still complaining of her back and admitted to Mercy Hospital in Council Bluffs on March 30, 1981 and while there she received treatment for her back, although such was not the major reason for her hospitalization. The records of claimant's hospitalization commencing July 24, 1981 make no reference to back complaints at that time. There is also no treatment shown in those records for any back pain or condition in her back. According to claimant's testimony her condition improved little at any time since the fall. The ninth page of exhibit 116 indicates that there was a fareup of her back pain at approximately the time she was admitted to Mercy Hospital in Council Bluffs on March 30, 1981. Under such a record it will be determined that claimant reached the point of maximum significant medical improvement from the injury on May 1, 1981, the day she was last discharged from any hospitalization which included treatment for her back continuing, although somewhat sparadic improvement is noted up to that date. There is nothing in the record to indicate that her condition improved after May 1, 1981. That date of discharge also amounts to what is substantially the end of claimant seeking medical care for her back. In view of the nature of her condition it will also be found, medical opinions to the contrary notwithstanding, that her healing period ran continuously from the date of injury until May 1, 1981, a period of 68 weeks four days.

It is clear from the record Dr. Pantano was an authorized treating physician. When he chose to call upon Dr. Murphy for consultation, such impliedly authorizes care by Dr. Murphy. His charges in the amount of $370.00 were incurred for care of claimant's back and are the responsibility of the defendants.

Exhibit 1 relates to claimant's admission to Lutheran Medical Center on December 22, 1980. While so hospitalized claimant was subjected to certain tests and procedures which were not related to her back. They were, however, part of a series of diagnostic tests used to determine the full nature and extent of whatever injuries she had sustained in the fall. Some of the tests excluded some possible causes of claimant's complaints which would not be related to a fall. That testing allowed the diagnosis concerning her back to be more certain does not render those tests unnecessary or unreasonable. It should be noted that they were arranged under the directions of Dr. Pantano, an authorized treating physician. There are, nevertheless, four charges on exhibit 1 which cannot be related to the injury of July 7, 1980. They are the electrocardiogram posted February 24, 1980 in the amount of $40.00, the x-ray of the gall bladder posted February 29, 1980 in the amount of $65.00, the CT scan of the pancreas posted December 30, 1980 in the amount of $326.00 and the echography of the gall bladder posted December 30, 1980 in the amount of $59.00. All other charges on exhibit 1, which total $4,438.25 are found to be the responsibility of the defendants under the provisions of section 85.27 of the Code of Iowa.

FINDINGS OF FACT

1. Claimant is a 60 year old married resident of the State of Iowa.

2. On January 7, 1980 claimant was an employee of Coleman Industrial Cleaning, a business which has its business offices in the State of Iowa.

3. On January 7, 1980 claimant, while cleaning the Pacesetter Building in Omaha, Nebraska as part of the work for her employer, tripped on carpet and fell down a short flight of three or four stairs landing on a cement floor.

4. Claimant completed the tenth grade in school and has no further formal education or vocational training.

5. Claimant's work experience is generally limited to domestic work in the nature of cooking and cleaning, but she also has a limited amount of experience of packaging meat in a packing house and in working as a cashier at a fast food restaurant.

6. Claimant's rate of compensation is $55.24 per week.

7. In 1973 claimant sustained an injury which resulted in a permanent partial functional impairment centered in her low

back of five to ten percent of the body as a whole. That injury was in the nature of a lumbosacral strain and was accompanied by symptoms similar to those which followed from the injury claimant sustained January 7, 1980. She was awarded 17 1/2 percent permanent partial disability as a result of that 1973 injury.

8. By the time claimant commenced working for Coleman Industrial Cleaning in 1979, the discomfort related to the 1973 injury had substantially reduced.

9. Following the 1973 injury claimant performed little, if any, work beyond the work in and around her home until the time she commenced employment with Coleman Industrial Cleaning.

10. In the fall which claimant suffered on January 7, 1980 her injuries included a lumbosacral strain. There exists a possibility that she may have suffered a herniated disc, but such cannot be confirmed.

11. On October 17, 1980 claimant had a five percent functional impairment of the body as a whole attributable to the condition of her lumbar spine.

12. Claimant suffers continuing discomfort in her lumbar spine as a result of the injury.

13. Claimant's complaints exceed any objective clinical findings regarding her injury.

14. Claimant reached the point of maximum significant medical improvement from the injury on May 1, 1981.

15. Claimant's emotional disturbances have not been shown to be related to the injury of January 7, 1980.

16. The services of Richard P. Murphy, M.D., were called upon by Dr. Pantano, the authorized treating physician for claimant's injury.

17. Of the charges from Lutheran Medical Center, as shown on claimant's exhibit 1, $4,438.25 were for care related to the injury. Charges totaling $490.00 were for medical care of claimant's unrelated gastric problems.

18. Defendants have paid claimant 50 5/7 weeks of healing period benefits and 37 1/2 weeks of compensation for permanent partial disability which relates to a disability of 7 1/2 percent of the body as a whole.

CONCLUSIONS OF LAW

Where claimant is a resident of the State of Iowa and defendant employer maintains its business office in the State of Iowa this agency has jurisdiction of the subject matter and parties of this proceeding, even though the injury occurred in the State of Nebraska and all of claimant's work was performed in the State of Nebraska.

The injury claimant sustained arising out of and in the course of her employment on January 7, 1980 was a proximate cause of the disability which she presently exhibits.

Claimant's total present disability, when measured in industrial terms, is 25 percent of the body as a whole.

The injury claimant sustained was an aggravation of her preexisting back injury and condition and that the extent to which her disability increased as a result of the injury of January 7, 1980 is 7 1/2 percent of the body as a whole when the same is measured industrially and consideration given to her preexisting disability of 17 1/2 percent.

Claimant's healing period commenced January 8, 1980 and ended May 1, 1981 resulting in a total of 68 4/7 weeks.

The services of Richard P. Murphy, M.D., were obtained at the request of Anthony R. Pantano, M.D., the authorized treating physician and Dr. Murphy's charges in the amount of $370.00 are the responsibility of the defendants under section 85.27 of the Code of Iowa.

All of the charges from Lutheran Medical Center incurred as a result of claimant's hospitalization which began December 22, 1980 were authorized by Dr. Pantano and related to care for the injury claimant sustained January 7, 1980, except charges relating to her gastric disturbance which total the sum of $490.00, leaving defendants responsible for the remainder of the charges which total $4,438.25.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant sixty-eight and four-sevenths (68 4/7) weeks of healing period compensation at the rate of fifty-five and 24/100 dollars ($55.24) per week commencing January 8, 1980.

IT IS FURTHER ORDERED that defendants pay claimant thirty-seven and one-half (37 1/2) weeks of compensation for permanent partial disability at the rate of fifty-five and 24/100 dollars ($55.24) commencing May 2, 1981.

IT IS FURTHER ORDERED that defendants receive credit for all amounts of compensation for healing period and permanent partial disability previously paid which results in defendants currently owing claimant seventeen and six-sevenths (17 6/7) weeks of compensation at the rate of fifty-five and 24/100 dollars ($55.24) per week if the payments shown on the final report dated June 23, 1983 are correct.

IT IS FURTHER ORDERED that defendants pay the amount due and owing in a lump sum together with interest thereon in accordance with section 85.30 of the Code of Iowa.

IT IS FURTHER ORDERED that defendants pay the cost of this action pursuant to Industrial Commissioner Rule 500-4.33.

IT IS FURTHER ORDERED that defendants file a final report within twenty (20) days from the date of this decision.

Signed and filed this 6th day of June, 1984.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES COLLINS,	:	
Claimant,	:	File No. 683826
vs.	:	R E V I E W -
AUDUBON BROOKHISER	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
HAWKEYE INSURANCE GROUP,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Charles Collins, the claimant, against his employer, Audubon Brookhiser and the insurance carrier, Hawkeye Insurance Group, to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on or about September 30, 1981. 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 October 12, 1981 defendants filed a first report of injury concerning the September 30, 1981 injury. On October 29, 1981 defendants filed a memorandum of agreement (Form 2), and on December 10, 1981 they filed a Form 2B indicating that the weekly rate for compensation benefits was $304.61. At the time of the hearing defendants indicated that they were still paying the claimant weekly benefits and that they had converted from healing period to permanent partial disability on or about August 23, 1982.

The record consists of the testimony of the claimant, of Patricia Collins, of Deanne Collins, of John Boone, and of Susan Garrett; claimant's exhibits 1 and 2, packets of medical records with identifying cover sheets; claimant's exhibit 4, statement from the Keokuk Area Hospital; claimant's exhibit 5, the deposition testimony of Dr. Harold L. Schrier; claimant's exhibit 6, the deposition testimony of Julio del Castillo, M.D.; and defendants' exhibit 1, February 12, 1982 office notes of Don K. Gilchrist, M.D., with attached cover letter and February 12, 1982 x-ray report from C. G. Wagner, M.D.

ISSUES

The issues to be determined include the nature and extent of claimant's disability and whether claimant is entitled to payment of the Keokuk Area Hospital bill and certain mileage expenses.

REVIEW OF THE RECORD

Claimant, who began driving a truck for a living in 1976, testified that he was in good health prior to September 30, 1981. Dr. Harold L. Schrier, who examined the claimant on April 28, 1981 for a DOT pre-employment physical, verified that although the limited examination would not necessarily reveal a chronic back problem, claimant did not register any physical complaints at the time and did qualify for truck driving from a medical standpoint.

On Wednesday, September 30, 1981, claimant delivered a load of grain for defendant employer at Omaha, Nebraska. As he was in the process of unloading his truck he slipped from the side ladder, struck a table and landed on the concrete floor. Claimant twisted his back and injured his right shoulder in the fall. However, he got up, completed the assignment and drove home. He called the defendant employer during the ride home and requested time off the following day. Claimant took another assignment on Friday but found his condition worsening to the point where he could not get out of the trailer. He was off Saturday. A Minnesota trip on Sunday was his last run.

Joung Wha Lee, M.D., examined the claimant on October 6, 1981 and found tenderness in the right scapular area and positive straight leg raising and Patrick's sign on the right. He initially diagnosed claimant's problem as a sprain to the right shoulder, low back and hip. Since claimant's symptoms showed no improvement as of October 12, 1981, Dr. Lee admitted the claimant to the Keokuk Area Hospital for conservative treatment consisting of pelvic traction, ultrasound, bedrest and medication. A lumbar spine x-ray taken on outpatient basis was normal. Examination at the time of admission revealed tenderness at L4-5, no swelling, positive straight leg raising and Patrick's

maneuver on the right and on the left but to a lesser degree, no weakness and decreased sensation in the right leg. Upon discharge on October 21, 1981, claimant's condition had not improved significantly. Final diagnosis was herniated intervertebral disc L4-5. After additional bedrest at home and medication proved unsuccessful, Dr. Lee referred the claimant to Julio del Castillo, M.D.

Dr. del Castillo, board certified neurosurgeon and fellow of the American College of Surgeons, testified that he first saw the claimant on November 3, 1981. He received a history of the injury and course of treatment that was essentially consistent with the record. Claimant's complaints included low back pain radiating toward the right hip with right leg weakness. According to Dr. del Castillo, claimant also noted that his right leg felt "different" but the description did not equate with paresthesia.

Dr. del Castillo reviewed x-rays the claimant brought from Keokuk Area Hospital and found what he believed to be evidence of narrowing at L4-5 and greater narrowing at L5-S1. Neurological examination on November 3, 1981 revealed:

> The lordotic curve is preserved, there is a moderate amount of right sided spasm and pain to percussion of the lumbar spinous processes, but not to palpation of the sciatic nerves on either side. There is fairly good range of motion, but pain upon flexion or hyperextension and also some tightness on lateralization to the left, the pain being perceived on the right lumbosacral area. He walks on toes and heels, but seems to have some trouble doing this on the right side. The entire right leg appears moderately weak without any specific dermatome being implied. The knee and ankle jerks are brisk and symmetrically present. There are no alterations to pin prick [sic] perception. Laseque is positive at 45° on the right and negative on the left. The thighs 5 inches above the knee caps were 20 inches on the right and 19 3/4 of an inch on the left, and the calves, 3 inches below the tibial tuberosity were 14 5/8 of an inch bilaterally.
>
> (Claimant's exhibit, item 1, p. 2.)

Dr. del Castillo's impression was possible ruptured disc at both L4-5 and L5-S1. He recommended limited physical activity and performance of back exercises twice a day.

James B. Smith, L.P.T., first saw the claimant on November 18, 1981. He instructed the claimant in hip flexion stretching and abdominal pelvic tilt exercises to be done after application of moist heat. When Mr. Smith re-evaluated the claimant on November 23, 1981, he found increased hip flexion and a 15° increase in straight leg raising. Claimant reported that lumbar area spasms were less severe and less frequent. Claimant was attempting pelvic tilt exercises at that time. On November 30, 1981 claimant reported experiencing increased pain upon bending over on November 26, 1981. There was a re-occurrence of severe lumbar muscle tightness and straight leg raising was limited to 30°. Mr. Smith began the claimant on a program of daily electrical stimulation with moist heat which lasted through December 4, 1981. By December 7, 1981 there was a substantial reduction in bilateral lumbar tightness and claimant was able to tolerate straight leg raising to approximately 70° and hip flexion to 90°. Lower extremity extension exercises were begun. Treatment was reduced to three times a week. In a December 15, 1981 letter addressed to defendant carrier, Mr. Smith opined that a return to work date was still undeterminable.

Claimant reported another episode of severe spasm of the upper lumbar muscles on the left on December 30, 1981. Once again electrical stimulation was begun and all exercises were discontinued for approximately a week. Mr. Smith noted slow progress on January 4, 1982, January 25, 1982 and February 12, 1982.

Claimant was also seen by Donald K. Gilchrist, M.D., on February 12, 1982, at the request of defendant carrier. Dr. Gilchrist received a hitory from the claimant which was essentially consistent with the record as a whole. He, too, observed that claimant's description of strange sensations in the legs did not suggest sciatica or paresthesia. Dr. Gilchrist set forth his examination findings and diagnosis in a progress report dated February 12, 1982.

> He is alert, orientated, well-developed, well nourished, and cooperative. He moves about the examining room freely and easily. In the erect position, his leg lengths are clinically equal and his spine is straight. When he forward flexes with knees extended, he can do so only so that his fingertips lack 16 inches of touching the floor. Right and left lateral bend are full, however, at 20 degrees and there is adequate torso twisting to either side. He expresses some tenderness to palpation to the right side of the lower lumbar spine. Maximum chest expansion is 2 inches. The circumference of the distal thighs are equal at 16 1/2 inches. Circumference of the calves--four inches below the knee are equal at 14 1/2 inches, and 8 inches below the knee they are equal at 11 1/4 inches. Straight leg raising can be done in both sitting and supine positions to 90 degrees, but at that point on both sides he gets low back pain, but not sciatica. The knee jerks and ankle jerks are brisk and equal. Pinprick sensation is preserved, in fact, there is slight hyperesthesia over the course of the left L-5 and S-1 dormatomes (this seems hyperesthetic rather than the right being hypoesthetic). He can walk on his heels in a sustained fashion; however, 10 toe lifts suggest some weakness of the right gastroc.
>
> X-rays of the lumbosacral spine in multiple projections were done, and are interpretted [sic] as being normal. With the possible exception of a slight narrowing of the L-5, S-1 interspace.
>
> DIAGNOSIS: I believe this man had a strain of his anulus fibrosis and now has some degree of degenerative disc disease of the low back, but the level cannot be determined. He did not appear to be a surgical candidate at this time.
>
> I do think that psychometric testing should be done, probably in the form of an MMPI by someone trained in that procedure.
>
> I feel at the present time, the man is totally disabled from doing his regular occupation of a tank truck driver. It also should be noted that this occupation, which of course involves prolonged sitting and bouncing, is probably the worse type of occupation for someone with disc problems of the low back; hence, it is not inconceivable that this man may have to be retrained for another type of job. In the meantime, I think he should continue to be treated. Should he get worse, he may have to have surgery by neurosurgeons.
>
> (Claimant's exhibit 1, item 9 and defendants' exhibit 1.)

Parenthetically, it should be noted that defendants' copy of Dr. Gilchrist's report contained the following sentence: "At the present time, the patient states that he would be able to go back to full work, prolonged sitting increases his back pain." Claimant's copy contains the same sentence but the word "not" was inserted (handwritten) between "would" and "be". Claimant testified on direct examination that he wrote the "not" on the report after he received it in the mail and confirmed with the doctor that the omission was a typographical error. He then furnished the report to his attorney. Upon cross-examination, claimant seemed confused as to whether the report was received from Dr. Gilchrist or Dr. del Castillo and testified that he called both doctors about the report.

In office notes for February 17, 1982, Mr. Smith commented that claimant reported "he had passed out and was hospitalized prior to this date. He had also had a severe muscle spasm of the lumbar area at the time he fainted." (Claimant's exhibit 2, item 1, p. 2. According to claimant's exhibit 4, a bill from Keokuk Area Hospital, claimant was hospitalized from February 13, 1982 to February 14, 1982 under Dr. Lee's care.) Claimant's exercise program was reduced for a few weeks. Then on March 10, 1982, March 15, 1982 and April 26, 1982, Mr. Smith reported that claimant's condition steadily improved and that claimant had experienced no recurrence of muscle spasm.

Dr. del Castillo saw the claimant again on May 7, 1982 for general questioning and a cursory examination. He reported his findings to Dr. Lee in a letter under the same date:

> Mr. Collins tells me that he is pretty comfortable. When he gets soreness, he gets it on his low back and nothing else. Under the circumstances, I would not advise myelograms or surgeries of any kind. I think Mr. Collins will have to do light work and a type of work that is compatible with his problem and that only should the pain become extremely severe would we have to consider a complete re-evaluation and lumbar myelography and up to and including possible surgery.
>
> Light work would consist of a weight lifting limit of 25 pounds, no repeated back bendings, no twisting, no pushing or pulling of heavy objects. I don't think he can sit and drive for hours on end because this is not going to do him any good. Work that is within this framework could be performed anytime.
>
> I will be glad to see him again should the pain aggravate to the point that myelography is required.

When deposed on July 20, 1982, Dr. del Castillo had not seen the claimant since the last examination. He opined that claimant's impairment was 20 percent of the body as a whole and that, based on the length of time that had gone by between his two examinations and the persistence of symptoms, claimant had reached maximum recovery.

Mr. Smith continued to treat the claimant on May 24, 1982, June 16, 1982, July 5, 1982, August 12, 1982 and August 30, 1982. A spasm recurrence occurred in mid June. In an office note dated September 2, 1982, Mr. Smith reported that claimant did not keep the appointment for that date and that as of August 30, 1982 claimant "was able to perform good straight leg raising, and passive straight leg raising could be done to within normal limits without any increased lumbar pain. The patient has had no recurrence of soft tissue tightness as of this date." (Claimant's exhibit 2, item 1, p. 4.) (Claimant testified that he continued to seek physical therapy until he received a letter from defendant carrier indicating his healing period benefits would be ending.)

Claimant testified that his main problem is recurrence of muscle spasms from a myriad of activities he was able to perform prior to the work injury. He reported being unable to sit for any significant length of time, to walk very far, to drive a car more than 35 miles, to lift a rimless tire, to work on his car, to climb into a truck, to ride a tractor, to shovel, to rake, to mow, to wallpaper and paint, to ride a bike or to play softball. He can swim but has not attempted waterskiing since the injury because of the flareup he experienced from trying to mow the yard. Claimant related that the pain does not always occur immediately--sometimes the spasm begins the day after he has attempted a particular activity. He estimated the spasms vary in length from a day to three weeks.

Claimant is 36 years old. Aside from his high school education, the only other training claimant received was on the G.I. bill and in auto body work, which he stated he could no longer do. Claimant calculated his earnings for the year he was injured would have been $30,000, based on the fact he had earned approximately $20,000 during the months he did work in 1981.

Claimant reported that he sent out 35 resumes seeking, but not specifying, a position in safety, sales or troubleshooting. He emphasized his perfect driving record for one million miles and his background and, on half of the sent resumes, he mentioned his injury. According to the claimant, he received answers from all who received the resume without the extra information but received no answer from those who received the other version. Claimant added that he has not talked to any of the employers who did respond because they indicated either they had no position that would utilize his talents or they were not hiring for economic reasons. Claimant explained that he thought he was qualified to apply for non-driver jobs because he had owned his own truck and was aware of safety aspects, lines of commodities, and other related information. Claimant testified generally that he has been unable to obtain other employment.

John Arthur Boone, a farmer and a friend of the claimant for five years, testified that the claimant helped him farm prior to the date of injury but was unable to do so afterwards. Mr. Boone recalled the claimant tried to drive a tractor in the spring of 1982 but became almost immobile and had difficulty getting off the machinery. Mr. Boone also observed the claimant suffer a severe muscle spasm when standing up after a card game. Apparently, claimant knocked himself out as he twisted in pain and hit the wall.

Susan Garrett, another friend of the claimant, testified that she had to drive the claimant home from the restaurant where they had been sitting drinking coffee for two to three hours because he had so much pain after sitting that long. She drove claimant back the next day to get his car.

Claimant's wife of 14 years and 13 year old daughter verified claimant's complaints and remarked about a noticeable change, for the worse, in his personality.

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 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

While the matter of causal connection between the injury and disability was not preserved as an issue at the time of the pre-hearing or hearing, some of counsels' inquiries suggest that such point may have been part of the general controversy. Accordingly, a few preliminary comments on causal connection are in order. The record indicates that claimant had no history of back complaints prior to the date of injury but has been plagued with muscle spasms since September 30, 1981. There is no record of subsequent injury or of unrelated illnesses contributing to claimant's malady. Dr. del Castillo's confirmation of the "disc problem" as being the basis of claimant's ongoing discomfort does not mean that claimant's disability is not traceable to the injury. Rather, the "disc problem" refers to the narrowing at L-4 and L-5 due to softening of the disc as a result of the injury. Dr. Gilchrist corroborated that the injury caused such a strain of the anulus fibrosis and resulted in some degree of degenerative disc disease.

With regard to the extent of claimant's impairment, the medical experts agree that while claimant's condition does not warrant consideration of surgical intervention he no longer is capable of performing the work in which he was engaged when injured. Light work as described by Dr. del Castillo would appear to be suitable for the claimant at this time. By the claimant's own admission he felt qualified for certain work in the trucking industry, that seemingly would fall into the light category, and was advised by at least some employers that he would be appropriate for such positions if the economy were better and they had openings. No evidence was presented on how much income such jobs would generate. Similarly, claimant's testimony regarding loss of earnings would have had more impact if documented and if expanded to recent prior years.

Although claimant's initiative in writing to various employers for suitable work tends to reflect positively on his motivation, one questions why claimant has not pursued by phone call or direct personal contact some of the more favorable responses in case an opening does occur. With regard to the employers who did not respond, a copy of the resumes and cover letters sent to the prospective employers would have been helpful in drawing accurate conclusions about the lack of response as it relates to claimant's disability.

The record does not reflect exactly what other type of work claimant sought since he was injured. Nor did the claimant relate his work history prior to 1976. Claimant is young by today's standards and appears to be of at least average intelligence. Some form of retraining appears to be a reasonable option. Again, the record contains no indication that claimant has considered or is interested in such rehabilitation.

While claimant's complaints regarding recurrent muscle spasms are credible in general, one wonders why the claimant was willing to accept, apparently without inquiry, a letter informing him of a cutoff of healing period benefits as meaning an end of therapy treatments if the spasms were and are as debilitating as he states. Since the letter in question is not part of the record, the reasonableness of claimant's reaction cannot be properly assessed. Defendants are encouraged to investigate further care, including the testing recommended by Dr. Gilchrist, if the claimant seeks such treatment in an effort to lessen or to control his level of pain.

Based on the severity of the injury, the length of healing period (approximately ten months according to Dr. del Castillo's testimony), the functional impairment rating and related limitations specified by the medical experts, in addition to the other factors of industrial disability analyzed above, the claimant has established that he sustained a 35 percent loss of earning capacity as a result of the September 30, 1981 injury.

With regard to the offered medical expenses, the record reflects that the mileage expenses were related to reasonable and necessary treatment of the injury. However, the record contains no probative evidence upon which a finding may be made that the hospitalization in February of 1982 was for reasonable and necessary treatment of claimant's back condition. Claimant's testimony and Mr. Smith's February 17, 1982 office notes, which amount to hearsay, support only speculation that claimant's episode of passing out was directly traceable to the back pain. The bare hospital bill does not remedy the lack of proof. Some report from Dr. Lee or the admitting and discharge diagnoses may have satisfied claimant's burden. See geneally DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940); Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1956).

Finally, the parties should note that the controversy over the altered exhibit had no bearing on claimant's credibility or the outcome of this case. Claimant's explanation of what occurred is believable. Indeed the content of the sentence, especially when read with the rest of the report, makes it obvious that the omission of "not" was an oversight.

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 injured his low back on September 30, 1981 when he slipped from a ladder and fell on a concrete floor in the course of unloading his truck.

FINDING 2. Claimant was initially hospitalized for pelvic traction, ultrasound, bedrest and medication and thereafter received follow-up physical therapy through the end of August 1982.

FINDING 3. The medical experts concluded that claimant may have suffered a herniated intervertebral disc at L4-5 or at L5-S1 or at both levels, but they did not recommend a myelogram or surgical intervention.

FINDING 4. The medical record indicates that claimant has a 20 percent functional impairment to the body as a whole and should avoid lifting over 25 pounds, twisting, pushing, pulling, repeated bending and prolonged sitting.

FINDING 5. Claimant's main complaint is recurrent muscle spasm upon performance of most activities in which he engaged without difficulty prior to the work injury.

FINDING 6. Claimant is 36 years old.

FINDING 7. Claimant is a high school graduate and received training in auto body work while in the military.

FINDING 8. Claimant was employed as a truck driver from 1976 until injured in 1981. His prior work history is unknown.

FINDING 9. Claimant's estimated earnings for 1981, had he worked the entire year, was $30,000.00. His earnings for prior years are unknown.

FINDING 10. Claimant has not returned to work. Claimant has made some effort to locate non-driver positions with employers in the trucking industry. Testimony regarding other job hunting was non-specific. Claimant did not mention consideration of retraining.

CONCLUSION A. Claimant has sustained a thirty-five percent (35%) loss of earning capacity as a result of the September 30, 1981 work injury.

FINDING 11. The medical record indicates that significant improvement was no longer anticipated on May 7, 1982.

CONCLUSION B. Pursuant to Code section 85.34(1), claimant's healing period ended on May 7, 1982.

FINDING 12. The record does not contain evidence of sufficient probative value to determine the reason for claimant's hospitalization from February 13, 1982 to February 14, 1982.

CONCLUSION C. Claimant has failed to sustain his burden of proving that the Keokuk Area Hospital bill was for treatment of the work injury as contemplated by Code section 85.27.

FINDING 13. The record indicates that offered mileage expenses are related to obtaining treatment of the work injury.

CONCLUSION D. Pursuant to Code section 85.27, claimant is entitled to reimbursement of the offered mileage expenses.

ORDER

THEREFORE, IT IS ORDERED that the defendants pay the claimant one hundred seventy-five (175) weeks of permanent partial disability at the rate of three hundred four and 61/100 dollars ($304.61) per week. Pursuant to Code section 85.34(2) permanent partial disability benefits shall begin as of May 8, 1982.

Defendants are ordered to pay claimant healing priod benefits from the date of injury through May 7, 1982 at the rate of three hundred four and 61/100 dollars ($304.61) 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 mileage expenses:

Dr. del Castillo - 90 miles round trip (11-3-81 and 5-7-82)	180 x $.22	$ 39.60
Dr. Gilchrist - 86 miles round trip (2-12-82)	86 x .22	18.92
Physical Therapy - 10 miles round trip		
(11-18-81 to 6-30-82 - 83 trips)	830 x .22	182.60
(7-1-82 to 8-30-82 - 16 trips)	160 x .24	38.40

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 28th day of July, 1983.

LEE M. JACKWIG
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES CONRAD, Claimant, vs. MARQUETTE SCHOOL, INC., Employer, and U.S.F.&G. INSURANCE COMPANY, Insurance Carrier, Defendants.	FILE NO. 696189 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 James Conrad, claimant, against Marquette School, Inc., employer, and U.S.F. & G. Insurance Company, insurance carrier.

Claimant seeks further benefits as a result of the injury which occurred on January 11, 1982. Claimant's rate of compensation is $157.97 per week as established by the memorandum of agreement filed January 19, 1982 and as confirmed by stipulation of the parties at hearing.

The hearing commenced February 28, 1984 at the Henry County Courthouse in Mount Pleasant, Iowa and was fully submitted at the conclusion of the hearing on that date.

The record in this proceeding consists of the testimony of claimant, Dan Kieler, Larry Menke and Bill Tester which was given in person at the hearing. Claimant's exhibits 1 through 6 were received into evidence as were defendants' exhibits A through Z, AA, BB, CC and DD. Claimant's exhibit 1 is the evidentiary deposition of Thomas R. Lehmann, M.D., taken November 1, 1983. Defendants' exhibit P is the evidentiary deposition of William H. Whitley, D.O., taken November 18, 1983.

The parties stipulated that the correct date for conversion from healing period into permanent partial disability was March 28, 1983 and that the amount charged for the medical services rendered to claimant was reasonable in relation to the services provided. Defendants' entry into such stipulations was made on the expressed condition that such does not constitute an admission of any other matter related to the case.

ISSUES

The issues presented by the parties at the time of hearing are whether or not there is a causal connection between the injury claimant suffered January 11, 1982 and his present disability and the medical expenses which he incurred. Also at issue is a determination of the nature and extent of any disability which claimant may have arising from that injury.

REVIEW OF THE EVIDENCE

Claimant, James Conrad, testified on his own behalf. He related that he is 46 years of age and was born January 13, 1938. He is not married and claims no dependents.

Claimant holds a high school diploma, has not served in the military and has received no other formal education.

Claimant testified that he worked 14 years at Nichting's farm implement business setting up equipment. He stated that such employment required lifting including heavy items such as wheel weights. At the time he left he had some supervisory duties.

Claimant stated that he had farmed for six or seven years ending in 1978. He stated that while doing so he was the only operator and that he did everything involved in a farming operation. Claimant has also been engaged in salvage operations of tearing down barns as well as construction of farm buildings. Claimant has worked briefly as a carpenter, performed electrical wiring, framing, roofing, cement work and general building maintenance and repair.

Claimant testified that prior to January 11, 1982 he had some back muscle pains and that he had seen a number of doctors for his back problems. He related having surgery on his ankle, knee and appendix but denied any previous back surgery. He stated that he was not having back problems when he started to work at Marquette, no problem doing his work at Marquette and that he had received no complaints from his employer regarding his performance.

Claimant described his job with defendant employer as maintenance work consisting of electrical, loading and unloading, moving snow, checking furnaces, lowering ceilings, putting plastic on windows and driving between schools. On occasion he would be involved in moving desks and other items. He related putting a new roof on the gymnasium and insulating the senior high school.

He stated that he was directed to maintain a 40 hour work week but that his days and hours of work varied.

Claimant stated that on January 11, 1982 he was shoveling snow on the east side of the Westpoint Senior High School and that there was ice beneath the snow. He stated that his right foot slipped out from underneath him and that he suddenly experienced pain in his lower back although he did not actually fall. He stopped shoveling but the pain did not go away. Claimant related that he believed the pain was muscle pain and did not notify anyone of the incident at that time. He stated that he took pain pills but that the pain worsened. Claimant related that he advised the Marquette principal, Dan Kieler, of his injury.

Claimant related receiving medical care and that Duane K. Nelson, M.D., arranged an appointment for him to go to Iowa City. Claimant stated that Dr. Lehmann performed surgery on March 3, 1982.

Claimant testified that the last day he worked for Marquette was the last day of January, 1982.

Claimant testified that since having back surgery he has done some work for Menke Feed Store, Pilot Grove Bank, The Westpoint Care Center, constructed a building upon his farm, attempted to tear down a house and did some electrical work for his brother.

Claimant described the work for Menke Feed Store as finishing a farrowing building and helping to install a heat exchanger. He described the work as requiring little lifting. The most significant lifting involved carrying pieces of plastic tube weighing approximately 40 pounds. He stated that he had carried approximately 10 such pieces.

Claimant described the work for the bank as cutting down one large tree which took about 30 minutes and trimming another which took about one and one-half hours.

Claimant related that he had attempted to tear down a house but that he quit at the point after removing the windows and electrical fixtures. He stated that he could not pull nails or use a crowbar as he had done prior to this injury.

Claimant testified that the wiring he did for his brother consisted of putting wire into boxes and that it did not involve pushing, pulling or lifting of any significance.

Claimant stated that the hog shed was built on his property in the Fall of 1982 or Spring of 1983. He stated that his brother did most of the work and that he supervised.

Claimant stated that he worked at the Westpoint Care Center doing maintenance work. He described this as including buffing floors, electrical work in the nature of changing light bulbs and switches and removing, cleaning and reinstalling window air-conditioning units with another employee. Claimant stated that the buffing caused him a great deal of difficulty and that the buffing occurred once each week at the Westpoint Center and once every two weeks at the Mount Pleasant Care Center. He stated that he quit the employment because the buffing was too painful.

Claimant states that many activities cause him discomfort. These include riding a tractor, riding in a car and sitting on a soft chair. He states that he is unable to bend and, for example, that he must sit in order to tie his shoes. He states that he is unable to lift items such as tractor weights or cement forms. He has not tried to paint or hang wallpaper since the injury. Continued standing or continued sitting also causes pain.

Claimant states that he has done some welding, driven a truck, cut wood, and played softball since the injury. He relates that he can do some of these things, but he is unable to do them for any sustained amount of time, and that they make him very sore the next day. He states that he has been riding a bicycle upon the recommendation of Dr. Lehmann.

Claimant stated that his main interest in life is farming. He grew up on a family farm but had to find a non-farming job as there were eight boys in the family. He stated that four of his brothers have also had back problems.

Claimant denied receiving any salvaged lumber or completing any building salvage operations since the injury. When questioned concerning exhibits AA, BB, CC and DD claimant stated that he did not know if he was in the photos. He stated that he believed that Robert Stooker was the person riding the tractor in the exhibits. He stated that exhibit CC showed the stump of the tree he had cut down. Claimant admitted he owned an orange cap.

In an extended cross-examination claimant admitted that he had previous back problems and did not recall the contents of all the exhibits. He generally did not disagree with whatever was shown on the exhibits. He stated that the pain pills which he took following the accident were actually bufferin and that he had continued to work after the incident until January 30 even though he was experiencing increasing discomfort.

Claimant stated that he recalled digging a septic tank on Thanksgiving, 1981 and moving a piano for a Christmas concert on December 6, 1981. He stated that he kept the calendar, exhibit 5, for purposes of his pay at Marquette and has not kept it since January 30, 1982.

Claimant admitted prior significant traumas, including getting caught in a power takeoff, being struck by a falling wall and a back strain while working for Nichting Implement Co. Claimant also admitted making prior disability claims including a claim for social security disability.

Claimant denied that he had ever been given lifting restrictions prior to the incident in question.

Claimant denied seeking medical opinions concerning disability arising from low back complaints in 1968.

Claimant stated that he has been to Job Service, the care center, Menke's and Nichting's but has not found any employment that he is capable of performing. He stated that he obtained the care center job through rehabilitation services after being referred by Job Service.

Claimant stated that in 1983 he earned approximately $2,036.27. He stated that the primary source of his income comes from rental of his farm. He also related that he ceased farming prior to taking the job at Marquette due to financial circumstances. He stated that he missed only one day of work at Marquette due to sickness or injury and that was a day he had the flu. He stated that after his injury he was fired as shown on exhibit 6.

Dan Kieler testified that he is the principal of Marquette junior and senior high schools. He stated that he became acquainted with claimant when claimant began employment with the schools but that someone else had actually hired claimant. He stated that he assigned work to claimant and that claimant kept track of his time and had no close supervision. Kieler stated that he was not aware that claimant had hurt his back until he learned of it through the secretary at the school business office. He does not recall claimant telling him about the incident.

He stated the letter identified as exhibit 6 was directed by the school board.

Kieler testified that at one time claimant stopped at the school and asked about a piece of sheetrock of a size which was not locally available. The witness thought that the size was four by eight or possibly larger.

Kieler also testified that he went to Pilot Grove and saw claimant working on a house which was being torn down. He referred to exhibits AA and BB and stated that claimant is the person shown wearing jeans, a sweatshirt and red hat. He stated that claimant tried to pull a wall down using a van. Kieler stated that everyone on the job site was actively involved and that he observed for approximately 20 minutes.

Larry Menke testified that he is the owner of Menke Feed and Supply, a member of the Marquette school board and also of the city council. He stated that he has known claimant for many years as a friend and casual acquaintance commencing when they worked together at the Nichting Company. He stated that claimant was his supervisor and that the supervisory duties were shared with another individual. He stated that claimant is a very efficient worker and would make a good supervisor. He felt that claimant had mechanical abilities and general knowledge of farm equipment and carpentry.

Menke stated that prior to January of 1982, claimant had been involved in tearing down barns. Claimant had contracted to erect the building in the incident where a wall fell on claimant and that claimant had made an unsuccessful workers' compensation claim based upon it.

Menke stated that the materials listed on exhibits Y and Z were sold to claimant for a hog confinement unit. He related that on one day he went to claimant's farm and saw claimant nailing tin on the outside of the building. The witness did not know and has no knowledge of who performed the other work on the building.

Bill Tester testified that he is the administrator of the Westpoint and Pleasant Manor Care Centers. He stated that he met claimant in June when claimant was hired and discussed claimant's physical condition prior to hiring. The hiring process included a waiver and that he would not have hired claimant without such a waiver.

Tester stated that when claimant quit claimant told him that the standing and buffing caused numbness in his lower extremity.

Claimant's exhibit 1 is the deposition of Thomas R. Lehmann, M.D., taken November 1, 1983. Dr. Lehmann related that prior to January 11, 1982 claimant had disc degeneration with instability between L3 and L4 and between L4 and L5 but that he did not then have a herniated disc. He related that when he saw claimant on February 19, 1982 a myelogram showed abnormalities at three levels with the most remarkable between the fifth lumbar and the sacrum which he felt was a rupture of the disc. The discussion concerning claimant's impairment and the causation for that impairment, relates:

> A. My opinion is that he has a permanent partial impairment which I would estimate to be ten percent of his body as a whole.
>
> Q. And within a reasonable degree of medical certainty is that causally connected and consistent with the medical history that you had with regard to the injury that he described?
>
> A. Yes, it is.
>
> Q. And the percent that you've given us, does that exclude any preexisting problem that may have carried over, as such?
>
> A. It excludes any preexisting pathology in his spine. (Deposition pages 10 & 11)
>
> ...
>
> Q. Your rating is strictly functional?
>
> A. It's strictly related to the medical thing that is wrong rather than the industrial disability per se.
>
> Q. And do you base your ratings strictly on the A.M.A. Guides or do you take into account factors other than those?
>
> A. I guess I don't really strictly follow any guide. I particularly do not follow the A.M.A. Guide.
>
> Q. Okay.
>
> A. And I tend to follow more the American Academy of Orthopedic Surgeons Guide.
>
> Q. And to flesh out the question a little more or be more specific, do subjective types of information related to you play a part in the ratings you give such as how a patient feels on a certain day and so on?
>
> A. The subjective description of how the patient is feeling on various days when it's consistent with other objective findings and my knowledge of the natural history of the course of various diseases would likely play a role.

Q. And likewise, when you are attempting to make a determination as to whether a causal connection exists, do you necessarily have to work with the information that's made available to you?

A. Well, in determining causation I rely usually virtually a hundred percent on the subjective clinical history because if I find a patient with a ruptured disc I can't date that ruptured disc. It could be two days old or twenty years old, and there would be no way for me to tell.

Q. Right.

A. Other than by the clinical history.

Q. You have here the history of Mr. Conrad as it pertains to treatment and examination in the University Hospitals, correct, way back dating to when he was first seen at some early age?

A. That's correct.

Q. Were you ever or have you ever up to this time been given information about examinations and treatments of Mr. Conrad by other physicians except possibly those who may have referred him to the University Hospitals?

A. Well, the only information that I'm aware of is related to those physicians who referred him to me. (Depo. p. 13-15)

...

Q. And if I understand your previous testimony, your opinion as to the causal connection of this disability to the snow shoveling is based upon the fact that that is the only event that he related to you, correct?

A. Well, it's related not only the only event he related to me, but it was his perception that that was the only significant event which could attribute to his pain whereas he felt that he was doing relatively well until the time he was shoveling this snow, and that when he had the onset of pain the only thing he could think of that may have caused this increased pain was the shoveling of the snow.

Q. And that --

A. And so it not only is the only event that he told me about but it's also the event which he perceived was the cause of the event. (Depo. p. 22-23)

...

Q. I take it you felt he had a pretty good recovery from the surgery?

A. I felt that he had a, I guess, pretty good recovery from the surgery.

Q. And would be capable of lifting air-conditioners and water softener salt and floor buffing machines?

A. I felt that he could be capable of doing that, yeah.

Q. Okay, and that, of course, would have taken into account not only the event described to you from January of '82 but also the preexisting condition of Mr. Conrad's back, which he, of course, will always have; correct?

A. That is correct. (Depo. p. 25-26)

Dr. Lehmann related that he had treated claimant prior to January, 1982. His description of that treatment included the following:

Q. Mr. Conrad indicated in his deposition that you had examined and to some extent treated him for a tractor power takeoff injury in 1977 and then a wall falling injury in 1978. Did you personally participate in that?

A. In his treatment? Yes, I did.

Q. Did those incidents, based on the information made available to you, result in total and complete disability of Mr. Conrad for a time and then partial disability for a later time?

A. Yes, they did.

Q. And did you continue to treat Mr. Conrad after those incidents on a somewhat regular basis or at any rate examine him?

A. Yes, I did.

Q. And what was the time interval that you were seeing him?

A. Well, the first time I saw him was March 9th, 1979. Previously at the University Hospitals he'd been seen by Dr. Mickelson, M-i-c-k-e-l-s-o-n [spelling], and I saw him on March 9th, '79, May

4th, 1979, February 22nd, 1980, March 5th, 1981.

Q. Your first exam was the March 9, is that what --

A. My first exam was March 9, 1979.

Q. All right, and in that examination did you -- well, can you tell whether that examination confirmed the previous compression fracture to the fifth lumbar vertebra in the X-rays?

A. Well, I don't recall, and in using my notes from March 9, 1979 I didn't make a reference to that. As I review the films here today, specifically as I review a film from September the 19th, 1978 I don't see evidence of a compression fracture of L5. On February 22nd, 1980 he does, however, exhibit some deformity of the fifth lumbar vertebra indicating possible previous fracture of that area.

Q. Off the record or on --

MR. HOFFMAN: On.

Q. What was that date?

A. On September 19th, 1978 was the first examination where there didn't appear to be a compression fracture of the vertebra, and on February the 22nd, 1980 there's some deformity of the body of L5 suggesting that he may have had a compression fracture.

Q. I guess what made me think of it was the entry in the 3/1979 dictation in April 1978 he was caught in a power takeoff and subsequently sustained an injury to the fifth lumbar vertebra, apparently had a compression-type of fracture?

A. Right. That was in the clinical history.

Q. Right. At any rate, he does have evidence of some changes of the fifth lumbar vertebra, which would be clinically and radiographically consistent with his clinical history of the fracture of the fifth lumbar vertebra.

And following that visit -- well, actually on the February 22nd, 1980 visit?

A. Right.

Q. The dictation indicated the patient's main reason for this clinic visit was for reevaluation to return to work. The patient is a former farmer and has been doing odd jobs over the past year. (Depo. p. 15-17)

...

Q. Okay. Then on March 5, 1981 he returned for degenerative -- pardon me, having been -- and the entry indicates, does it not, he'd been followed since 1978 for degenerative disc disease of L3-4, L4-5, and L5-S1 with vacuum disc at L4-5 and spondylolisthesis grade 1, 3, and 4 in the degenerative areas?

A. That's what the entry says, yes. Yes, he had been followed through 1978 for degeneration of the disc.

Q. Can you describe --

A. He didn't actually have spondylolisthesis grade 1, 3, and 4, so that's an error in the record. He did have definite signs of degeneration of the disc at L3-4, L4-5, L5-S1.

Q. And continuing with the entry, he developed low back pain with radiation on the right leg in the L4 region?

A. That's correct. (Depo. p. 18-19)

Dr. Lehmann could not recall whether or not he gave claimant a lifting restriction but stated that a 25 pound restriction would not be unusual or inappropriate.

Claimant's exhibit 2 consists of approximately 122 pages of medical records and reports. The first 92 pages are records from Burlington Medical Center. On the 5th page of such records it is noted the history which relates two to three weeks of pain in the right buttock, thigh, posterior lateral calf down to the heel and lateral side of the foot which came on following scooping snow and which had become increasingly severe. The examination, reported at page 6, notes positive straight leg raising at 75 degrees on the right and an impression of a herniated nucleus pulposus.

The 25th page is the report of a myelogram taken February 17, 1982 which reads in part:

> Extrinsic pressure defects nearly occlude the spinal canal at the L3-4 and L4-5 levels anteriorly as well as to the right and left. In addition there is a large extradural pressure effects at the L5-S1 level on the right....
>
> IMP:
>
> Large extradural lesions at L3-4 and L4-5 and L4-5 and L5-S1 as described.

Also included as part of exhibit 2 are two sets of reports and records from the University of Iowa Hospitals. Of particular interest is the report from Dr. Lehmann addressed to Ray W. Card, dated May 27, 1982 which appears at the 4th and 5th pages of the second set of reports. The findings and opinions related in the report are consistent with the deposition.

Claimant's exhibit 3 consists of medical records and reports which duplicate those already in the record as part of exhibit 2.

Claimant's exhibit 4 consists of records from Orthopaedic and Reconstructive Surgery Associates, P.C., dated March 28, 1983. Although no signature appears, it appears to be a report from Duane K. Nelson, M.D. On the 2nd page claimant's permanent impairment is rated at 10 percent of the whole man. The history related in the report is consistent with that related by claimant at hearing and refers to the incident as an industrial injury.

Exhibit 5 is a calendar which shows claimant to have been

sick for part of the day on January 13, 1981, all day on January 14 and part of the day on January 16, 1981. It also reflects claimant being off work on March 5 and July 13, 1981 with the notation of "Iowa City" and on July 10 and July 14, 1981 with the notation of "cattle shed". The balance of the report lists times and miles which were described by claimant in his testimony as his record of his days and hours of work and the travel between the two schools at which he worked.

Exhibit 6 is a copy of a letter dated May 24, 1982 from Marquette School, Inc. signed by Daniel J. Kieler which indicates that claimant has been discharged from his position due to physical inability to perform all the duties required.

Defendants' exhibits A through G consist of various medical records affecting claimant commencing in 1978. The records show claimant to have had preexisting degenerative arthritis in his lumbar and cervical spine.

Defendants' exhibits H through O are physicians' reports, statements, letters and general correspondence dealing with disability claims previously filed by claimant arising from his previous back problems. The exhibits confirm periods of disability following a tractor accident on March 18, 1978, being struck by the wall of a building on November 9, 1978 and an undescribed farm accident which occurred March 23, 1977.

Exhibit P is the deposition of William H. Whitley, D.O., taken November 18, 1983. Dr. Whitley related treating claimant for circumstances unrelated to his back prior to January 11, 1982. Dr. Whitley was presented with a hypothetical question concerning claimant, which question related claimant's prior injuries and preexisting degenerative disc disease to which he replied:

> A. Well, I think the possibility of a herniated disc can occur any time there is a basis for it; but I have no basis to support, you know, a professional opinion that any of those could cause it, you know. Like I said, anything can cause a herniated disc with the appropriate, you know, situation.
>
> Q. (By Mr. Hardy) Let me then ask you--
>
> A. You know, herniated disc normally is not something that just happens overnight. You know, it's a succession of degenerative changes over a period of time until such time as the wall of the disc is weakened to the point that it begins to bulge and exert pressure on that spinal nerve root.
>
> It is not like the thing just pops out of there and all of a sudden one day you have a herniated disc.
>
> Q. Right. Let me ask with respect to some other possible causes, and you please feel free to comment on them as you feel appropriate:
>
> Fixing fences; digging up septic tanks; moving pianos; carpentry work and cleaning ceilings; tearing down old buildings; Can any of those activities cause a--
>
> A. They can't cause it. They can contribute to it; or if the situation was as--if all the factors were present, then perhaps it could cause it. But any of them, you know, just one thing-- What you're asking me to do is isolate one thing and say that caused a herniated disc, and I can't do that. I don't have the facts at my disposal here to give you that information.
>
> Q. Given the understanding that you've explained to us that a herniation doesn't occur overnight and it is a gradual process-- Well, let me just ask this:
>
> Is it an accurate layman's understanding to ask whether a herniation requires the tendency or the predisposition to be there before the event that contributes?
>
> A. Well, the herniation of an intervertebral disc is a series of events. It is a series of insults, a weakening and degeneration of fiber cartilage in the disc, and the bottom line is normally one or a series of events that brings about some of the symptoms. It's not just--just not like you cut your finger. It is a series of events of degeneration that it occurs, many events of improper use of the back. It can be a series in the manner in which a man earns his living. Obviously, you're not going to have a herniated disc as opposed to a guy out there hauling rock all day.
>
> Q. Right. Did you indicate that you've received a mailing from some other doctor indicating an episode with snow shoveling in early 1982?
>
> A. Yes. I received a consultation report from a doctor.
>
> Q. Let me ask, Do you have an opinion to a reasonable degree of medical certainty as to whether the events that I have related to you in series, including digging up septic tanks, are medically equally probable contributing factors to the herniation of a disc as an episode of shoveling snow as described in this February 4 document?
>
> A. I guess any of them could precipitate the symptoms.
>
> Q. Okay. Do I take that answer to be affirmative then?
>
> A. I would say Yeah, anything you named, given the appropriate circumstances, could bring about symptoms if a man has a herniated disc or the potential for a herniated disc. (Depo. p. 9-11)

Exhibit Q is 17 pages of copies of checks which appear to show 103 weeks of payments to claimant from the defendants at the rate of $157.97 per week, the same having been paid bi-weekly. Although the last check relates 102 weeks of payments, examination of the exhibit shows that 103 were actually paid. This amount totals the sum of $16,270.91 and covers the period from February 2, 1982 through January 26, 1984 inclusive.

Exhibit R appears to be the employer's copy of checks issued in payment of claimant's medical expenses. His actual expenses were not admitted into evidence and no comparison can be made.

Exhibit S is a notice to claimant dated January 26, 1984 which informs him that his weekly benefits will be terminated effective immediately following the payment which will come due March 19, 1984.

Exhibit U are records of two previous instances when claimant received compensation benefits, the first for an injury of October 13, 1969 for which he was paid $22.84. The second relates to an injury of November 25, 1969 for which he was paid $40.00. Both relate to his back.

Exhibits V and W are a brief contract which designates claimant to have been an independent contractor and a first report of injury for an accident which occurred November 16, 1978 when the wall of a building fell on claimant.

Exhibit X is a medical report dated January 3, 1979. It notes pain radiating into the leg. It notes limited motion in the lumbar spine, a negative straight leg raising test, negative Patrick's test and normal ankle jerks.

APPLICABLE LAW

The supreme court of Iowa in Almquist v. Shenandoah Nurseries, 218 Iowa 724, 731-32, 254 N.W. 35, 38 (1934), discussed the definition of personal injury in workers' compensation cases as follows:

> While a personal injury does not include an occupational disease under the Workmen's Compensation Act, yet an injury to the health may be a personal injury. [Citations omitted.] Likewise a personal injury includes a disease resulting from an injury.... The result of changes in the human body incident to the general processes of nature do not amount to a personal injury. This must follow, even though such natural change may come about because the life has been devoted to labor and hard work. Such result of those natural changes does not constitute a personal injury even though the same brings about impairment of health or the total or partial incapacity of the functions of the human body.
>
> ....
>
> A personal injury, contemplated by the Workmen's Compensation Law, obviously means an injury to the body, the impairment of health, or a disease, not excluded by the act, which comes about, not through the natural building up and tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee. [Citations omitted.] The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body.

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.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 11, 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).

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 employment activity must be a proximate cause of claimant's disability, but it need not be the only cause. Armstrong Tire & Rubber Co. v. Kubli, Iowa Appl, 312 N.W.2d 60 (Iowa 1981).

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, 252 Iowa 613, 620, 106 N.W.2d 591, 595 (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, 252 Iowa 613, 106 N.W.2d 591

(1960). See also Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Almquist, 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, 902 (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, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963) 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, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (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. McSpadden, 288 N.W.2d 181 (Iowa 1980).

A memorandum of agreement conclusively establishes an employer-employee relationship and the occurrence of an injury arising out of and in the course of employment. Trenhaile v. Quaker Oats Co., 228 Iowa 711, 292 N.W. 799 (1940), Fickbohm v. Ryal Miller Co., 228 Iowa 919, 292 N.W. 801 (1940). It does not establish the nature or extent of disability. Freeman v. Luppes Transport Company, Inc., 227 N.W.2d 143 (1975). It cannot be set aside by this agency. Whitters & Sons, Inc. v. Karr, 180 N.W.2d 444 (1970).

ANALYSIS

In their brief, defendants raised the issue of whether or not claimant sustained an injury arising out of and in the course of his employment on January 11, 1982. Their position is consistent with the answer to claimant's petition which was filed in this case but it was not identified as a disputed issue at or prior to the time of hearing. It will, however, be addressed in this decision. The evidence in the case reflects that defendants have paid weekly benefits to claimant from February 2, 1982 well into calendar year 1984. The agency file in this proceeding contains a Form 2A filed March 1, 1982 which states that it is a notice of voluntary payment pursuant to Iowa Code section 86.20. The file does not reflect an application to extend voluntary payments beyond 90 days. The file reflects a Form 2 filed July 19, 1982 which indicates that it is a memorandum of agreement pursuant to Iowa Code section 86.13. The only denial of liability which has been filed by defendants is found in the answer to claimant's petition filed as a result of this contested case proceeding. Defendants continued to pay weekly benefits beyond the 90 days authorized by Iowa Code section 86.20 before such code section was repealed effective July 1, 1982 and thereafter filed a memorandum of agreement. There is no indication that the statutory changes were to be applied retroactively. It is not necessary to determine if the procedures in effect at the time of injury control the processing of the entire case or only those payments which were paid prior to July 1, 1982. The fact remains that more than 90 days of weekly compensation was paid and that upon reaching 90 days of payments without requesting an extension, defendants were required by statute to file either a denial of liability or a memorandum of agreement. Where that duty had been imposed but not satisfied, the statutory change of July 1, 1982 did not act to release or absolve defendants from that duty which had previously arisen. Defendants chose to file a memorandum of agreement which conclusively establishes the existence of the employer-employee relationship and the occurrence of a work related injury on the date in question. Accordingly, whether or not claimant sustained an injury arising out of and in the course of his employment on January 11, 1982 is not a proper issue in this proceeding and this case is properly entitled as a review-reopening proceeding. Resolution of this issue does not, however, establish the nature of the injury nor whether such injury resulted in disability.

Determination of whether defendants have liability in this proceeding hinges upon claimant's credibility. A review of all the medical exhibits in this case clearly establishes that claimant had preexisting back difficulties. He denied having memory of certain occurrences and dates which were established by the medical reports but generally did not dispute anything that was shown in the reports. The history portion of the reports dealing with the alleged injury of January 11, 1982 generally refer to scooping snow rather than slipping while scooping snow. Claimant testified that he related the slipping when he gave the history and that he also related that he had been shoveling for several days. He felt that if the records made no reference to slipping, that they simply omitted it. In light of the nature of claimant's complaints to the medical practitioners, omission of an incident of slipping without falling during several days of shoveling snow would not be inconceivable. Part of claimant's exhibit 4 consists of records from Orthopaedic and Reconstructive Surgery Associates, P.C. The second page, which is dated February 4, 1982, contains the statement, "he does not recall having prior sciatica such as this." The third page contains the statement, "he reports that he has chronic backache, but never has had this type of leg pain before." The statements do not necessarily constitute a denial of previous radiating pain. They could as easily refer to a heightened severity of pain which had not previously been experienced.

Exhibits AA and BB are photographs which Dan Kieler testified show claimant on the ladder in the corner of the building. When confronted with the photographs, claimant replied that he did not know if he was shown in those photographs. When shown exhibits CC and DD claimant denied that the person on the tractor was him and stated that it was Robert Stooker. He admitted that exhibit CC showed the stump of the tree he had cut down. Claimant's testimony concerning these matters was given prior to the testimony of Dan Kieler. None of the photographs provide sufficient detail to independently determine whether or not the person shown is actually claimant or even if the person shown in AA and BB is the same person as the one shown in CC and DD. Claimant testified that when doing tear downs he generally worked by himself and did not hire others but that his brother sometimes helped. He also testified that he attempted to tear down one house after the injury in question but that he was unable to do so because he could not pull nails or use a crowbar. If claimant had, in fact, commenced the tear down of a house, he probably incurred some obligation to complete it. Exhibits AA and BB show one and two other individuals respectively. Claimant did not deny that he was in those photographs. No testimony was taken regarding how or if the building in question was subsequently razed. If claimant commenced the tear down, he probably incurred an obligation to complete it. If he was unable to do so himself, it would have been necessary for him to find someone else to do it.

Kieler testified that claimant was using a chainsaw and this would be consistent with claimant's testimony of using a chainsaw to cut down and trim the trees by the bank. It is concluded that claimant is shown in the photographs AA and BB. It is not possibly, however, to determine the exact nature of his activities at that time or whether this was an ongoing course of conduct rather than an isolated incident.

Claimant's complaints were corroborated by the surgical findings which resulted in laminotomies at the L5-S1 disc space and also the L4-L5 space. The edema and discoloration of the S1 nerve root and the protrusion of the fifth lumbar vertebra into the L5 nerve root provide ample corroboration. Such would be expected to cause a level of discomfort which an individual would not endure indefinitely without seeking medical care. Exhibit 5 shows a number of activities which would require substantial physical exertion being performed over an extended period of time prior to January 11, 1982, but none appear after that time.

Even though there are matters in the record which raise a possible question concerning claimant's credibility, his testimony at hearing is found to be credible and is accepted. It is found that claimant's injury occurred as he testified.

Dr. Whitley related that it was possible that shoveling snow could bring about symptoms of a herniated disc in a person who has the potential for such. Dr. Lehmann found the herniated disc to be related to the incident described by claimant. The reports of Dr. Nelson do not contradict the findings of Dr. Lehmann. Admittedly, his opinion relies upon what was related to him by claimant. Claimant has previously been found to be credible and the history given to Dr. Lehmann is consistent with that given to other physicians and the description of the events presented by claimant at hearing. The opinion of Dr. Lehmann, which finds claimant's herniated disc to be a result of the shoveling and slipping incident at his place of employment, is adopted.

Drs. Nelson and Lehmann express the opinion claimant sustained a 10 percent permanent partial impairment of the body as a whole as a result of the injury in question. Their opinions are uncontradicted and are adopted. Based upon the surgeries involved and the surgical findings, it would appear that claimant's overall physical impairment may be greater than 10 percent if preexisting impairment arising from other sources is considered. While claimant has been found to have suffered a 10 percent permanent partial impairment as a result of the injury in question, it appears very likely that he has additional unrelated permanent functional impairment.

Prior to the injury, claimant was employable. Since the injury, his employer has found him to be unable to continue at his old position.

Claimant is a man of diverse experience and background. Larry Menke felt that claimant was an energetic worker and that he would make a good supervisor. The evidence in the case indicates claimant is well motivated and attempts to perform gainful activity. The evidence also clearly shows, however, that claimant's significant functional impairment does limit his ability to perform activities which place stress upon his lumbar spine. The problems related to buffing floors at the nursing homes are illustrative of the nature of claimant's physical limitations. He is able to perform moderate physical labor but the extent and duration of such must be quite limited or claimant subsequently suffers.

Claimant is at an age where retraining is feasible. Observation of him at hearing gives no indication that his intelligence may be below normal limits.

With a moderate amount of training claimant could become gainfully employed in a supervisory or other position that does not require continued or extended physical activity. Such positions could include supervision at an implement dealership, supervision of building construction, farm management, counter sales at a lumbar yard, feed store, farm implement dealership or one of many other businesses where his diverse background would enable him to function proficiently.

Claimant was somewhat impaired prior to the injury of January 11, 1982. It appears that his back was in such a condition that it caused him frequent problems. He was seeing Dr. Lehmann for chronic back pain, he wore an elastic corset or belt on occasion, he performed exercises on a regular basis and he avoided certain activity in order to avoid pain.

In 1983 claimant earned a little over $2,000.00. In 1981 the stipulated rate of compensation indicates that he would have earned approximately $269.00 per week which computes to approximately $13,500.00 per year. The types of work for which claimant is still suited are limited in availability and the rate of earning at those positions could vary from minimum wage to perhaps greater than what he had earned with the school. He will be forced to seek a position which is at or near the entry level for whatever line of work he may subsequently enter. His physical limitations clearly prohibit him engaging in the kind of work which he has previously performed. He has no demonstrated skills for communication, math or business administration. It is apparent that he does possess a high degree of disability from an industrial standpoint. Claimant's industrial disability which can be related to this aggravation of his preexisting condition is 25 percent. His recovery is limited to the extent of the aggravation.

No evidence was introduced concerning the amount of claimant's medical expenses, travel expenses or costs of this proceeding and no ruling can be made thereon.

FINDINGS OF FACT

1. Claimant is a 46 year old single male with no dependents.

2. Claimant has work experience in the areas of carpentry, farm implement mechanics, plumbing, electrical wiring, building construction and demolition and general farming operations.

3. Claimant has some demonstrated supervisory skill but has no demonstrated communication, bookkeeping or business management skills.

4. Claimant is well motivated.

5. Claimant's testimony in this proceeding was credible.

6. On January 11, 1982 claimant was an employee of Marquette School, Inc.

7. On January 11, 1982, while scooping snow, claimant slipped but caught himself without falling and experienced immediate pain in his lower back.

8. The incident of slipping while shoveling resulted in an injury consisting of an aggravation of claimant's preexisting disc degeneration.

9. The injury claimant sustained was significantly improved by surgery which consisted of a laminotomy at L5-S1 on the right with disectomy and laminotomy bilaterally with excision of innerspinous ligament at L4-5.

10. Claimant's surgery had a good result.

11. Claimant has a 10 percent permanent partial functional impairment as a result of the injury of January 11, 1982.

12. Claimant had preexisting functional impairment in an undetermined amount prior to January 11, 1982.

13. Claimant remains able to perform light or moderate lifting and labor on an intermittent basis.

14. Claimant is unable to perform activities such as continued standing, continued sitting, repeated bending, or other activities which place stress upon his lumbar spine without experiencing the onset of significant discomfort.

15. Claimant's physical limitations render him incapable of continued gainful employment in any occupation in which he was previously engaged.

16. Claimant has no demonstrated work skills which would make him immediately employable at an earning level which could reasonably be anticipated to equal that which he enjoyed while working with Marquette School, Inc.

17. Claimant's diverse background renders it likely that he will be able to find an entry level position where his past experience and knowledge will render him capable of proficient performance.

18. Claimant's employment was terminated as a result of the injury and he has made reasonable attempts to find other employment.

19. No evidence regarding claimant's rate of earnings having been introduced the stipulated compensation rate of $157.97 is adopted as correct.

20. Claimant's healing period commenced January 30, 1982 and extended through March 28, 1983, a period of 60 2/7 weeks.

21. Defendants have paid medical expenses incurred by claimant with regard to this injury but it cannot be ascertained if all related medical expenses have been submitted or paid.

22. Defendants have paid claimant $16,270.91 in healing period benefits effective January 26, 1984 and are entitled to credit for the same and for any payments made subsequent to hearing but prior to the entry of the decision in this case.

CONCLUSIONS OF LAW

This agency has jurisdiction of the subject matter of this proceeding and its parties.

Claimant sustained an injury on January 11, 1982 arising out of and in the course of his employment with Marquette School, Inc.

Claimant has sustained a permanent partial industrial disability of 25 percent of the body as a whole as a result of that injury.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant sixty and two-sevenths (60 2/7) weeks of compensation for healing period at the rate of one hundred fifty-seven and 97/100 dollars ($157.97) per week commencing January 30, 1982.

IT IS FURTHER ORDERED that defendants pay claimant one hundred twenty-five (125) weeks of compensation for permanent partial disability at the rate of one hundred fifty-seven and 97/100 dollars ($157.97) per week commencing March 28, 1983.

IT IS FURTHER ORDERED that defendants receive credit for all amounts previously paid.

IT IS FURTHER ORDERED that defendants pay all past due amounts in a lump sum with interest at the rate of 10 percent per annum from the date each unpaid payment came due until the date it is actually paid pursuant to Iowa Code section 85.30.

IT IS FURTHER ORDERED that defendants shall pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

IT IS FURTHER ORDERED that defendants file an activity report within twenty (20) days from the date of this decision.

Signed and filed this 30th day of April, 1984.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KATHERINE L. COONEY,	:	
Claimant,	:	
vs.	:	File No. 712347
CLIFTON PRECISION,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
AMERICAN MUTUAL LIABILITY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Katherine Cooney, claimant, against Clifton Precision, employer, and American Mutual Liability, insurance carrier, defendants, to recover benefits under the Iowa Workers' Compensation Act for an alleged injury of July 21, 1982. It came on for hearing on October 14, 1983 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 September 7, 1982. A denial of the claim was received on September 27, 1982.

At the time of hearing the parties stipulated to a rate of $202.93 in the event of an award and that the proper time off work was from September 8, 1982 to October 18, 1982.

The record in this matter consists of the testimony of claimant, Robin Kroloff, Dale Fangman and Martin Miller; claimant's exhibit 1, information on an encoding altimeter; claimant's exhibit 2, a diagram of the BCCS Unit; claimant's exhibit 3, a letter from Thomas J. Stoffel, M.D.; claimant's exhibit 4, a first report of injury; claimant's exhibit 5, various records relating to claimant's hospital admission of April 20, 1981; claimant's exhibit 6, a CT scan of the lungs taken May 15, 1981; claimant's exhibit 6A, discharge instructions dated May 11, 1981; claimant's exhibit 7, a CT scan of the abdomen taken June 18, 1981; claimant's exhibit 8, a CT scan of the chest and

abdomen done September 22, 1981; claimant's exhibit 9, treatment planning by Dr. Stoffel; claimant's exhibit 10, the report of an abdominal CT scan taken March 1, 1982; claimant's exhibit 11, report from a chest x-ray taken March 5, 1982; claimant's exhibit 12, a radiation therapy summary; claimant's exhibit 13, a report from George River, M.D.; claimant's exhibit 14, a report of bilateral xeromammography from August 6, 1982; claimant's exhibit 15, a letter from Eugene Kerns, M.D., dated September 9, 1982; claimant's exhibit 16, doctor's office notes; claimant's exhibit 17, records from a hospital admission of September 7, 1982; claimant's exhibit 18, record of an intravenous pyelogram taken November 1, 1982; claimant's exhibit 19, a report from Barry Lake Fischer, M.D., dated April 12, 1983; defendants' exhibit A, a letter from Kenneth H. McKay, M.D., dated September 10, 1982; defendants' exhibit B, a report from John A. Stoner, M.D.; defendants' exhibit C, a notation of payment of group health benefits; and defendants' exhibit D, claimant's dispensary record.

ISSUES

The issues in this matter are whether or not claimant's injury arose out of and in the course of her employment; whether or not there is a causal relationship between claimant's injury and her disability; whether or not claimant is entitled to healing period and permanent partial disability benefits; and whether or not claimant is entitled to medical benefits under Iowa Code section 85.27. Defendants ask a credit under Iowa Code section 85.38.

STATEMENT OF THE CASE

Sixty-four year old single claimant testified to working for what is now defendant-employer since 1946 although the company has changed hands a number of times. Claimant recalled that prior to 1981 she ran a rivet through her left thumb, cut off a portion of her left index finger in a press, and hit her right shin on a cart with soreness in her leg lasting a couple of weeks. She lost no time off work, received no workers' compensation and made no workers' compensation claim. She was hospitalized with pneumonia and later with a polyp.

Claimant reported that in March 1981 she commenced having urinary problems. She was hospitalized for the removal of a large mass and a complete hysterectomy. She was able to return to work in July and she was told not to do hard work. She had a five pound weight restriction. Her work entailed building front housings on altimeters and included putting in shafts, light screens, gaskets and glass. At several points in the process the instrument was checked for leaks. Finally it was taken to calibration. Claimant described the altimeter as being ten inches long, four and a half inches in diameter and weighing four to five pounds. She claimed that she was able to assemble altimeters with no trouble from her incision.

Claimant testified that when she went to Dr. Kerns for her annual checkup in February or March of 1982 another tumor was discovered between her rectum and vagina. This time radiation therapy was used with claimant having 34 treatments. She was unable to work for a time. She agreed that on her return to work she was to avoid bending, stooping, heavy lifting and getting down on the floor.

She went back to work in June of 1982 and was assigned to building BCCS units which apparently are attached to trucks and used to clean and recharge bottles. It was a two person job, but claimant was left to learn the job alone which she was able to do because she could read schematics. Construction of the unit started with a frame to which panels were added. A blower motor had to be built with some wiring being done. There was also plumbing. Claimant, who according to the medical records, is six feet tall, said she was too large to crawl under the unit; however, she did some work lying on the floor. Other assembly tasks she did while standing on a box. Claimant's tools consisted of hammers, mallets, screwdrivers, picks and other hand tools. She said that she lifted 45 pound panels from the floor to even with her face. Although claimant was supposed to have help for heavy lifting, the person assigned to help was on vacation. She recalled having assistance with the blower on only three occasions. She said that she complained to a foreman everyday that the work was too heavy and that she complained to Fangman as well.

Claimant recalled that after the first few days back at work she noticed the muscles across her abdominal area were hurting. Although she had immediate soreness, she asserted that she did not have the sharp pains that came later. There was a feeling of pulling on her incision. After her first day at work, she got a letter from Dr. Stoffel to set out what she could and could not do and had it mailed to the personnel manager.

Soon she confided in her union chairperson. Within a couple of weeks after her return, there was a meeting with the personnel manager at which claimant said she would not do the BCCS job. She tried to get the job of someone with lesser seniority, but the company said no. The union said they would take the matter to arbitration.

Claimant recalled the circumstances surrounding her injury thusly: She was building BCCS units. She was standing on a box to install a gauge panel. She had the panel which weighed 25 pounds without the gauges and possibly an additional 25 pounds with them in one hand and a bolt in the other. The panel slipped off a ledge. She attempted to catch it with both hands. The box she was standing on was unstable. She came down on the floor. She felt a sharp ripping pain in her abdomen and the umbilical area. She continued to work. A red ballooning developed in the area of her incision. The bulge changed to black and blue and grew larger.

She had two conversations with Kroloff, but she did not recall when they occurred or their substance. One had been a casual discussion; the other was more substantive. In the second, she told Kroloff that she thought she had a hernia which happened at work. Kroloff sent her to Dr. McKay by company car. Dr. McKay told her that her case was too complicated and recommended a girdle. She saw her oncologist who sent her to Dr. Stoner, who recommended surgery. She thought she saw Dr. Stoner who saw the hernia before she saw Dr. McKay. She was hesitant to seek medical care because of the expense as she had to pay doctor bills herself because they were not covered by insurance. She had a breast biopsy and hernia repair. She was paid accident and sickness benefits which totalled around $115 weekly after deductions.

When she returned to work in the fall she went back on altimeters. In the spring of 1983 she took on additional duties in the bearing room where she washes various small parts weighing no more than eight ounces.

Claimant stated that she continues to see her doctors who watch her tumor and provide her with medication for urinary tract infection. She has soreness in the muscles in the area of her incision. She recently traveled to Houston for consultation about her cancer problem. She believed that the restrictions given her after the hysterectomy remain in force.

Claimant testified that she plans to retire at age 65 and work for a presidential candidate.

Claimant acknowledged telling Dr. Stoner and Dr. Fischer that she was lifting heavy panels when the hernia occurred. She did not report the incident at first because she wished to make sure how badly she was hurt. The bulge did not appear until two or three days later. She said the company had not provided instructions on what to report by way of injuries.

Robin Kroloff, employee relations administrator for slightly more than a year, testified that claimant's medical cards are kept in her office. One of her duties is to man the first aid office for from four to eight hours. Other employees also serve there. A buzzer is used by employees to summon the person on duty. Persons working in the station have both first aid and CPR training. Recertification is necessary from time to time.

Kroloff said that in August it came to her attention that claimant was claiming an injury. An entry of August 6, 1982 records a doctor's appointment. On August 30, 1982 claimant went to Dr. McKay for examination for a possible hernia.

Kroloff acknowledged that she might have had a casual conversation with claimant earlier in the summer, but she remembered being told by claimant that she was leaning over tightening bolts and screws and that the stress of leaning and stretching caused the hernia. She thought awareness that claimant was claiming a compensable injury might have come from a discussion which took place at a meeting with the union and that might have led to claimant's being asked to come in.

The witness said that when the letter recording restrictions was received by the company, the restrictions were reported to the area supervisor. After the July shutdown she checked with claimant's supervisor to see if things were all right with claimant and she was told they were.

Dale Fangman, manager of the fabrication and assembly division, testified that he knows claimant and has worked with her for 31 years. He directs her supervisor and when he learned of her restrictions in the summer of 1982 he went over those limitations with her supervisor. He recalled that claimant had been on the second shift and was working on altimeters. When she came back, business was down and the altimeter job was no longer there. Claimant was asked to switch to days and plans were made to train her on gear assembly. Although he did not actually observe her working, he understood that claimant was having a quality problem. After claimant had been in training for almost a month, people were shifted again; and claimant was put in the BCCS unit. When business improved, claimant went back to altimeters and had additional duties in pressure wash.

Through all the changes, claimant retained the same classificat and the same pay. She was characterized as a good worker who presented no discipline problem. However, he did remember that when claimant was working on the BCCS unit, she felt that the company wanted to get rid of her because of her age.

Fangman was unable to swear to the source of his information, but he thought he had learned through the union that claimant had a hernia. He could not remember when he got that knowledge. He asserted that the company has to be told when an employee needs help as the supervisors have more than one department and are not on the scene at all times.

Martin Miller, an assembly foreman with defendant for four years and claimant's direct supervisor, testified that he was aware of the restrictions claimant carried when she came back from radiation treatment. He said that one part of the blower assembly which claimant lifted weighed about 20 pounds. Claimant was to tell the lead man when she was ready to put the blower into the assembly. She could also tell the witness when she needed assistance which he recalled providing on one occasion. He claimed that claimant had been instructed not to lift the blower. He acknowledged that when the lead man was on vacation there was no one else to give claimant help. He estimated that the lifting would need to be done two to three times a week. His testimony as to the weight of the panel with guages varied from claimant's. He estimated the weight at ten pounds. Installati of the panel would be done from the floor. Miller did not remember claimant's lying on the floor, but he had seen her working while sitting on the floor.

He did not remember claimant's reporting any injuries to him. He believed he first heard of claimant's claim in 1983. Miller described claimant's work at the time of hearing as satisfactory.

Materials regarding the altimeter indicate a diameter of slightly greater than three inches, a length of five and a half inches and weight of a bit more than two pounds.

Medical records show claimant was admitted to the hospital on April 20, 1981 with complaints of urinary frequency and lower left quadrant abdominal pain. On examination claimant had a large suprapubic mass with tenderness on the left. Claimant was seen in consultation by Eugene Kerns, M.D.

On April 23, 1981 claimant had a dilation and curettement, an exploratory laparatomy with a total abdominal hysterectomy and removal of a sarcomatous or liomyomatous mass. Robert J.

Kitelaar, M.D., on microscopic examination of the removed tissue diagnosed leiomyosarcoma. Claimant was discharged on May 11, 1981 with instructions to see her physician for follow-up care. Her discharge instructions included the following entries under activity level: "As tolerated; avoid any heavy lifting -- over five pounds."

Following her release from the hospital, claimant had a CT scan of her lungs which failed to demonstrate obvious mass lesions, masses involving the nodal areas or obvious mass lesions. The next month a CT scan of the abdomen was done and a small soft tissue density which was interpreted as representing either a small enlarged lymph node or a tortuous vascular structure was found. In September a CT scan of the abdomen was repeated and the chest was included as well. No abnormalities were found.

Claimant sought medical care in early 1982 when she had pain in the pelvic region. A new mass was found. A CT scan showed a lobular mass in the right side of the pelvis superior to the bladder and an anterior bulging of the rectus sheath in the region of the linea alba which was suggestive of an incisional hernia. Claimant was given radiation therapy.

On June 11, 1982 Thomas J. Stoffel, M.D., wrote that claimant was instructed "not to do heavy lfiting, bending, sitting down on the floor, or any heavy drilling."

On August 6, 1982 claimant underwent a bilateral xeromammography which was interpreted by A. Berkow, M.D., as showing bilateral arterial calcification with a large benign calcification in the left breast. There was a suspicious area and a biopsy was suggested.

Doctor's notes dated August 25, 1982 record an umbilical hernia which was work related. A letter from Eugene Kerns, M.D., states: "I saw Katherine Cooney on February 15, 1982 for physical examination and, at that time, noted no evidence of a possible hernia."

Kenneth H. McKay, M.D., examined claimant on August 30, 1982. It was the doctor's understanding that her job did not involve excessive straining or lifting. Dr. McKay reported that claimant had a ventral hernia at the time of her CT scan in March or April of 1982. Based on that information Dr. McKay did not feel claimant's hernia was traceable to her work although "it might have been aggravated by her work activities."

John H. Stoner, M.D., admitted claimant to the hospital on September 7, 1982 with a history of noting discomfort at work and a mass in her anterior abdomen which was diagnosed as a ventral hernia with incarcerated omentum. A CT scan of the abdomen continued to show a pelvic mass. On September 8, 1982 claimant had a left breast quadrantectomy and hernia repair. Dr. Stoner attributed the hernia to heavy lifting at the claimant's work.

Claimant was examined by Barry Lake Fischer, M.D., on April 6, 1983 who expressed the opinion "that this patient sustained an injury to her abdomen resulting in some industrial loss of the person as a whole due to abdominal hernia."

APPLICABLE LAW AND ANALYSIS

The first issue to be determined is whether or not claimant's injuries arose 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).

There is some variation in what claimant testified to and to what Kroloff recalled being told, but these discrepancies are not of such significance to defeat claimant's claim. Claimant returned to work after surgery with a five pound weight restriction and a prohibition against getting down on the floor. Although claimant's estimates of weight are not entirely accurate; for example, she estimated the weight of an altimeter at four to five pounds which in reality weighs a bit more than two, Miller, her foreman, testified that she was lifting over ten pounds. She had been instructed not to lift, but the person assigned to help her was on vacation and the foreman was not always available. Miller also observed that she worked on the floor.

Medical evidence reveals a bulging in the rectus sheath in the region of the linea alba in a CT scan taken March 1, 1982. In the month prior to that time, Dr. Kerns saw no evidence of a possible hernia. Dr. Stoner traces claimant's hernia to heavy lifting. Dr. McKay, the company doctor, states "I cannot deny, however, that it [the hernia] might well have been aggravated by her work activities." Dr. McKay thought claimant did not do excessive straining or lifting.

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. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1960).

Expert testimony coupled with non-expert 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's testimony coupled with that of the medical experts carries claimant's burden. She was not supposed to lift in excess of five pounds or to work on the floor. She did both and obviously put some strain on her incision. A bulging was seen in the CT scan but it was not until claimant's strain at work that the bulging became significant and required repair.

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 21, 1982 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).

Claimant has not sustained her burden of showing her hernia has resulted in disability beyond a temporary one. The only medical evidence which is supportive comes from the examining physician who concludes that claimant has "some industrial loss of the person as a whole." He assesses no functional impairment and his assignment of industrial loss invades the province of the industrial commissioner.

Claimant will not be awarded healing period or permanent partial disability, but she is entitled to temporary total disability benefits for her time off related to the hernia injury.

No medical expenses pursuant to Iowa Code section 85.27 were presented. None will be awarded.

Defendants have requested a credit pursuant to Iowa Code section 85.38. A credit of $677.01 will be allowed.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is 64 years of age.

That claimant's work experience has been exclusively with defendant employer.

That claimant injured her left thumb, left index finger, and right shin in work related incidents prior to July 21, 1982.

That on April 23, 1981 claimant underwent a dilation and curettement an exploratory laparotomy, an abdominal hysterectomy and removal of a sarcomatous or liomyomatous mass.

That after surgery claimant carried a five pound weight limitation.

That claimant returned to work building altimeters.

That claimant had no trouble from her incision when she was building altimeters.

That claimant had a new mass in early 1982 which was treated with radiation therapy.

That claimant was instructed not to do heavy lifting, bending, sitting down on the floor or drilling.

That claimant was assigned to building BCCS units when she returned to work.

That claimant was supposed to ask for and to have help with heavy lifting.

That claimant noticed discomfort in her abdominal area on this job.

That claimant experienced a sharp ripping pain in her abdomen as she slipped from a box she was standing on to install a gauge panel.

That claimant had a hernia repair.

That claimant was paid accident and sickness benefits for time off after the hernia repair.

That claimant returned to work on altimeters and took on additional duties in the bearing room.

That claimant continues to have soreness in the area of her incision.

That claimant carries the restrictions imposed after her hysterectomy.

That claimant plans to retire in February when she will be 65.

That claimant has retained the same classification and the same pay.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has suffered and injury arising out of and in the course of her employment.

That claimant has failed to establish a causal relationship between that injury and any permanent partial disability which she now may suffer.

That claimant is entitled to temporary total disability benefits as a result of her injury.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant temporary total disability benefits from September 8, 1982 to October 18, 1982 at a rate of two hundred two and 93/100 dollars ($202.93).

That defendants be allowed a credit pursuant to Iowa Code section 85.38.

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 18 day of November, 1983.

JUDITH ANN BIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FLOYD D. CRABTREE, Claimant,	:	File No. 415154
vs.	:	A P P E A L
JOHN DEERE OTTUMWA WORKS, Employer, Self-Insured, Defendant.	:	D E C I S I O N

By order of the industrial commissioner filed July 21, 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. Defendant appeals from an adverse review-reopening decision.

The record on appeal consists of the transcript; claimant's exhibits 1 through 14, inclusive; defendant's exhibits 1 through 4, inclusive (exhibit 4 being the discovery deposition of the claimant); and the depositions of Ronald Lacey, M.D., taken December 17, 1982 and of Ronald K. Bunten, M.D., taken April 13, 1977 on the occasion of a prior hearing, all of which evidence was considered in reaching this final agency decision. The result of this appeal decision will be the same as that of the hearing deputy as to the weekly compensation awarded; however, the basis of this final agency decision differs from that of the proposed decision.

REVIEW OF THE CASE AND OF THE EVIDENCE

Claimant hurt his low back in a lifting incident of April 3, 1974. As a result of a hearing on August 25, 1977, a review-reopening decision dated December 20, 1977 awarded claimant 30 percent permanent partial disability to the body as a whole, 150 weeks of compensation at the rate of $84 per week. On April 17, 1978, defendant's filed a report of payments which indicated the award had been paid. On December 8, 1980, claimant again filed in review-reopening.

Ronald K. Bunten, M.D., a qualified orthopedic surgeon testified in 1977 that on July 1, 1976 he had performed a bilateral lumbar laminectomy and that claimant should improve for some one and one-half years after the surgery. He testified further that claimant would have a residual impairment of 15-20 percent as a result of back pain. He also noted that claimant exhibited some symptoms of depression. (Dep., 27-28)

Claimant complains of pain 24 hours a day, including radiation of that pain into his hips and down his left leg. Claimant's own testimony indicates that his back condition is no worse than it was following the injury or the surgery. (Tr. 12, 17 and claimant's dep., 48)

As to his mental condition, claimant testified that he had some depression after the surgery in 1976 which extended into 1977 and that the depression was worse than "now" (July 9, 1981: Discovery dep., p. 44) Although claimant felted he was depressed in 1976 and 1977, as well as afterwards, he did not seek nor was he given professional treatment.

Some time after the injury, claimant started into the real estate business, but (he testified) because of pain in his low back and left leg and because of his mental depression, he could not continue. Thus he has not worked since October of 1979.

A report of Donald Blair, M.D., a qualified orthopedic surgeon, dated November 13, 1979 states as follows:

> This man is having a persisting degree of low back as well as some left leg symptoms since 1974 and with only partial relief following a lumbar laminectomy in 1976. His findings now do indicate a definite degree of spinal arthritis as well as quite marked narrowing of the lumbo-sacral disc space.

In a report of October 6, 1981, William R. Boulden, M.D., a qualified orthopedic surgeon, states:

> Discussion: At this point in time, I feel the patient has a definite problem with residual nerve irritability with residuals of nerve damage on the left leg from previous injury with subsequent back surgery failure. At this point in time I feel he would be unable to return back to his previous occupation, and I feel the restrictions that need to be placed on the gentlemen are no repetitive bending or lifting greater than 10 pounds and to be more sedentary type work in nature with no prolonged standing.
>
> At this point in time I feel the patient's permanent partial impairment of the lumbar spine is 20% of the lumbar spine based on probable disc surgery in the past.

With respect to claimant's mental condition, a report of John C. Garfield, Ph.D., a qualified psychologist, dated February 26, 1981, states:

> It is my professional judgment that Mr. Crabtree's industrial accident, followed by the prolonged period of time in which he was unable to obtain persisting relief from pain through the medical treatments which are described in detail in other reports, precipitated a significant depressive reaction. This psychological reaction in combination with the physical injury and resulting chronic pain, in my judgment, have rendered Mr. Crabtree, totally disabled. I would strongly recommend an extensive course of psychotherapy in this case, without which recovery of function seems unlikely.

Ronald Lacey, M.D., a non-board certified psychiatrist, testified that claimant's mental depression and anxiety come from his disability and inability to work as well as personal factors, interfamilial problems and financial problems. (Dep. p. 13)

ISSUE

The hearing deputy awarded additional healing period benefits beginning October 9, 1979 at the rate of $91 per week to be paid until psychiatric treatment had been provided and concluded.

Defendant states the issue in the present appeal: "The issue before the Commissioner is whether or not Claimant, by sufficient competent evidence, has shown a material change of condition since the award in 1977."

APPLICABLE LAW

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

The Iowa Supreme Court in the case of Gosek v. Garmer and Stiles Company, 158 N.W.2d 731 (1968), in discussing the question of whether claimant need show a change of condition, stated:

> We now hold, cause for allowance of additional compensation exists on proper showing that facts relative to an employment connected injury existed but were unknown and could not have been discovered by the exercise of reasonable diligence, sometimes referred to as a substantive omission due to mistake, at time of any prior settlement or award.

The Iowa Court of Appeals in Meyers v. Holiday Inn of Cedar Falls, Iowa 272 N.W.2d 24 (1978) at p. 25 stated further: "With respect to review reopening proceedings under this statute, the court in Gosek v. Garmer and Stiles Co., 158 N.W.2d 731, 735 (Iowa 1968) rejected the contention that a claimant must show a change of condition subsequent to a prior adjudication in order to seek additional compensation." However, in Blacksmith v. All-American, Inc., 290 N.W.2d 348, 350 (1980) the Iowa Supreme Court said: "An increase in industrial disability may occur without a change in physical condition. A change in earning capacity subsequent to the original award which is proximately caused by the original injury also constitutes a change in condition under section 85.26(2) and 86.14(2)."

ANALYSIS

Considering the general principle of res adjudicata and the latest pronouncement of the Iowa Supreme Court, it appears that Iowa requires a change of condition before a claimant may prevail in a second review-reopening proceeding. It is clear, however, that the change of condition does not have to be a change of physical condition.

With respect to claimant's permanent partial impairment to the back and the role it plays in his industrial disability, a hearing was held in 1977, and an award was made. Part of the basis of that industrial disability was a 20 percent permanent partial impairment, an amount not shown to have been increased. The only difference of substance, and the hearing deputy based a great deal of his reasoning on this difference, is that in 1981, Dr. Boulden lowered the limit on lifting to 10 pounds from the 50 pounds which had been allowed by Dr. Bunten in 1977. Even so, Dr. Boulden gave a permanent partial rating of 20 percent of the lumbar spine (not of the body as a whole), and claimant himself did not testify to any substantial or material change in his condition. (Since there was no evidence from Dr. Bunten in the 1982 hearing, it is impossible to know his opinion.) Therefore, the evidence shows that claimant did not undergo any change of physical condition.

With respect to claimant's mental condition, which seems to be a form of depression, the case is different. Although he had problems with depression in 1976, 1977 and thereafter, it appears from the 1977 decision that he also had periods of optimism concerning his business venture. Thus, although Dr. Bunten spotted the depressive reaction, he did not recommend claimant seek treatment. It therefore appears claimant, in exercising reasonable diligence, could not have known enough about his condition at the time of the prior hearing to make a claim for compensation. For these reasons, he meets the standard set in the Gosek case and may bring an action for compensation of the depressive reaction.

It is clear there is a causal relationship between the injury and the depression. See Dr. Garfield's report and the Lacey deposition, pp. 13-16.

Claimant thus is entitled to compensation for a depressive reaction which was causally related to the original injury of 1974. Claimant has a good prognosis (Lacey, 24-25) and, hopefully, will benefit from treatment.

Finally, although it is clear claimant has considerable problems with pain in his low back and left lower extremity, the compensation is not being awarded on account of a change of condition in the back.

The hearing deputy started the temporary total disability benefits on October 9, 1979 which appears to coincide with when claimant last worked and appears to be proper.

FINDINGS OF FACT

1. That this agency has jurisdiction of the parties and the subject matter.

2. That the claimant sustained an admitted industrial injury on April 3, 1974.

3. That the claimant had a review-reopening hearing on August 25, 1977.

4. That on December 20, 1977 the claimant received an award of 30 percent of the body as a whole as a result of the aforesaid hearing.

5. That the basis of said award was predicated on claimant's ability to lift 50 pounds.

6. That another basis of said award was predicated on claimant's ability to operate a real estate sales office.

7. That it appeared that claimant did not require psychiatric treatment following the date of the first hearing.

8. That there was no change in the permanent partial impairment since the hearing of August 25, 1977.

9. That the claimant is in need of psychiatric care and that the need for such care is causally connected to the industrial injury under review.

10. That the claimant has been unable to perform any acts of gainful employment since October 9, 1979 because of his work connected disabilities.

CONCLUSIONS OF LAW

That claimant sustained an injury which arose out of and in the course of his employment on April 3, 1974 and for which he has in the past been compensated for healing period, for one hundred fifty (150) weeks of permanent partial disability and for medical and allied benefits.

That claimant has in the present case showed no change of physical condition but has shown a psychological problem which stems from the injury and which is compensable to the extent of temporary total disability.

ORDER

THEREFORE, defendant is hereby ordered to choose psychiatric care and offer it to claimant and defendant is ordered to pay the claimant an additional period of temporary total disability at a weekly rate of ninety-one dollars ($91) beginning October 9, 1979 and continuing until the offered psychiatric treatment has been provided and concluded.

Interest shall accrue at the rate of ten (10) percent per year beginning May 31, 1983.

Accrued payments are payable in a lump sum.

Defendant shall file a current activity report within twenty (20) days from the date below.

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

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DOUGLAS W. CRIST,	:	
Claimant,	:	
vs.	:	File No. 516808
DAY'S MOVING & STORAGE, 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
FIREMAN'S FUND INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This matter came on for hearing at the Wapello County Courthouse in Ottumwa on April 21, 1983 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 13, 1978, along with a memorandum of agreement calling for the payment of $247 a week in compensation. (By inference, the permanent partial disability compensation rate is $228 per week.) The parties indicated that 129 6/7 weeks of temporary total disability compensation has been paid. The record consists of the testimony of the claimant; the deposition of Koert Smith, M.D.; claimant's exhibits 1 through 16; and defendants' exhibits 1 through 5.

ISSUE

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

STATEMENT OF THE EVIDENCE

Claimant, presently age 34, was employed by Day's Moving as an ironworker on October 5, 1977. Claimant testified that he has been an iron worker for sixteen years.

Claimant testified that he was working on a scaffold which collapsed. Claimant fell and hurt his right arm. Claimant was seen by Paul H. Bruckner, M.D., on the following day at the emergency room. At that time it was discovered that claimant had dislocated his right shoulder. At the time of examination, claimant's shoulder was in place and his right arm was in a sling. There was a large hematoma of the upper arm with considerable pain on even the slightest movement. Movement also caused tenderness in the right lower chest. Claimant continued to be treated by Dr. Breckner through May 25, 1979, when claimant was referred to Koert Smith, M.D., an orthopedic surgeon. Dr. Breckner's course of treatment is set forth in detail on claimant's exhibit 11.

Claimant was seen by Dr. Smith on June 19, 1977. It was noted that claimant was off work for about eleven months, but that claimant felt he had never returned to normal and was complaining of persistent pain in the medial aspect of the right elbow with radiation down to the hand with intermittent numbness and tingling in the right hand. Examination revealed localized tenderness in the area of the flexor muscle mass and in the olecranon groove. Neurologic exam was intact with the exception of possible weakness of finger abduction. Dr. Smith's impression at that time was that claimant had probable tardy ulnar nerve palsy. Nerve conduction studies were taken and these were interpreted as normal. Later studies (September 1979) revealed slowing of nerve conduction. Since claimant's symptoms were persistent and had been so for some time, Dr. Smith caused claimant to be admitted to the hospital, where surgery was performed in the form of a right ulnar nerve transplant.

On October 3, 1979, claimant returned to Dr. Smith and stated that the old aching pain in the upper arm was gone. Sutures were removed. The splint was removed on October 24, 1979 and claimant started range of motion exercises. In November 1979, claimant was still complaining of some pain about the elbow, but the numbness in the ulnar distribution had disappeared. In April 1980, examination revealed a 10 degree flexion contracture of the elbow with further flexion to 140 degrees. On the left, claimant had about five degrees of hyperextension. In June 1980, claimant complained that since he had tried to increase his activity and lift weights, he had some increased pain in the elbow. He was complaining of intermittent grating or catching sensation in the elbow associated with a sharp pain. Examination at that time revealed a five degree flexion contracture. X-rays showed no bony abnormalities, and no evidence of loose bodies.

On October 30, 1980, claimant returned for a final impairment rating. This rating is as follows:

> EXAMINATION TODAY: Reveals a completely full range of motion of the shoulder. At the right elbow, he has a 5 degree flexion contracture, further flexion to 130 degrees compared to 140 on the opposite side. Measurement of the biceps is ½" less in circumference on the right side than the left. Forearm circumference is equal. Grip strength is 90 lbs. on the right, 120 lbs. on the left. He is right handed. Range of motion of the forearm and wrist are symmetrical.
>
> Patient is now working but is working as a foreman and is not doing any heavy work. If he has to do heavy work, he does have considerable difficulty doing this.
>
> Based on the AMA Guid [sic] to the Evaluation of Permanent Impairment, for loss of motion at the elbow, he would rate 1% upper extremity impairment. For loss of full extension, 5% for flexion to 130

degrees. Adding these, this is 6% upper extremity impairment. Because of the weakness in his arm as manifested both by the grip strength and measurable atrophy in the biceps area, he would rate an additional 6% upper extremity impairment. Using the combination tables, this combines to 12% upper extremity impairment. Again, using the conversion table, this would be 7% whole man impairment.

Dr. Smith continued to treat claimant and he noted that claimant would get recurrence of pain in the anterior biceps and medial epicondylar area when he did heavy work for a few days. Dr. Smith did not feel that claimant had any increase in permanent impairment, although the necessity of the claimant to find lighter employment was discussed. Vocational rehabilitation was discussed.

In September 1981 and thereafter, claimant was seen by Professional Rehabilitation Management, Inc., specifically, Deanna Hardin, M.S. (See Claimant's Exhibit 15). Computer training was discussed, but not pursued.

On March 3, 1981, claimant was seen by F. Dale Wilson, M.D., a general surgeon from Davenport. X-rays were taken and functional impairment was rated as follows:

A.	Loss of motion in the shoulder,	1. flexion . .	.2 %
		2. lateral . .	.2
		3. rotation .	.3%
	elbow,	1. flexion . .	.8%
		2. rotation, (in 3, out 3) .	.6
B.	Pain		5
C.	Weakness of hand & arm (atrophy)		10
D.	Nerves 1. about epicondyle		2
	2. ulnar nerve neuropathy.		15
E.	Deformity		0

You may combine these (not add) and they combine to 43% extremity. You may add 5% because it is the right arm, 48% disability of the extremity, equivalent of 29% whole man.

Dr. Wilson wrote a later report indicating as follows:

DISABILITY EVALUATION: Right Extremity

A. Motion loss (1) Shoulder	Flexion	0%	
	Lateral	2	
	Rotation	1	
		3%	
(2) Elbow	Flexion	11	
	Rotation	5	
		16%	
B. Pain		5%	
C. Weakness-grip strength & weight lifting		10%	not changed
D. Nerve involvement - Ulnar nerve		33%	not improved
E. Restricting deformity		0	

Combine 33,16 = 44,10 = 50,5 = 53,3 = 54% disability of the right extremity.
Previous evaluation 43% of the extremity.

This report indicated that claimant should not work above ground level. Dr. Wilson noted, in a report dated March 28, 1983:

> It is for this reason that I give the opinion that the "impairment of function" rating provided by application of the AMA Guides does not allow this man a "disability" rating commensurate with his actual disability; it is for this reason that I gave him a higher "disability" rating in my initial report.

Dr. Smith testified by way of deposition. Dr. Smith indicated that claimant had normal range of shoulder motion. He discounted Dr. Wilson's indication that claimant's ulnar nerve involvement was important in evaluating the case, since claimant's symptoms were improved or relieved by the surgery. (Deposition, p. 15, ll. 17-18) On cross-examination, Dr. Smith indicated that he did not recollect whether he used a goniometer to measure range of motion. Dr. Smith cautioned that the AMA Guide was exactly that--a guide. (Dep. p. 24, l. 23)

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., 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 1980).

3. Section 85.34(2)(m) allows permanent partial disability compensation in the amount of 250 weeks for the loss of an arm.

4. The claimant has the burden of proving by a preponderance of the evidence that the injury of October 5, 1977 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).

5. The recent case of Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983) deals with the question of the evaluation of "scheduled members." The court stated that in order for disability to be rated, the claimant must have a "non-scheduled" injury. The court stated that it would only overturn the rule that a scheduled member is to be compensated as a scheduled member is by "statutory amendment."

ANALYSIS

Based on the principles enunciated it is found that claimant sustained a 12 percent permanent partial impairment to the arm as a result of the industrial injury of October 15, 1977.

Dr. Smith's status as a treating physician is important. He has seen the claimant many times. His opinion concurs with mine. In nearly eight years in this position I have seen many injuries. The personal observations I have made are sometimes more important to me than the ratings given by the doctors. When there is such a wide discrepancy (as here), I can only rely on my own observations of claimant's impairment to come forth with a finding. Of course, the agency may use its experience, technical competence and specialized knowledge in evaluating evidence. See section 17A.14(5), Code of Iowa.

I have observed claimant. The rating of 12 percent of the right arm is within the range of loss given by other doctors in cases similar to this. The effects of the injury do not extend beyond the arm.

FINDINGS OF FACT

1. Claimant was employed by defendant employer on October 5, 1977.

2. Claimant hurt his arm while working on October 5, 1977.

3. Defendants filed a memorandum of agreement concerning an October 5, 1977 injury.

4. Claimant sustained permanency because of the October 5, 1977 injury.

5. The permanency resulting from the injury is confined to the arm.

6. The permanency resulting from the injury is 12 percent of the right arm.

7. The rate of compensation for permanent partial disability is $228 per week.

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties and the subject matter.

2. Claimant was employed by defendant employer on October 5, 1977.

3. Claimant sustained an injury arising out of and in the course of his employment on October 5, 1977.

4. Claimant will be paid 30 weeks of permanent partial disability compensation at the rate of $228 per week.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant thirty (30) weeks of permanent partial disability compensation at the rate of two hundred twenty-eight dollars ($228) per week. Defendants are to receive credit for permanent partial disability compensation already paid.

Interest is to accrue on this award from the date of this decision.

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

Costs are taxed to defendants.

Signed and filed this 6th day of September, 1983.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ARNOLD F. CURLER,

Claimant,

vs.

DUBUQUE LUMBER COMPANY,

Employer,

and

AMERICAN MUTUAL INSURANCE COMPANY,

Insurance Carrier, Defendants.

File No. 618722

A P P E A L

D E C I S I O N

By order of the industrial commissioner filed August 24, 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 appealed from an adverse arbitration decision.

The record consists of the hearing transcript; claimant's exhibits A through V, inclusive; joint exhibit W; defendants' exhibits 1 through 6, inclusive; and the deposition of Eugene E. Herzberger, M.D. (which was marked as claimant's exibit V), all of which evidence was considered in reaching this final agency decision.

There is also an attorney's fee dispute in this case. Attorney Henkels represented claimant through the hearing level, and attorney Tallon represented claimant for the appeal to the industrial commissioner. Claimant is pro se as to the attorney's fee dispute. Claimant and Mr. Henkels were given the option of incorporating the attorney's fee dispute into this final agency decision or considering that dispute separate from the merits of the case and proceeding on the hearing level. They elected to include the matter of the attorney's fee dispute in this final agency decision. Therefore, the instant decision will be a final agency decision of the merits of the case and on the attorney's fee. Additionally, Mr. Tallon also asked the undersigned deputy industrial commissioner to set his fee.

The result of the decision on the merits of the case will be somewhat modified from that reached by the hearing deputy.

REVIEW OF THE EVIDENCE

Claimant, who was age 55 at the time of the hearing, testified that he completed the eleventh grade and that his work history included labor for Dubuque Packing Company and later as a technician in the smoked meats department. He has a chauffer's license and has driven a truck and worked for Bruester Mills as a laborer. His work for North American Van Lines involved driving a truck and being a warehouse manager. He apparently did not work between 1974 and 1977 and began for the East Dubuque Lumber Company in 1977. He worked for the Dubuque Lumber Company from 1977 until his injury in August 1979 and somewhat thereafter.

His medical history shows no prior low back complaints, which is the nature of his problem in this case.

Claimant's work for the defendant employer was physical labor. On July 14, 1979, claimant was unloading feeder wood and did not have the help he would normally have had. By the middle of the morning, claimant felt unwell and was taken to the hospital.

Here the record becomes somewhat ambivalent. Claimant's symptoms were those which would resemble a heart attack; he insists, however, that he also had low back symptoms and complained of them at that time. His treating physician was J. G. Brehm, M.D., whose diagnosis was simply precordial chest pain. Dr. Brehm made no note of any back complaints.

Claimant was readmitted to the hospital on August 20, 1979 with similar symptoms of chest pain with radiation to the back and shoulders. Again there is no record of any complaint of low back pain. Claimant returned to work on Monday, August 27, 1979 and worked through Thursday, September 6, 1979. He testified that he could no longer perform his work and went on vacation.

On September 12, 1979, claimant saw Eugene E. Herzberger, M.D., a qualified neurosurgeon. Dr. Herzberger testified that claimant gave the following history:

> Yes. He said that about two weeks prior to seeing me on September 12 he had low back pain radiating into the right hip and to some extent into his testicles. The pain was very bothersome and it had been disabling, and he told me that in '67 he was injured in the course of his employment and had a compression fracture of several cervical vertebral bodies, so another area of the spine, and the cervical spine was injured at the time and was treated by Dr. Frank Schmidt, Dr. James Pearson, was seen also in the Neurology Department at the University of Iowa, and eventually he healed; and recently he said, that means sometime before September the 12th, he was hospitalized because of sudden left lateral chest pain. He was suspected of having a myocardial infarction, but the studies which were carried out including coronary angiography were normal. So, this is the history I obtained. (Herzberger dep., pp. 4-5 ll. 21-25 and 1-12)

Dr. Herzberger administered conservative treatment until June 16, 1980 when he operated, finding herniated discs at L4, 5 and L5, S1, right side. He performed discectomies at those levels.

With respect to the meager history given by claimant, Dr. Herzberger testified as follows:

> Now, as we go on here I see that the patient came in and he stated that he was doing a great deal of work in August. I have here a statement from November, and this statement is worded as follows: "Mr. Arnold Curler's low back and right sciatic pain started without any well defined preceding incident or accident. However, once it was present it seemed to have become aggravated by continuous heavy work," according to what the patient was saying." Eventually the pain became intolerable and not compatible with normal work and the patient had to stop working. Therefore, it can be stated that continuous heavy work from August 27 to September 12, '79 has at least aggravated the patient's condition," and this is the statement made at the patient's request after he has presented all these facts. So, of course, I usually prefer to have this given to me in the very first interview but sometimes people don't do that but then when they come later on they give you all these facts -- this happened, that happened and so forth, and then I have to, of course, put them on the right course for whatever they're worth.
>
> Q. Would you say, Doctor, that the heavy work was the probable cause of the aggravated condition the patient was in at the time?
>
> A. Well, he felt that the heavy work has aggravated his condition and I have seen him with low back and right leg pain for a disk problem, so I have to say that it can be aggravated by heavy work, but very often this condition is a rather sudden event and it comes on quickly after a certain effort or something of that sort which we have missed here. We didn't have any specific incident that can be incriminated, "while on that date this and that happened." We are missing that, but then if you do heavy work of course there are opportunities for rupturing disks. (Herzberger dep., pp. 10-11 ll. 1-25 and 1-11)

Dr. Herzberger assigns a permanent partial impairment rating to the body as a whole of five percent. Claimant visited the University Hospitals in Iowa City and on July 20, 1981, Steven Demeter, M.D., of the Department of Neurology, opined that claimant's impairment was five percent and that his disability of the whole man but 25 percent as to work involving labor.

Richard J. Delaney, a co-worker of claimant at the employer's lumber yard, stated that claimant was an excellent worker who could sustain heavy lifting prior to his injury. With respect to after the injury, the witness stated: "Well, from what I saw he just -- he couldn't handle it much anymore. He would either have to quit during a loading of something, or have to take it easy and take half of what he usually did. He just wasn't the same as far as I was concerned." (Tr., pp. 10-11 ll. 22-25 and 1)

ISSUES

The arbitration decision held that claimant sustained an injury which arose out of and in the course of his employment on August 14, 1979 and which resulted in a permanent industrial disability of 30 percent of the body as a whole, entitling claimant to 150 weeks of compensation at the rate of $163.87 per week and entitling claimant to 13 4/7 weeks healing period at the same rate. On appeal defendants state the issues as follows:

> I. Whether claimant has sustained his burden of proof that he sustained an injury on August 14, 1979, arising out of and in the course of his employment.
>
> II. Whether that alleged injury caused the disability for which benefits are sought.
>
> III. The extent of the permanent partial disability resulting from that alleged injury.

Additionally, claimant although he did not appeal, states in his brief that more healing period benefits should have been awarded. Since this is a de novo appeal, that issue will be considered.

APPLICABLE LAW

Claimant has the burden to show he sustained an injury which arouse out of and in the course of his employment. Lindahl v. L. O. Boggs Co., 236 Iowa 296, 18 N.W.2d 607 (1945). Matters of causal relationship are essentially within the realm of expert medical testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). An expert's opinion based upon an incomplete history is not binding upon the commissioner. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). However that history may be weighed together with the other facts and circumstances, the ultimate conclusion being for the finder of fact. Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

Industrial disability is the reduction of earning capacity and not mere functional impairment. Such disability includes considerations of functional impairment, age, education, qualifications, experience, and claimant's inability because of the injury to engage in employment for which he is fitted. Olson v. Goodyear Stores, 255 Iowa 1112, 125 N.W.2d 251 (Iowa 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).

The findings of the hearing deputy have some significance. Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293 (Iowa 1982).

ANALYSIS

The case is a close one because, except for claimant's testimony, the alleged back pain of August 14, 1979 is not found in the medical history. However, there is claimant's testimony which supports the proposition that he had low back pain on the date in question. Further, it appears that claimant attempted to perform his usual duties in late August and early September and was unable to do so. According to Dr. Herzberger's report and deposition, the continued exertion would have aggravated the preexisting condition. Such being the case, the hearing deputy's award can stand.

The arbitration decision properly reviewed the matter of the industrial disability and those findings also will be adopted.

The question of the healing period is another matter. Claimant alleges that in 1979 he lost time from work because of the injury in August, September, October and November, totalling eight weeks, two days. However, the time claimed in August, some 10 days, would have been due to the chest pains and not to the back injury. It was on September 14 that claimant began losing work because of his back injury, and this period of disability extended until November 2, 1979, for a total of seven weeks, one day. Claimant would also be entitled to the time for recuperation from the surgery, June 9, 1980 through December 31, 1980, equalling 29 weeks, 2 days. The two periods of disability therefore equal 36 weeks, 3 days.

ATTORNEY'S FEE DISPUTE

Section 86.39, Code of Iowa, 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.

A federal district court stated:

> "[F]ees in compensation cases should not be fixed by reference to an arbitrary percentage applicable to all or most cases. The extent and character of the legal work, the amount invovled, the intricacy and novelty of the issues, and the results obtained must all be considered.
>
> "Some authorities also include as elements for consideration in fixing the fees the circumstances of the claimant and the standing of counsel. The latter element has less application in compensation cases than in other fields. As to the former, the circumstances of the claimant are almost always needy, and should moderate the demands of counsel, but should not be so emphasized by those approving the fees as to drive competent counsel out of the field. In some compensation cases the issue of liability is bitterly contested and the collection of any fee is necessarily contingent upon success; in other cases, the only question is how much compensation will be awarded, some fee is sure to be allowed and to make a lien upon the award, and that factor should be considered in fixing the fee." Hillman v. O'Hearne, 129 F. Supp. 217, 218 (D. Md. 1955)

Citing Kirkpatrick v. Patterson, 172 N.W.2d 259, 261 (Iowa 1969) the industrial commissioner stated:

> In making this determination the following factors are considered: (1) the time spent by the attorney in the proceeding; (2) the nature and extent of the services rendered; (3) the amount of the award that is involved; (4) the difficulty of handling and the importance of the issues presented; 5) the responsibility assumed and the results obtained by the attorney; (6) the professional standing and experience of the attorney; and (7) any other element which may have a bearing on attorney fees. Lee v. John Deere Waterloo Tractor Works, 34th Biennial Report of the Iowa Industrial Commissioner, p. 186 (1978).

The original fee agreement appears to have been upon the contigency that a recovery was possible but not assured, with the attorney to take a portion of the award as his fee. This system allows many people, who might otherwise be unable to afford it, to obtain the services of lawyers. Of course, the contingency element is the part that seems least tolerable to the public. That is, in one case a lawyer may labor for many, many hours and not obtain a recovery for the client and in another case might not labor much at all and come up with an excellent result. The lawyer looks at all his cases when he considers how much money is earned by his or her labors, but the client looks only at the client's case.

The industrial commissioner's file contains the various transcripts and exhibits listed above as well as the pleadings and briefs. The exhibits are mainly medical reports. In a letter written to the industrial commissioner, claimant complained that he initiated "every action that was taken," with respect to obtaining certain medical information. Whatever the case with respect to obtaining that information, the industrial commissioner's file is not a bulky one which would indicate that the time spent by the attorney was moderate. With respect to the second element, the nature and extent of the attorney's services, it is clear that the case involved obtaining certain evidence and going through an oral hearing. The amount of the award would indicate that the attorney obtained an excellent result because he had to overcome the confusion surrounding the medical history.

The difficulty of the handling and the importance of the issues presented seems to have been that of the average workers' compensation case as was the responsibility assumed therefor. The result obtained by the attorney has already been remarked upon. The professional standing and experience of the attorney, to the knowledge of the undersigned, is excellent. Finally, there appears to be no other element which would affect the amount of the fee. In a letter, Mr. Tallon stated that he spent 11.8 hours in various activities connected with the appeal, including the writing of the appeal brief.

Considering the factors listed above, the attorneys' efforts through the present level are determined to be worth 25 percent of the award for compensation. That award is $29,566, of which 25 percent is $7,391.64. Of that amount, Mr. Tallon will be allowed 11.8 hours at $75 per hour, equals $885 and Mr. Henkels will be allowed the balance, or $6,506.64.

The findings of facts and conclusions of law of the hearing deputy basically will be adopted, the alteration being with respect to the length of the healing period and the attorneys' fees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Finding 1. On August 14, 1979 claimant injured his back while working for defendant.

Conclusion A. On August 14, 1979 claimant received an injury arising out of and in the course of his employment with defendant.

Finding 2. As a result of his injury claimant was hospitalized on several occasions and had two discs removed.

Conclusion B. Claimant has met his burden in proving that his back problems were causally connected to his injury on August 14, 1979.

Finding 3. Claimant has a permanent functional impairment of five percent (5%) as a result of his injury.

Finding 4. Claimant is 55 years old and dropped out of school in the twelfth grade.

Finding 5. Claimant has been involved with heavy manual labor since entering the work force.

Finding 6. Claimant has managed a warehouse and driven trucks.

Finding 7. Claimant presently has complaints of pain.

Finding 8. Claimant does have some restrictions on movement as a result of his injury.

Finding 9. Claimant is no longer working for defendants because of a lack of work.

Finding 10. Claimant has tried to work on his own without much success.

Conclusion C. Claimant has met his burden proving he has a permanent partial disability of thirty percent (30%) as a result of his injury.

Finding 11. Claimant missed work as a result of the injury for a period of seven and one-sevenths (7 1/7) weeks in 1979 and required twenty-nine and two-sevenths (29 2/7) weeks to recuperate from surgery in 1980.

Conclusion D. Claimant is entitled to thirty-six and three-sevenths (36 3/7) weeks of healing period benefits as a result of his injury.

Conclusion E. The fair amount for an attorney's fee for Mr. Tallon is eight hundred eighty-five dollars ($885), and the fair amount for an attorney's fee for Mr. Henkels is six thousand five hundred six and 64/100 dollars ($6,506.64).

ORDER

THEREFORE, defendants are to pay unto claimant one hundred fifty (150) weeks of permanent partial disability benefits at a rate of one hundred sixty-three and 87/100 dollars ($163.87) per week and thirty-six and three-sevenths (36 3/7) weeks of healing period benefits at a rate of one hundred sixty-three and 87/100 dollars ($163.87) per week.

Mr. Tallon is entitled to an attorney's fee of eight hundred eighty-five dollars ($885), and Mr. Henkels is entitled to an attorney's fee of six thousand five hundred six and 64/100 dollars ($6,506.64).

Accrued benefits are to be paid in a lump sum together with statutory interest from August 15, 1979, and thereafter on payments as they became due at the rate of ten percent (10%) per year pursuant to section 85.30, Code of Iowa, as amended.

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 at Des Moines, Iowa this 10th day of ~~January~~ February, 1984.

Appealed to District Court;
Affirmed

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TIMOTHY L. CURRY,

Claimant,

vs.

ROWE AUTO BODY,

and

MILWAUKEE INSURANCE,

Insurance Carrier,
Defendants.

File No. 630596

A P P E A L

D E C I S I O N

By order of the industrial commissioner filed October 20, 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 and claimant cross appeals the result of a decision in review-reopening filed September 30, 1983.

On appeal the record consists of the transcript; claimant's exhibits 1 through 4 (exhibit 3 is claimant's deposition and exhibit 4 is the deposition of Mayank Kothari); and defendants' exhibit A, all of which evidence was considered in reaching this final agency decision.

The result of this appeal decision will be the same as that reached by the hearing deputy.

STATEMENT OF THE CASE

Claimant, a 28 year old body repairman, received a severe blow to his head at work on March 18, 1980. Claimant was hospitalized for a short time and received compensation benefits from March 19, 1980 through April 20, 1980. Then, on June 12, 1980, claimant developed a severe headache and was again hospitalized, this time until June 29, 1980.

He returned to work on July 25, 1980 but claimed he was not able to earn full wages again until December, 1981.

ISSUES

The review-reopening decision awarded claimant 6 weeks, 1 day compensation for temporary total disability at the rate of $268.94 per week for the period of time June 12, 1980 through July 24, 1980.

Defendants state the issue thus: "Has claimant sustained his burden of proving by a preponderance of the evidence that a causal connection exists between his work injury of March 18, 1980, and his intracranial hemorrhage of June 12, 1980?"

Claimant, in his cross appeal, raises another issue: "An award for temporary partial disability was available to the claimant prior to July 1, 1982 under Iowa Code Section 85.33 (1979)."

APPLICABLE LAW

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 v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 (1934). 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).

Section 85.33, Code of Iowa (1979) 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

With respect to the issue of causal relationship, defendants depend upon the reports of Stuart R. Winston, M.D., a qualified neurosurgeon, whose opinion is epitomized in his letter of July 23, 1982:

> It was our impression that the patient suffered his hemorrhage on the basis of hypertension which continues to be treated by Dr. Kothari, to the best of my knowledge. I know of no relationship between the head injury of March, 1980 and the subsequent episode. Perhaps an internist who specializes in hypertension should be consulted for any obscure etiologic relationship under these circumstances. Certainly, not in my experience dealing with many of these patients, have I seen hypertension to be caused by the type of injury which the record would seem to indicate he sustained in March of 1980.

Claimant's blood pressure was 220/100 on June 12, 1980 when he was admitted to the emergency room. Defendants argue that Dr. Winston's opinion that no causal relationship existed between the injury and the subsequent episode of intracranial bleeding is entitled to greater weight because his expertise is greater; because Dr. Kothari's opinion is more of theory than anything else; that Dr. Kothari's testimony is only that of a possibility; and; finally, that there is no objective support for Dr. Kothari's view.

It is true that Dr. Kothari waxes and wanes, as it were, on his opinion. In a report of July 16, 1980 he states:

> Your question, whether the June 12, 1980 picture was related to the injuries succumbed [sic] on March 18, 1980, cannot be answered conclusively, authoritatively and scientifically, because the evidence is nebulous. All I can say is that it is possible. It is also possible that he could have had a full-fledged picture, just as on June 12, 1980, even though he did not have injury on March 18, 1980.

By the time Dr. Kothari's deposition was taken on May 27, 1982, his opinion was more firm. Conceding that his opinion was a theory, he stated:

> That the time interval was so narrow, three months almost, that it is very, very much likely that the continued headaches and then all of a sudden out-of-the-blue-type of manifestation was in some fashion or at least related to the first injury. The first injury, one should not discard. For the record I would like to say it was a 70-ton force, which he himself told me after he woke up from the concussion effects. That was a pretty severe injury. (Kothari dep., p. 28 ll. 12-20)

Dr. Winston's opinion, also, is based on theory, namely that the hemorrhage was caused by hypertension as opposed to being caused by the blow on the head of three months earlier. Dr. Winston's theory suggests claimant has blood vessels which have been weaken by hypertension. Claimant denies any history of hypertension (Tr. 25) and Dr. Kothari testified that hypertension would not weaken the blood vessels of such a young person. (Dep. 21) It seems far more likely that the blow to the head caused the subsequent bleeding as suggested by Dr. Kothari. The opinion of Dr. Kothari is taken over that of Dr. Winston because the former seems more logical than the latter.

The issue on cross appeal is whether or not temporary partial disability is payable under §85.33 of the 1979 code. The employee does not claim that §85.33 of the 1982 Code of Iowa, which specifically authorizes temporary partial disability, applies in this case. Claimant alleges that "as a result of the work related injury on March 18, 1980, the Claimant's post-injury wages were on the average $156.68 below his pre-injury gross weekly wage, for a period of 17 months." (Claimant's brief, 9) It is claimant's position that he should receive full temporary disability benefits in order to make up for his lost wages for the period July 1980 through December 1981. In support of his argument, claimant cites 2 Larson, Workman's Compensation Law, section 57, specifically sections 57.21, 57.42 and 57.43 (1982). These sections cover the question of earning capacity and the question of when wages would be a credit against compensation. However, these sections apply not to temporary disability, as is claimant's case, but to permanent partial disability as it affects earning capacity.

Under the Iowa law, temporary disability is payable based upon the average weekly wage, and the inference taken is that since the wage in most cases is for full-time work, the compensation correspondingly is for full-time disability. Return to work ceases the period of temporary disability. Barker v. City Wide Cartage, 1 Iowa Industrial Commissioner Report 12, 15 (1980). Claimant's theory is somewhat akin to the Florida wage loss theory wherein certain disabilities are compensated for by supplementing lower return-to-work wages with certain payments. Code of Florida, section 440.15 (1980).

For the above reason, it cannot be said that §85.33 as it was in effect in March of 1980 provided for temporary partial disability payments.

The findings of fact and conclusions of law of the review-reopening decision will be adopted except that finding of fact No. 10 is an addition.

FINDINGS OF FACT

1. Claimant was employed by defendant-employer on March 18, 1980.

2. Defendants filed a memorandum of agreement for a March 18, 1980 injury.

3. Because of the March 18, 1980 injury, claimant was disabled from acts of gainful employment from March 19, 1980 through April 20, 1980, a period of 4 5/7 weeks. Claimant was paid temporary total disability compensation at the rate of two hundred sixty-eight and 94/100 dollars ($268.94) per week.

4. The correct rate of compensation is two hundred sixty-eight and 94/100 dollars ($268.94) per week.

5. Claimant sustained a further disability commencing on June 13, 1980.

6. The disability which commenced on June 13, 1980 was proximately caused by the injury of March 18, 1980.

7. Claimant was again disabled from acts of gainful employment from June 13, 1980 through July 25, 1980, a period of 6 1/7 weeks. This loss time was because of the March 18, 1980 injury.

8. Claimant incurred additional medical expenses which relate to the March 18, 1980 injury.

9. Claimant seeks temporary partial disability compensation for a period of time prior to the enacting date of the statute providing therefor.

10. For the 17 month period ending December 31, 1981, claimant's weekly wages were $156.68 less than prior to the injury.

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties and the subject matter.

2. Claimant was employed by defendant employer on March 18, 1980.

3. Claimant sustained an injury arising out of and in the course of his employment on March 18, 1980.

4. Claimant is entitled to be paid an additional six and one-seventh (6 1/7) weeks temporary total disability compensation at the rate of two hundred sixty-eight and 94/100 dollars ($268.94) per week.

5. Claimant's claim for temporary partial disability compensation is denied.

6. Defendants will be ordered to pay the following medical expenses, to wit:

Dr. Kothari	$ 421.00
Dr. Winston	625.00
Iowa Lutheran Hospital	1,383.75
Mercy Medical Center	6,518.74

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant an additional six and one-seventh (6 1/7) weeks of temporary total disability compensation at the rate of two hundred sixty-eight and 94/100 dollars ($268.94) per week.

IT IS FURTHER ORDERED that defendants pay unto claimant the following medical expenses:

Dr. Kothari	$ 421.00
Dr. Winston	625.00
Iowa Lutheran Hospital	1,383.75
Mercy Medical Center	6,518.74

Costs are taxed to defendants.

Interest is to accrue on this award from September 30, 1983.

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

Signed and filed at Des Moines, Iowa this 31st day of January, 1984.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BRANDON CURTIS,

Claimant,

vs.

SWIFT INDEPENDENT PACKING,

Employer,

and

NATIONAL UNION FIRE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 693117

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 the claimant, Brandon Curtis, against his employer, Swift Independent Packing Company, and the insurance carrier, National Union Fire Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury claimant allegedly sustained on February 2 or 3, 1982.

This matter came on for hearing before the undersigned at the office of the industrial commissioner in Des Moines, Iowa on November 9, 1983. Pursuant to a post-hearing order of that date, briefs were filed by both claimant and defendants on or before December 8, 1983. These were considered in the disposition of this case.

An examination of the industrial commissioner's file reveals that a first report of injury was filed February 17, 1982. There are no other official filings.

The record in this case consists of the testimony of claimant, of claimant's father, Gregory Curtis; of Herb Wilson; of Tony Paul Harris; claimant's exhibits 1 through 37; and defendants' exhibits A through N. Claimant's objections to defendants' exhibit B is sustained on the grounds that defendants failed to make the document available to claimant's counsel. Claimant's objection to defendants' exhibit D is overruled. Objections to oral testimony on which ruling has been reserved, if any, will be adddressed in the review of the evidence.

The parties stipulated that medical expenses were fair and reasonable. The insurer has paid all bills. There was no stipulation as to rate.

ISSUES

The following issues are to be resolved:

1) Whether claimant received an injury which arose out of and in the course of his employment.

2) Whether there is a causal relationship between the alleged injury and the disability.

3) Whether claimant is entitled to benefits and the nature and extent of any benefits to which he is entitled.

4) Whether defendants should be subject to penalties under section 86.13.

5) The applicable rate of weekly compensation if an award is made.

6 The date the healing period ended.

REVIEW OF THE EVIDENCE

Claimant, Brandon Lee Curtis, testified in his own behalf. Claimant is a married, twenty-five year old, male. He has two minor children, one of whom was born after the injury date.

Claimant testified that he completed twelfth grade, but lacks one-quarter credit required for high school graduation. While in high school claimant lettered in football and baseball and took classes in diesel mechanics for three years. Claimant has no other specialized training and has undertaken no other post-high school training.

Claimant's work history reveals that he has worked largely as a general laborer or in semi-skilled jobs. Claimant worked at the Holiday Inn on a part-time basis from 1973 through 1976. Claimant washed dishes and taxied truck drivers who were seeking rooms to the motel. Claimant worked as a truck washer and assistant mechanic at Leaseway Diesel. Claimant recited that he was hired under a government program and received only minimum wage at this job. Claimant also worked for Powell Construction for a period in 1977. In this job, claimant "roughed" in the frames and weather-tightened residential housing. Claimant related he has worked for Southern Iowa Remodelers, a business which his father owns, at various times since his fifteenth birthday. Claimant stated that while Remodelers builds garages and additions to existing homes, his duties were substantially similar to those performed for Powell. Claimant has also worked for Ideal Construction intermittently for approximately two and one-half years. Powell renovates slum properties into rental housing. Claimant states he performed "all-around" work for Ideal including plumbing and other skilled trades as needed. Claimant earned between four and five dollars per hour working for Ideal; he earned a percentage of the total paid for each job when working with his father. Claimant estimated this to be about five dollars per hour. Claimant worked for Home Plastics as a press operator for one year. He earned only $3.30 to $3.40 per hour, but stated this was steady employment whereas construction work is seasonal and generally only available from March to December. Claimant left Home Plastics to work for Swift commencing June 27, 1981. Claimant cites the pay increase to $5.00 per hour as the reason for his job transfer. Claimant worked as a chuck boner. Chuck boners remove the bone from the neck of the beef chuck. Claimant related that it can take from two to ten minutes to debone a chuck. In order to receive qualification rate pay, a worker must be able to debone in less than two minutes and maintain such time for eight hours. Qualified boners receive an additional $1.10 per hour. Claimant testified that he qualified before the February 1982 injury date. Claimant stated that there were generally eight employees on the chuck deboning line and that he was able to do his share. He stated there was an unwritten law that each employee just did his share. Claimant stated that deboners used the weight of the chuck to help pull the bone.

Claimant also worked in data pack. There, he boxed chuck into 28 by 15 or 16 inch boxes. He also worked in meat packaging. This required considerable lifting and pulling of chuck weighing between 70 and 100 pounds. Claimant also worked on wizard line, spinal cord removal, maintenance, cleanup, and as a round line fill-in. Claimant stated that the wizard line cleaned meat off bones for hamburger. Both this job and spinal cord removal required lifting of two pounds or less. Claimant did not detail the duties and requirements of maintenance, cleanup, and fill-in workers.

Swift has an employee grading system under which employees receive scores from one to ten. One denotes a very superior worker. Claimant recited that he had achieved a grade one by the injury date and consequently received a $1.10 per hour pay raise. The record is unclear as to whether this is an additional salary increase beyond that for qualifying as a chuck boner. Claimant testified that he was receiving a wage of $7.40 per hour on the injury date. He states he received union, employment length, and qualification rate salary increases.

Under a union contract in force on the injury date, employees were guaranteed payment for at least 36 hours of work.

Claimant described his pre-injury health as "good"; he related a number of illnesses and injuries, however. Claimant broke his arm in second grade. He suffered a bout of kidney problems in 1967; injured his foot and ankle when he dropped a flour canister on his toe in 1965; received knee injuries while playing football in 1974 and while working for Powell in 1977; injured his thumb and finger in the press at Home Plastics; and twisted his knee in a home injury this year. Claimant also suffered tendonitis while at Swift. Claimant was off work for two days and was put on cleanup at less than his full pay grade when he returned.

Claimant testified that he had no pain or back injury before February 2 or 3, 1982. Claimant worked the 3 to 11 shift. He states that at approximately 8:00 p.m., on or about February 1,

1983, he experienced a sharp pain in his lower back when he "raised up" to throw a chuck bone back. He states he finished out his shift without reporting the pain to his supervisors. He states he told fellow employees. No other testimony corroborates this assertion, however. Claimant rested in bed and did not report for work the next day; when bed rest had not alleviated his condition, he consulted Swift-authorized physicians the following day. Dr. Hoffman apparently prescribed a medication for muscle spasms. Claimant reacted to the medication and sought emergency room treatment when he began to vomit blood. Claimant then saw Dr. Hanson who took x-rays. Claimant states Dr. Hanson suggested to Dr. Hoffman that a myelogram be done. Claimant has never had a myelogram. Doctor Hoffman released claimant for work. Claimant reports he worked from 3:00 to 5:00 p.m., but left because he was experiencing lower back pain. Dr. Hoffman then referred claimant to Dr. Boulden.

Dr. Boulden prescribed inpatient physical therapy with ultra-sound and then use of a portable TENS unit. Claimant rented a TENS unit for constant wear for four weeks. Dr. Boulden also suggested claimant swim every other day. Claimant subsequently joined a health center and attempted to do so.

Dr. Boulden released claimant to return to work April 27, 1982. Claimant states he boned chuck Tuesday through Friday even though his lower back became stiff and sore and bothered him. He also worked for a time on wizard line since he suffered back pain while boning. Claimant relates that when he reported to work on Saturday his supervisor, Terry Church, "took him out the back door". Claimant states that Mr. Church told claimant that he did not want claimant to endanger himself and preferred that claimant go ahead and quit, but if claimant did not do so, claimant would be laid off until Swift received a medical report on his condition. (Defendant's objection to this testimony on the grounds that it called for speculation on claimant's part is overruled.)

Claimant states he reported for work on both the following Monday and Tuesday. Each day, he was told he could not return to work since Swift had not received a medical report on his condition. Claimant relates that when he reported to work on Wednesday he was advised that the personnel office had news. Claimant recites that Swift's personnel director, Tony Harris, told claimant he was being let go because of his disability. Claimant reports Dr. Harris advised him to return to school and Swift "wouldn't fight" his disability. Claimant stated he believed he had no choice to return to work even though he felt he could perform light duty work. Claimant testified he had interviewed for, but did not receive, a supervisory job before his injury. Claimant opined he could have worked on wizard line, or cleanup, in packaging, or in the knife room. Claimant testified that on the previous Saturday, Mr. Church had told claimant that even if he were assigned a light duty job, he could slip and paralyze his back and, therefore, Swift did not want him working.

Claimant stated that he underwent vocational rehabilitation testing after his termination at Swift. He reported additional education and training for light duty work were recommended. Defendants' objection to this evidence as hearsay is overruled. Claimant expressed his belief that he could not afford to go to school.

Claimant related that he has held a variety of jobs since his termination from Swift. Claimant assisted his father in cabinetmaking. The work was characterized as requiring little physical labor. Claimant reported that he worked as a hand sander and that he was allowed to leave work when his pain affected his ability to work.

Claimant states he worked as a hired hand on his father's farm during the fall of 1982. His duties included checking livestock, giving antibiotics, and milking. He worked approximately 16 to 20 hours per week. His total wage was between $500 and $600. Claimant built garages and remodeled basements with his father from approximately April to October 1983. He laid out building frames and cut building materials. Claimant received one-third of his father's return on each job. His total earnings were approximately $3,600.00.

Claimant reported he has a constant backache and that if he "turns wrong" he is unable to work for three or four days. He said quick movement aggravates his pain as does prolonged sitting. He said that when he uses proper body mechanics and keeps the weight in his arms and legs, he can lift without great pain.

Claimant related an incident where he experienced pain simply because he stepped from a truck improperly.

At hearing time, claimant was working as a foreman at Midwest Garage Builders. He reported that while he anticipated steady employment until the construction season ended in December 1983, he is treated as a general contractor and, therefore, will not qualify for unemployment during the three months of winter layoff. Claimant did not testify as to his earnings at Midwest; he did state that he is paid by the square foot of construction rather than on a hourly rate.

Claimant had a CT scan in January 1983. Following such, Dr. Boulden advised claimant that either a body cast or surgery would be necessary. Claimant did not consent to either procedure. Claimant is afraid surgery would further impair his condition. Claimant believes his condition has improved since seeing Dr. Boulden in January.

On cross-examination, claimant admitted he did farm work for his father while receiving unemployment; he has missed no work time because of back pain since summer 1983; he indicated on his unemployment application that he was ready and willing to work; he had never discussed vocational rehabilitation benefits with his attorney; he had had no butchering or packinghouse experience before joining Swift; and he received a three-day suspension while working at Home Plastics when he "messed up" an order.

Claimant denied having back pain with his kidney infection and following his auto accident in 1981. When questioned as to why the medical history taken on February 8, 1983 reported claimant had stated that he had had back pain for the last one or two weeks, claimant explained he did not realize he had a back problem until x-rays were taken. Claimant also admitted that when he talked to Mr. Harris on his termination date, claimant did not specifically request a job change, but only asked what he could do.

On redirect examination, claimant stated he was unaware of his back injury when he first discussed his problems with medical personnel. He thought he only had muscle spasms. He stated his doctors told him his injury was the result of deboning chuck. He recited that he had been an average student generally, but with superior ability in English and physical education. When further questioned by defense counsel, claimant admitted he could not state that any one deboning incident had brought on his back pain.

Claimant's father, Gregory Curtis, testified in claimant's behalf. He stated claimant had not had back problems before February 1982. He reported that claimant's back pain was episodic with periods in which claimant could work though with limited agility followed by times of aggravated pain during which claimant was unable to work. The witness stated that because of his slower reaction time, claimant is now unable to work heights. Claimant now lacks the flexibility necessary to bend over and nail siding. The witness opined that most employers would not grant claimant the flexible work arrangements his back pain requires; he stated he would not do so if claimant were not his son.

On cross-examination, Mr. Curtis stated that claimant's current job is similar to the subcontracting position the witness had previously and that the witness would have earned between $22,000.00 and $24,000.00 in 1983 had he remained in that position. The witness conceded that claimant had gained experience as an overseer when working for the witness and that with such experience, claimant could become a leadman or possibly a carpenter foreman. The witness reported that carpenters generally earned $7.00 per hour; leadmen $8.00 per hour; and foremen $9.00 to $9.25 per hour. The witness stated that construction workers generally will not work for eight or nine weeks during the winter.

The witness had observed that claimant had leg pain and loss of flexibility and mobility after his earlier knee injury, but denied having seen any evidence that claimant had back pain before February 1982.

On redirect examination, claimant's counsel asked the witness whether subcontractors usually hire persons with claimant's back problems. The witness stated that a leadman or foreman who often missed work because of medical problems would not be kept. Defense counsel's objection to the above as lacking proper foundation is overruled pursuant to section 17A.14(1), Code of Iowa.

Herb Wilson of Preferred Business Services, Inc. testified in defendants' behalf. This witness was hired to surveil claimant's post-injury activities and report these to Swift. Mr. Wilson filmed claimant a number of times and prepared a report outlining the activities observed. Defense counsel offered the report as defendants' exhibit D. Claimant's objection to defendants' exhibit D on the grounds that it is hearsay and cumulative is overruled. Defendants' exhibits G, H, I, J, K, L and M are film reels showing claimant carrying and lifting various items, generally five-eighths thicknesses of four by eight particle board, which the witness stated weigh between 40 and 50 pounds. The witness stated he observed claimant from 7:00 to 11:00 a.m. on May 19, 1983. He stated claimant began work at 8:00 a.m. and took no rest breaks during the observation. The witness reported that during other observations, the claimant appeared to be doing the bulk of the lifting.

On cross-examination the witness admitted that when observing claimant in January, he noted that two women shoveled the snow from claimant's drive even though claimant was home. The witness admitted he had only observed claimant during 13 days over approximately six months. The views on defendants' exhibits G through M were the witness's only observations of claimant doing physical labor.

Mr. Tony P. Harris also testified as a witness for defendant. Mr. Harris has been Swift's personnel manager for the last three years. Mr. Harris stated that the purpose of his pre-termination meeting with claimant was to discuss other possible jobs at Swift with claimant. Mr. Harris reported that a "gentleman's agreement" was reached with claimant under which claimant would be taken off the active payroll and Swift would not contest claimant's unemployment benefits. Mr. Harris reported he had known claimant suffered from a degenerative back condition prior to beginning work at Swift. He relayed that claimant had never discussed other jobs with him even though the witness reported he intended to discuss such with claimant and specifically that of trimming contamination. Mr. Harris intimated claimant terminated his employment because of claimant's concern that he would further injure himself. Mr. Harris stated the union shop made job transfers difficult.

Mr. Harris testified that he was familiar with chuck boning and observed that if the cut were lifted properly, the worker need never pick up the entire weight of the chuck.

On cross-examination, claimant's counsel questioned this witness extensively as to his knowledge of workers' compensation law and Swift's policy toward workers suffering job-related injuries. Defense counsel's objections on the grounds of relevancy and lack of foundation are overruled and the witness's responses are admitted for whatever probative value they have. The witness stated he supervises workers' compensation administration at Swift with the advice of Crawford and Company whom he characterized as insurance adjusters. He opined that less than one percent of Swift's workers are "let go" after work-related injuries. He stated those terminated were terminated because they violated other company policies and not because of their injuries. Mr. Harris said he was unaware of claimant's reported conversation with Mr. Church. The witness equivocated that he would consider rehiring claimant if he applied for work with Swift, but would not commit himself regarding such stating he had not reviewed claimant's work history in the past year or claimant's desire to work or whether work was available at Swift.

On redirect examination, the witness testified that injured employees were terminated only after three days unexcused absence after receiving a doctor's release to return to work. He stated he relies on the advice of company counsel regarding post-injury terminations. On further questioning by claimant's counsel, the witness admitted that he knew of more than five cases where workers alleged Swift terminated them because they had submitted compensation claims.

On rebuttal, claimant recited that defendants' exhibit C, a small sample of five-eighths inches particle board was thicker than that normally used as garage walls. He related that one-half inch and three-eighths inches thickness are normally used for walls and stated these weigh approximately 15 pounds.

Claimant's exhibit 34 is the deposition of William R. Boulden taken by defense counsel on August 3, 1983. Dr. Boulden is an orthopedic surgeon. Upon questioning by defense counsel, Dr. Boulden stated he had last seen claimant on July 21, 1983. He reported claimant then told him he had not had much problem in the six months interval since his examination by Dr. Boulden in January 1983. On examination, claimant had a full range of motion and no negative straight leg raising indicating that claimant had no nerve root irritation. Claimant's reflexes were equal and symmetrical and he had no motor weakness. Based on these findings, the doctor reported telling claimant he did not then need surgery even though the doctor had recommended surgery in his March 7, 1983 report. The doctor relayed that a CT scan performed in January 1983 revealed claimant had a disc [problem] as well as spondylolysis. The doctor reported that he anticipated no further treatment of claimant for the February 1982 injury, but stated he would not want claimant in a job where claimant had to bend with his back or do repetitive lifting with his back. The doctor opined that claimant reached his maximum level of improvement by February 1983. When asked whether claimant would suffer any permanent partial disability as a result of his February 1982 injury, the doctor opined:

> The likelihood of this injury causing him any permanent disability, in my opinion, is zero, because --- and I will relate the reasons: Because there's been no new structural change in his back, or deterioration of structural things in his back.

The doctor stated that claimant's back was probably more susceptible to recurrences of like back problems as a result of the February 1982 injury, however. The doctor opined that from a medical standpoint claimant's back problems were unlikely to cause a loss of earnings. The doctor then observed many companies will not hire a person upon finding the individual has had back problems. The doctor assigned claimant a 10 to 15 percent disability as a result of his preexisting spondylolysis, but stated he did not feel claimant's permanent disability had changed as a result of the February 1982 injury.

On cross-examination by claimant's counsel the following dialogue transpired:

> Q Doctor, when you viewed the films of Mr. Curtis working on the garage, was the kind of lifting he was doing, lifting with his back?
>
> A No. I made comments to that to the counselor at the viewing that he was using his back in the proper way.
>
> Q So in a way, to the untrained eye, the films are deceiving in that they would indicate that the man has a good strong back without any defect at all, when, in fact, he's lifting with his legs and arms?
>
> A He was using proper back mechanics. I would say yes to your question.

The doctor answered affirmatively when asked if on claimant's release to return to work it was his recommendation that claimant avoid the kind of pulling and twisting activities that might be required in the job [of chuck boning] and be restricted to jobs that would not require pulling and twisting in the use of his back. The doctor further opined that he had recommended claimant use proper body mechanics and that this might restrict claimant in certain jobs at Swift. The doctor also intimated in response to claimant's counsel's questioning that claimant reached his maximum medical improvement in February 1983 stating: "... obviously I don't think [claimant] would have went [sic] back to the work he is doing now in February if the symptoms had been present...."

On redirect-examination by defense counsel, the doctor stated the restrictions he placed on claimant in April 1982 were due to both the February 1982 injury and claimant's preexisting condition.

Claimant's exhibit 35 is the deposition of Dr. Peter Wirtz taken on behalf of defendant on July 8, 1983. Dr. Wirtz is an orthopedic surgeon who examined claimant on March 14, 1983. On examination, the doctor observed that claimant's:

> [B]ack was flexed in 90 degrees. His straight leg raising was 90 degrees with both legs. The knee jerks were 2 over 2. The ankle jerks were 2 over 2, which were normal. The patient had pain to percussion in the right lower lumbar area as well as at the area of the L5, S1 disc space. There was no notch pain or [sic] any muscle tightening in the lower extremities."

There also were no limitations on claimant's range of motion in the low back area and the neurological examination of the low back was normal. Dr. Wirtz also agreed with Dr. Rosenfeld's statement of June 6, 1983 that "clinical exam [of claimant] has never really shown any neurological emphasis..." The doctor stated his 45 to 50 pound lifting limitation of April 4, 1983 was due to conditions other than the February 1982 injury, namely; claimant's spondylolysis at the lower lumbar area. In explanation of such, the following dialogue transpired between the doctor and defense counsel:

> Q. Can you describe for me what that is and how it affects the flexus of the low back?
>
> A. This spondylolisis [sic] is at L-5, which is the fifth lumbar vertebra. What has happened there is that the bone has had an injury to the area causing a fracture. The fracture is not healed bone to bone but has made a type of fibrous tissue. This makes that part of the spine less stable or less resilient to stresses and strains.
>
> Q. Are you aware of anything that indicates that that fracture would have occurred in February of 1982?
>
> A. With his history, it would be indicative that that fracture did not occur on that date, in that in the x-ray taken by Dr. Hanson, the patient was noted to have had an abnormality, which would indicate that pre-existed the 2-3-82 injury.
>
> Q. Would you then agree with Dr. Boulden that that pre-existing condition "is something he has had for a long period of time" when he so states it in his March 7, 1983, report?
>
> A. Yes.
>
> Q. Would you expect a person with this pre-existing condition to develop pain with heavy work and turning and twisting even without any specific injury while doing so?
>
> A. Yes.

The doctor opined that had claimant ruptured a disc in the February injury he could be expected to be able to state a specific incident concerning it but that a possible sequence of events from an injury which aggravated a preexisting condition was pain coming on over a time such as recorded in claimant's Iowa Luthern Hospital medical record of February 5, 1982. The doctor opined that claimant's CT scan revealed a disc abnormality on the right side as well as a degenerative facet with distortion of that area on the right side where the disc was diagnosed as herniated. He stated that with spondylolysis with disc distortion, it is difficult to read that area as to a frank herniate of material. Therefore, he had some question as to whether claimant had a ruptured disc.

The doctor diagnosed claimant as having a chronic backache of muscle secondary to the spondylolysis defect in his spine with no objective signs or symptoms that the injury occurred in claimant's low back in February 1982.

In response to query by defense counsel, Dr. Wirtz opined that claimant could do heavy work with some care and restriction of back activities if he used precautions against back strain. These include guarded lifting, some weight restrictions, some restrictions in pushing and pulling, twisting of his back. The doctor opined that such restrictions were not due to the February 1982 occurrence and that claimant had not suffered any permanent partial disability as a result of such. The doctor also expressed his belief that given claimant's condition at time of deposition, neither surgery nor a myelogram was warranted. The doctor also opined that claimant's sheetrock-carrying activities, as shown on Wirtz deposition exhibit 1, were not consistent with disc rupture in February 1982 or with permanent partial impairment resulting from the February 1982 injury and that those activities had a tendency to confirm the temporary nature of the aggravation of claimant's preexisting condition by claimant's February 1982 injury.

On cross-examination by defense counsel, the doctor agreed that claimant's job as a chuck boner was consistent with a preexisting spondylolysis even though the work involved a lot of heavy lifting, bending, stooping, and cutting heavy pieces of meat; that approximately 10 to 15 percent of the general population has like back conditions; that two-thirds of these never develop any symptomatology and, therefore, it was consistent with claimant's prior condition that he was able to do heavy work for at least six months before his February 1982 injury. On query from claimant's counsel, the doctor explained the probable on-set of an injury such as claimant's as follows:

> A. The patient usually suffers a rotational injury to the spine, and that rotates the disc material and the lining of the disc. Since the bone that is a problem with the spondylolysis does not stabilize, the spine in that part of the rotation will cause stretching of the ligaments. That sets up the low back pain in the muscles and the muscular pain in the back. Any type of rotational injury can be a flexion injury when the patient bends over to pick up an object. Simply leaning forward could cause a similar type of strain to the structures.
>
> Q. Over time, once that occurs, if you keep using that back, it can get worse and worse with activities?
>
> A. That's correct.
>
> Q. Once this occurs, what accounts for the continuing chronic pain? Is it that those ligaments have been stretched out of shape and now is less stable? Would you give me an idea in that regard?
>
> A. When the ligaments get strained, they tend to become swollen. It's like a sprained ankle, the same structures as a ligament. The structure gets stressed. It gets kind of stretched. It gets swollen and irritated. It takes nature a period of time to reduce the swelling and what we call the irritation in the ligament structures in the area of the sprain, whether it be in the ankle or the back. That's why it takes maybe two, three, four weeks to be rid of the severe pain.

Q. What about the chronic nature of the pain in a situation like that?...

A. ...The reason the symptoms stay persistent is that it doesn't take a lot of stress to stretch the ligament and become symptomatic. It doesn't take a lot of activity. It can be as a matter of getting up from a chair, rolling around in bed.

Q. If I understand this correctly then, a man can go through his life, play football, do heavy work and never have a problem; but once he has an overstretching of it and starts to have that symptomatology, it can become a chronic condition. Is that fair?

A. That is true.

Q. He becomes more susceptible to re-injury, so to speak, possibly less stable?

A. The whole sequence of events does tend-- Once it becomes symptomatic, it does tend to become chronically symptomatic and symptomatic to a lessor type of injury.

The doctor expressed his belief that claimant's symptoms are due to his spondylolysis and disc slippage rather than to a herniation since claimant does not have restriction of leg motion and evidence of nerve damage which would normally accompany herniation of disc material.

Claimant's exhibits 1 and 2 are medical reports of Martin S. Rosenfeld, D.O., an orthopedic surgeon, of October 12, 1982 and June 6, 1983 respectively. In exhibit 1, Dr. Rosenfeld diagnosed claimant as having a lumbar strain resolved with aggravation of the preexisting spondylitic defect, agreed that claimant achieved maximum medical improvement as of April 27, 1982, and assigned claimant a 20 percent physical impairment as a result of the injury. The doctor further opined:

> I do not feel that any of [claimant's] impairment is attributable necessarily to the spondylolitic defect as this is something that he had from any where up to twenty-four (24) years and had functioned quite well before the injury...I would feel [claimant] should be able to perform whatever activities he desires as long as he maintains and uses good body mechanics...[claimant] is restricted to activities at this time that require minimal manual labor and also that do not require prolonged sitting.

In exhibit 2, the doctor expressed his confusion that the CT scan would show a large herniated disc when clinical examination has never really shown any neurological deficits, opined that if claimant had a ruptured disc it could be related to his injury of June 1981 [sic] but the doctor felt he could not judge whether claimant had a ruptured disc or whether such was related to his injury on the basis of the CT scan alone.

Claimant's exhibits 4 through 9 and 11 through 15 are medical reports and related matters of William R. Boulden, M.D. Exhibit 10 is a work release for claimant of Dr. Boulden with a return to work date of April 27, 1982. In exhibit 3, Dr. Boulden opined to claimant's counsel that claimant has a 20 percent disability of his back based on the spondylolysis as well as the traumatic nature of his symptoms. He attributed 5 to 10 percent of this to claimant's preexisting condition and attributed 5 to 10 percent to his work injury. In exhibit 12, a March 7, 1983 letter of Dr. Boulden to Cyndra Gratias of Crawford and Company, Dr. Boulden states that claimant's CT scan shows a lumbar herniated disc at L5-S1 and that surgery is warranted since claimant has not shown much improvement. In exhibit 13,an April 18, 1983 letter to defense counsel, Dr. Boulden stated claimant has had a degenerative disc because of the spondylolisthesis for some period of time and, with this mechanical unstable back, had gone on to rupture. In exhibit 15, a July 1, 1983 letter to Cyndra Gratias, Dr. Boulden opined that claimant's symptoms had resolved from his previous trauma and that since claimant had a preexisting spondylolysis he had not sustained a permanent partial impairment of his back as a result of such.

Claimant's exhibits 16 through 19 are progress notes and medical reports of Glen D. Hanson, M.D. In exhibits 16, 18 and 19, the doctor records claimant's history as [claimant] had been doing a lot of twisting and turning at work February 3, 1982 and gradually developed low back pain which worsened when claimant twisted, turned or moved. In exhibits 19 and 20 the doctor states claimant denied any significant problems previous to February 3, 1982.

Claimant's exhibits 20, 21, 22, 23 and 24 are medical reports of R. W. Hoffman, M.D. Claimant's exhibit 21 is a work release by Dr. Hoffman reciting claimant could return to work without restrictions on February 22, 1982. Attached is a company nurse's report of February 22, 1982 directing claimant to go home and recheck with a doctor for further testing on his back.

Claimant's exhibit 25 is a physical therapy record for claimant from March 2, 1982 to March 15, 1982. Claimant's exhibits 26 through 28 are reports of Thomas W. Bowen, L.P.T.

Claimant's exhibits 26 through 33 are various hospital records and radiographic reports of Iowa Luthern Hospital from February 5, 1982 to February 18, 1983. Exhibit 29, the report of February 5, 1982 states this hand written history:

> Pt states for past 1-2 wk he has had R midback pain and when he bends over at work pain becomes sharp and radiates to L side uncertain of injury

followed by the observation that claimant:

> may have injured his back at work but is unsure at the present time of the injury. Over the past 2 weeks has had progressive worsenings of spasm and pain in the right and thoracic back with similar sharp types of pain in the left mid thoracic back area.

Exhibit 31, the radiographic report of February 9, 1982, reports a bilateral spondylolysis of the pars inter-articularis of L5 with little evidence for spondylolisthesis with extremely minimal change in this regard at L5-S1 and narrowed disc space at L5-S1. Exhibit 33, the February 18, 1983 radiographic report of claimant's CT scan reports a large herniated disc at the L5-S1 level on the right.

Claimant's exhibit 36 is Swift's attendance calendar for Brandon Curtis for 1981 and 1982.

Claimant's exhibit 37 is a March 1982 file letter of Richard Wood, EMT, relating that claimant was sent home from work for his back problems and stating Swift would check with his doctor on Monday to find the limitations his back can tolerate.

Defendant's exhibit A consists of a number of medical reports, many of which duplicate claimant's exhibits 1 through 33. Of note, however, were the following medical reports of Dr. Wirtz: a June 20, 1983 letter to defense counsel in which Dr. Wirtz opines that the disc herniation at L5-S1 on claimant's CT scan may be due to a distortion of this disc space rather than a frank herniation of disc material since this is the same level as the L5-S1 spondylolysis; an April 4, 1983 letter to Cyndra Gratias of Crawford and Company stating claimant had full range of motion on examination on March 14, 1983, and that, in light of such, claimant could have returned to some type of employment if so motivated, and that claimant's condition would limit heavy lifting, bending, pushing and pulling of approximately 45-50 pound limit; a March 14, 1983 letter to Crawford and Company diagnosing claimant's problem as chronic backache secondary to spondylolysis and stating:

> This patient suffered an aggravation of pre-existing problem in February of '82 which lasted over an extended period of time. He continues to be symptomatic and I feel this is a muscleskeletal strain in nature....

Defendants' exhibit C is a four inch by one and a half inch section of five-eighths inch particle board. Defendants' exhibit D is the surveillance reports of Preferred Business Services, Inc. Defendants' exhibit E is gross wage information for claimant for the 13 weeks prior to February 3, 1982. The exhibit shows a total of 486.8 hours worked with an average hourly wage of 6 and 099/1000 dollars.

Defendants' exhibit F consists of eight color photos which defendants' exhibit D relates to construction projects undertaken by claimant and his father.

Defendants' exhibit N is a Swift's termination notice for claimant. The notice characterizes claimant's termination as a discharge and states the reason for such as: "No misconduct. Physically unable to perform job due to previous physical condition."

APPLICABLE LAW AND ANALYSIS

This first issue to be decided is whether claimant received an injury which arose out of and in the course of his employment.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on February 2 or 3, 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 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, 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, 246 Iowa 402, 68 N.W.2d 63 (1955).

While the record in this case is voluminous, it is interlarded with irrelevancies and certain facts alone are salient in the determination of the issues. Briefly, claimant has a preexisting spondylolysis such as affects 10 to 15 percent of the general population; two-thirds of those so-affected will never experience significant discomfort related to the condition. Claimant, a twenty-five year old man who played both football and baseball in high school and who has engaged in construction work and other large motor-movement manual labor, testified he experienced no back difficulties before February 1982. Claimant's father substantiated this testimony. The February 1982 medical records in evidence taken as a whole support the on-set of claimant's difficulties at such time and each either affirmatively states or seriously considers that claimant's difficulties resulted from his employment activities. Claimant's job as a chuck deboner required that he engage in turning, twisting and pulling motions throughout an eight hour work day. Claimant would not be required to perform such motions consistently and for that prolonged period in ordinary life or in most other forms of employment. Neither claimant nor defendants produced evidence that claimant engaged in other activity which possibly produced his back pain of February 1982. A person with preexisting spondylolysis may develop pain with heavy work, turning and twisting without a specific injury or, perhaps more properly, a specific incident of injury.

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.

When the above-stated legal principles are applied to the above-stated facts, it becomes apparent claimant sustained an injury when the prolonged twisting and turning required in his work as a chuck deboner lighted up claimant's otherwise latent spondylolysis. Thus, claimant's work activity created both the source and the circumstances of his injury and claimant has met his burden of establishing that his injury arose out of and in the course of his employment.

(To so decide is not to accept wholehandedly claimant's testimony as to specific on-set of pain. Claimant may well have searched his mind beyond its border with his imagination in his hope to find a specific incident as a source of his symptoms. It is sufficient that the preponderance of credible lay and medical evidence establishes that, in early February 1983, this previously symptom-free, apparently healthy, young man experienced pain properly attributed to his work, such that by February 3, 1983 he could no longer continue his assigned duties.)

Next we must consider whether a causal relationship exists between claimant's injury and his alleged disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 3, 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).

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). The expert opinion may be accepted or rejected, in whole or in part, by the trier of fact, however. 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).

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, 218 Iowa 724, 254 N.W. 35 (1934).

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, 253 Iowa 369, 112 N.W.2d 299 (1961); 100 C.J.S. 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, 252 Iowa 613, 620, 106 N.W.2d 591 (1960), and cases cited.

It has already been established that claimant had a preexisting condition which was aggravated by his work injury. Therefore, the proper question now is whether claimant's current symptoms and life restrictions relate to the work injury or result from the underlying condition itself. The medical testimony on this point is conflicting with Dr. Boulden, claimant's treating physician, stating claimant's activity restrictions relate to both the work injury and the underlying condition; Dr. Rosenfeld attributing a 20 percent impairment rating wholly to the work injury and Dr. Wirtz's opining that claimant has fully recovered from his work injury and that any continuing restrictions arose solely from his underlying spondylolysis. Yet, as noted above, the evidence as a whole does not suggest claimant had any symptoms before the February 1982 injury. He simply had a latent condition which previously had not hindered his life. As Dr. Rosenfeld relates:

> I do not feel that any of [claimant's] impairment is attributable necessarily to the sponyolitic defect as this is something that he had from any where up to twenty-four (24) years and had functioned quite well before the injury....

Dr. Wirtz testified to the recurrent effects likely to follow an initial aggravation of the underlying condition as follows:

> Q What about the chronic nature of the pain in a situation like that?...
>
> A ...The reason the symptoms stay persistent is that it doesn't take a lot of stress to stretch the ligament and become symptomatic. It doesn't take a lot of activity. It can be as a matter of getting up from a chair, rolling around in bed.
>
> Q If I understand this correctly then, a man can go through his life, play football, do heavy work and never have a problem; but once he has an over stretching of it and starts to have that symptomatology, it can become a chronic condition. Is that fair?
>
> A That is true.
>
> Q He becomes more susceptible to re-injury, so to speak, possibly less stable?
>
> A The whole sequence of events does tend-- Once it becomes symptomatic, it does tend to become chronically symptomatic and symptomatic to a lessor type of injury.

Thus, claimant's initial work injury clearly set up the sequela by which claimant now must live guardedly or risk reoccurrence of persistent and debilitating pain. This is the disability for which claimant seeks compensation; claimant has established the requisite causal connection between the disability and his work injury.

Next we must decide the extent of claimant's disability and his benefit entitlement, if any.

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).

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. * * * *

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. McSpadden, 288 N.W.2d 181 (Iowa 1980).

Reliable functional impairment ratings have not been forth coming in this case. At one point, Dr. Boulden opined that claimant had a 20 percent disability of his back based on the spondylolysis as well as the traumatic nature of his symptoms. He attributed 5 to 10 percent of this to claimant's preexisting condition and 5 to 10 percent to his work injury. At deposition the doctor stated the likelihood claimant had suffered any permanent disability as a result of his working as zero since there had been no new structural change or deteriorations in claimant's back. Yet, the doctor also stated claimant should not do work requiring bending or repetitive lifting; he opined that claimant was more susceptible to reoccurrences of back problems because of his work injury; he observed employers often will not knowingly hire an individual with back problems. The doctor admitted his restrictions on claimant arise both from his work injury and his preexisting condition.

Dr. Rosenfeld assigns claimant a 20 percent permanent partial impairment to the body as a whole attributed wholly to his work injury. He offers no guidance as to how he arrived at such figure, however. He opined that claimant should be able to perform any activities he desires if he uses good body mechanics, but then states claimant is restricted to activities that require minimal manual labor and do not require prolonged sitting.

Dr. Wirtz stated claimant had not suffered any permanent partial impairment as a result of his work injury and that the lifting and motion restrictions he gave claimant were the result of his preexisting condition.

In light of all of the above, Dr. Boulden's original assignation of a 5 to 10 percent impairment of the spine will be accepted. That percentage is in keeping with the physical restrictions each physician has placed on claimant. It translates to a six percent functional impairment of the whole man.

Likewise, the other indications of industrial disability are mixed. Claimant has returned to productive employment although of a different nature and with less financial security and less actual income that claimant likely would have received had his employment with Swift continued. Swift does not dispute that claimant's post-injury physical condition precipitated his discharge. Claimant's father's testimony suggests claimant may have difficulty continuing his present employment should he miss work on account of his physical condition. Claimant is a young man and will need an income for approximately another four decades.

Claimant's apparent lack of motivation is troubling, however. Claimant requires one-fourth credit to obtain his high school diploma. He expresses no interest in either earning that credit or in obtaining his G.E.D. Claimant reportedly did well in school. Neither of these courses of action would be too difficult nor too costly for him. Either would enhance claimant's availability for light duty work or further training which state vocational rehabilitation suggested he receive. Claimant's feeling that he cannot afford to return to school for further formal education is somewhat more understandable. He is the father of two very small children and undoubtedly feels an obligation to support them, but his unwillingness to take the simple step of completing his high school credits or obtaining his G.E.D. is far less comprehensible.

When all the above indicia are coupled with claimant's relatively small functional impairment, it appears claimant has suffered an industrial disability of 12 percent. This award presumes claimant will be able to continue to work and support his family. Should his physical condition further hinder his ability to do so, he, of course, may seek a review-reopening of this matter.

The length of claimant's healing period is at issue. Dr. Hoffman released claimant to return to work on April 27, 1982. Claimant was subsequently terminated. For the greater part of the year following his termination, claimant worked only intermittently and at tasks that his physical limitations permitted. Neither the work itself nor its compensation were substantially similar to that before claimant's injury. Claimant only returned to regular full time work after January 1983. Dr. Boulden, his treating physician, opines claimant reached his maximum medical improvement in February 1983. For this reason, claimant's healing period properly runs from his injury date until February 1, 1983 minus those days claimant actually worked for defendant-employer or for others.

The applicable rate of weekly compensation must be assigned. At issue are subsections 1 and 6 of section 85.36. Subsection 1 provides as follows: "In the case of an employee who is paid on a weekly pay period basis, the weekly gross earnings."

Subsection 6 provides as follows:

> In the case of an employee who is paid on a daily, or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of said employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury.

Clearly claimant was not paid on a weekly pay period basis. He was paid on an hourly basis albeit under a union guarantee of a minimum number of hours per week. Thus, section 85.36(6) applies. Under that formula, claimant's weekly rate is $171.02.

Lastly, we must decide whether defendants are subject to a penalty under section 86.13. The section mandates that the commissioner award benefits up to 50 percent of the amount of benefits unreasonably delayed or denied where a delay in commencement of benefits occurs without reasonable or probable cause or excuse. The section is inapplicable. A fair question existed regarding claimant's entitlement to benefits in this case. That defendants may have wrongly decided to withhold the same does not mean they did so unreasonably.

FINDINGS OF FACT

Claimant is married, age 25, and has two children, one of whom was born after his injury date.

On February 2 or 3, 1982, claimant was employed by Swift as a chuck boner.

Claimant's work as a chuck boner required twisting, turning, and lifting motions throughout an eight hour work day.

Claimant first experienced back pain sufficient that he was off work during the week of February 1, 1982.

Claimant first sought medical treatment for his back problems on February 9, 1982.

Claimant attempted to return to work following his initial injury.

Claimant was terminated following his injury. Swift records list claimant's preexisting back problems as the reason for his termination.

Claimant first attributed his pain to muscle spasms.

Claimant has preexisting spondylolysis.

Approximately 10 to 15 percent of the general population has like back conditions. Two-thirds will never develop symptomatology.

Twisting and turning motions such as claimant's work required aggravate preexisting spondylolysis.

Once aggravation occurs, the patient's back is more susceptible to re-injury.

Claimant has experienced episodes of back pain since his termination by Swift.

Claimant reports that he can engage in various activities including lifting if he uses proper body mechanics. Incorrect movement may result in severe, disabling pain.

Until February 1983, claimant had symptoms severe enough that surgery was considered

Prior to working for Swift, claimant worked in semi-skilled or general laborer jobs primarily in home construction and remodeling.

At Swift, claimant worked on wizard line, spinal cord removal, maintenance, clean up, and as round line fill-in as well as a chuck boner.

On his injury date, claimant was classified as a grade one (very superior) worker and earned $7.40 per hour.

Since his termination, claimant has received unemployment, has worked as a farmhand, has worked as a cabinetmaker, and has worked in home construction and remodeling. Much of this work was done either for or with his father.

At time of hearing, claimant was working as a general contractor supervisor; he is paid by square footage of construction and not by an hourly wage; he will not receive unemployment benefits during the two and one half month winter layoff.

Claimant's father would have earned between $22,000.00 and $24,000.0 in 1983 had he remained in a similar position.

Claimant's condition limits heavy lifting, bending, pushing and pulling of approximately a 45 to 50 pound limit.

Claimant may experience difficulty being retained on his current job should claimant's back problems result in excessive absenteeism.

During the 13 weeks prior to February 3, 1982, claimant worked a total of 486.8 hours and received an average hourly wage of $6.90.

Claimant's physicians have assigned functional impairment rating attributable to the aggravation of his preexisting spondylolysis which range from zero to twenty percent.

Claimant was generally a good student and needs to complete one-fourth credit to graduate from high school, but has expressed no desire either to do so or to obtain his GED.

CONCLUSIONS OF LAW

Claimant has established an injury of February 1982 which arose out of and in the course of his employment.

Claimant has established a causal relationship exists between his February 1982 injury and his disability.

Claimant has sustained a permanent partial disability of 12 percent.

Claimant's healing period extended from the injury date until February 1, 1983. The injury date is established as February 3, 1983 as alleged in claimant's petition.

Claimant is entitled to healing period benefits from his injury date until February 1, 1983. Claimant's healing period benefits are reduced by the number of days claimant actually worked for defendant-employer or for others.

Claimant was paid on a hourly basis. His weekly rate of compensation is $171.02.

Defendants are not subject to penalty under section 86.13.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant sixty (60) weeks of permanent partial disability benefits at the rate of one hundred seventy-one and 02/100 dollars ($171.02).

Defendants pay claimant healing period benefits from the injury date to February 1, 1983. Healing period benefits are reduced by the number of days claimant actually worked for defendant-employer or for others.

Interest accrues pursuant to section 85.30 of the Code.

Costs of this action are taxed to defendants.

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

Signed and filed this 21st day of February, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BRANDON CURTIS, Claimant, vs. SWIFT INDEPENDENT PACKING, Employer, and NATIONAL UNION FIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	FILE NO. 693117 N U N C P R O T U N C O R D E R

Claimant filed his application for a nunc pro tunc order February 24, 1984. Defendants have not filed a resistance.

Claimant asks correction of a typographical error on page 26 of the decision in this case filed February 21, 1984. The fourth paragraph of the conclusions of law misstates the injury date as February 3, 1983. The corrent injury date is February 3, 1982.

The correction will merely clarify the order and will not prejudice defendants.

THEREFORE, IT IS ORDERED that in the decision in this matter filed February 21, 1984 on page 26 under the fourth paragraph of the conclusions of law, the words and numerals, "February 3, 1983", are corrected to read "February 3, 1982."

Signed and filed this 29th day of February, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM DANEHY, Claimant, vs. WALNUT GROVE PRODUCTS, Employer, and CNA INSURANCE COMPANY, Insurance Carrier, Defendants.	FILE NO. 729336 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 the claimant, William Danehy, against his employer, Walnut Grove Products, and CNA Insurance Company, the insurance carrier, at the courthouse in Waterloo, Iowa, December 19, 1983.

The record consists of the testimony of claimant, of claimant's wife, Sharon Danehy, of Anthony G. Greco, of Marian S. Jacobs, of Joseph Yoder, of Robert Gee, of Rueben Straw, of Alvie H. Long, of Don T. Martin, and William Danehy, Jr; of claimant's exhibits A through N; and of defendants' exhibits 1 through 5. Pursuant to section 17A.14, Code of Iowa, defendants' objection to claimant's exhibit E as hearsay is overruled. Noted objections to oral testimony will be ruled upon in the review of the evidence, below.

ISSUES

The issues to be heard include the following:

1. Whether claimant's action is barred because claimant failed to give the employer proper notice of his injury.

4. Whether claimant is entitled to benefits and the nature and extent of his benefit entitlement.

5. Whether certain medical treatment and the cost of such was authorized by the defendants.

6. Whether defendants should be assessed a penalty under section 86.13 for failure to institute benefits in a reasonable period of time.

Claimant's oral request to amend his petition at the time of hearing to include an allegation that claimant's back injury is an industrial disease is denied.

REVIEW OF THE EVIDENCE

At hearing, the parties stipulated that claimant earned $8.43 per hour and worked 40 hours per week; that claimant has not worked since February 25, 1982; and that his medical bills were fair and reasonable. Defendants raised the issue of whether the medical bills were causally related to an injury arising out of and in the course of claimant's employment. A two hundred dollar medical bill for Dr. Crouse's services is outstanding. The parties also stipulated that claimant traveled 25.5 miles each way for medical examinations and 26 miles for hospital treatments. Claimant's counsel noted, with regard to those bills paid by claimant's health insurance that the employer paid a portion of the health insurance premium and should be credited proportionately with regard to any medical award made. Claimant's counsel also stated that pharmacy statements included in claimant's exhibit B include medications prescribed for other members of claimant's family and that only those under Code 1 are medications prescribed for claimant after his injury date.

Claimant, William Patrick Danehy, testified in his own behalf. Claimant is 47 years old, married with four children, two of whom were dependents when his alleged injury occurred. Claimant attended school through the third grade but has never learned to read or write. He spent a number of years in the Woodward School for the mentally handicapped, leaving there at age 18.

Upon leaving Woodward, claimant repaired cars for his brother. Claimant indicates his brother gave him oral instructions in car repair and that his only wage for his work was his room and board. At age 21, claimant began work for wages. He asserts he worked at any job he could get. His job history includes many, intermittent jobs. He cleaned cow pens, picked cement and carried buckets of concrete, moved houses, and worked as a general laborer for building contractors. But for a year as a bacon pressor for Oscar Mayer in Chicago, and but for a wage of approximately three or four dollars per hour when employed by Irving Jensen Construction as a concrete worker, claimant had never earned more than $2.50 per hour or $45 per week until employed by defendant, Walnut Grove, in 1967. Claimant worked continuously for defendant from 1967 to his injury date.

Defendants employed claimant as an "elevator man." As such, claimant unloaded bulk grain feed from railroad cars and semi-trailers and sampled such for moisture and urea. Claimant also used a sledgehammer to bang the grain load in order to keep the grain moving from the car to the trailer. He also assisted the company's maintenance man. In doing such, he carried equipment weighing 70 pounds or more, ran a jackhammer, and used a sledgehamme to break up concrete when installing a new auger. He unloaded 100 pound bags of supplies and grain and loaded 50 pound bags of ground feed for storage. Sometimes another employee assisted claimant in loading and unloading; other times claimant worked alone. Claimant stated he was required to move pallets holding eight or ten 100 pound bags of grain or ground feed.

In 1971, while working for Walnut Grove, claimant was knocked off a semitrailer and fell approximately 13 feet to the ground. He was hospitalized for several days and was off work for about six weeks. Claimant states he had back problems following the incident but continued to work. He sought treatment by a chiropractor during this time but maintains the treatments were for leg problems not related to his back pain.

In 1977, claimant visited his family doctor, Dr. Manard, for treatment of his back pain. The visit apparently followed two work incidents. Claimant relates his employer required him to don a rope and hook and climb into 50 foot deep grain tanks and unplug the auger. Claimant also was buried to his chin in a corn tank while attempting to knock crusted corn off the top of the tank.

Dr. Manard hospitalized claimant for two weeks on two separate occasions in 1977. Following the second hospitalization, claimant returned to work and worked until February 1982.

Claimant states he was having severe back pain in early 1982. He took a week of vacation to "rest up" his back. During this time, his chiropractor referred him to Dr. Manard. The doctor took x-rays and referred claimant to Dr. Crouse, who recommended surgery.

Claimant returned to work; on February 26, 1982, claimant states he was catching bags of feed, bent over, and heard something "snap." Claimant asserts that in compliance with the employer's rules for reporting work injuries, he told his foreman of this. Reporting to the manager was the foreman's duty. Claimant had surgery shortly thereafter. Dr. Crouse released claimant to return to light duty work February 27, 1983. The employer subsequently terminated claimant; apparently on the grounds that light duty work was not available.

Claimant testified he has always been willing to return to work with his employer. He also has sought other work. (Defendant hearsay objection to claimant's testimony regarding his conversatio with potential employers is overruled and such evidence will be considered for whatever probative value it may have.) Claimant inquired as to work as a garbage collector and as a laborer at the state mental health center in Independence, Iowa, and at the local Job Service office. The bending and lifting required of a garbage collector was not within the light duty restrictions Dr. Crouse had placed upon claimant. Claimant feels he was not hired by the mental health center "for just being dumb." He relates as to Job Service for "what I could do they never had no jobs for."

Claimant described his pain as being in his lower back and

radiating into his right leg. He testified that this pain has substantially limited his life activities. He can no longer mow his lawn; he was unable to complete a dog house he was building; he can no longer walk the extended distances required to pheasant hunt; he can no longer fish in a boat; he can no longer install and maintain CB radio antennae; neither can he vaccum, do dishes, or work on cars.

Claimant's wife first queried as to whether claimant had a workers' compensation claim related to his back problems.

On cross-examination, claimant admitted he was involved in a car collision several weeks before the hearing and that he used a cane for a time following that accident. Claimant denied doing car repairs, siding his home, or climbing onto the roof of his home to repair his CB antenna since his surgery. Claimant stated that when he hurt his toes and smashed his thumb at work as well as when he fell from the semi he reported these incidents to his employer. He admitted he did not tell his employer of his back pain following his 1971 injury. Claimant related that his employer told him to use his company health insurance and not workers' compensation to pay his medical expenses following his toe injury. He admitted workers' compensation had paid the medicals related to his thumb injury and to his 1971 fall. Claimant identified the signatures on defendants' exhibits 2 and 4 as his and his wife's for him. He admitted that the medicals from his 1977 hospitalization were turned into his health insurer. He could not remember whether he had ever stated that the problem was work-related. To claimant's knowledge, no one ever told the employer that claimant's 1977 back complaints were work-related. Claimant stated that his wife filled out all insurance forms.

Claimant reiterated that he told his foreman and a co-worker when his back snapped on the injury date. Claimant identified a signature on defendants' exhibit 4 as his wife's and stated she was authorized to sign for him.

On query, claimant answered that he can tune and time an engine, change oil, as well as grease a car, and replace exhaust systems on vehicles.

He admitted that several times per week, he visits a neighbor who does auto mechanics, but he denied doing car repairs since his surgery. Claimant also denied being in great demand as a CB antenna installer and described in great detail the process of junking a car. Claimant admitted he has deerhunted with a bow and arrow since his injury date. Claimant also stated he had not told his employer he could neither read nor write nor had his lack of those skills appeared to create problems for him at work.

On rebuttal, claimant stated that "accident" meant a one time incident not something that developed over time. Claimant could not read the insurance forms provided him, and he testified he answered no as to whether his injury was work-related because his supervisor instructed him to so answer. Claimant also testified that the plant manager provided claimant with all forms used when applying for medical payments and that the manager, not claimant, decided whether these were to be paid under claimant's health or his workers' compensation insurance. On query by his counsel, claimant was unable to distinguish the word "on" from the word "no."

Claimant admitted he had assisted in removing a broken CB antenna from his home but stated he had simply backed up the truck while his son and neighbor did all physical labor required. He again asserted he had told a co-worker of his back pain before taking his February 1982 vacation. He stated he had used a cane before his auto accident when he was overtired and when it was icy.

Anthony Greco testified in claimant's behalf. Mr. Greco is the maintenance man at Walnut Grove and has known claimant about 20 years. This witness recalled claimant telling him of back pain in 1982 but does not recall claimant ever stating the pain was work-related.

Claimant's wife, Sharon Rae Danehy, next testified for claimant. She substantiated claimant's testimony regarding his lack of back problems before his 1971 fall, his 1977 hospitalization, and his 1982 injury and regarding his curtailed activities since his injury. She stated she filled out all insurance forms but that she "doesn't understand all this stuff." Defense counsel's objection on the grounds of relevancy to claimant's counsel query as to why Mrs. Danehy responded as she did on page two of defendants' exhibit 2 is overruled.

Pursuant to section 17A.14, defense counsel's objection to and motion to strike Mrs. Danehy's testimony regarding her discussions with Ladeana Johnson are overruled. Mrs. Danehy testified that Mrs. Johnson suggested claimant ought to be receiving medical payments under workers' compensation rather than under his health insurance. Mrs. Danehy asked Don Martin, the employer's plant manager, about this. She reports Martin told her that if claimant's problems developed from his 1971 fall, that incident had occurred far too long ago for claimant to now receive compensation. The witness did not recall whether she or Mr. Martin first related claimant's current problems to his 1971 fall.

Mrs. Danehy stated that, on the final page of defendants' exhibit 4, she had originally checked "yes" as regards to whether claimant's condition was work-related but had changed her answer to "no" when told claimant would not receive medical payment if "yes" were checked.

On cross-examination, Mrs. Danehy testified that her conversation with Don Martin regarding workers' compensation took place after claimant's 1982 hospitalization.

She stated she didn't know whether claimant had repaired cars or sided his house following his surgery.

Marion S. Jacobs, a vocational consultant from Rehabilation Resources, next testified for claimant. Ms. Jacobs has testified before this agency on numerous occasions. Her qualifications are well known by the undersigned and are set forth in claimant's exhibit D. They will not be detailed here. Ms. Jacobs testified regarding the findings reported in claimant's exhibit E which exhibit will be reviewed below.

Joseph Yoder was called on defendants' behalf. Claimant's counsel objected to the appearance of this witness on the grounds that claimant had received no notice of his appearance before hearing. Under the terms of the prehearing order of October 10, 1983, witness lists in this matter were to be exchanged by December 12, 1983. Mr. Yoder's name does not appear on defendants' list filed December 14, 1983. Pursuant to Industrial Commissioner Rule 500-4.36, his testimony is excluded from the evidence in this matter.

Robert Gee next testified for defendants. Mr. Gee testified he lives two houses from claimant and has known claimant 10 to 15 years. He reported seeing two people on claimant's roof following the storm damage to claimant's CB antenna. He didn't know who these people were. He reported seeing claimant bent over the hood of his car two or three times in the past year. He denied seeing claimant performing any strenuous work.

On cross-examination; the witness admitted he couldn't see very much of claimant's activities since he live one half block away and that he has never seen claimant work on cars other than his own or his son's. On redirect, he reported seeing claimant working in Art Butler's garage. Mr. Butler apparently is claimant's next door neighbor.

Ruben Straw next appeared for defendants. Mr. Straw stated he has seen claimant working on cars in the last year and has seen claimant carrying heavy, two feet long objects all day long.

On cross-examination, it was established that Mr. Straw lives almost a block from claimant and that claimant and his wife had filed charges against Mr. Straw alleging he had sexually molested their 12 year old daughter.

Alvie H. Long next testified for defendants. Mr. Long is plant foreman at Walnut Grove and has been employed by them for the past 38 years. He recited that company policy requires all injuries to be reported immediately. He characterized claimant as a good employee. He vaguely recalled claimant's 1971 fall but could not remember whether claimant was off work following such. He recalled that claimant had been hospitalized on occasions earlier than 1982. He stated that claimant had never discussed his back problems with him either in 1982 or earlier. He did not recall claimant reporting that his back snapped nor did he recall any conversations with claimant's wife.

The witness characterized an injury as when someone gets hurt. He stated breathing dust could be an injury.

Don T. Martin next testified for defendants. He is plant manager at Walnut Grove. The witness reports workers' compensation injuries for the employer. He stated that had claimant reported a work-injury he would have received workers' compensation forms rather than health insurance forms. He stated that while he is unfamiliar with the employer's health insurance forms had claimant reported a work injury claimant would have received those forms as well but would have been expected to answer that his injury was work related. The witness stated the witness would then have completed a work injury report for claimant. The witness recalled no conversations with claimant's wife as to whether claimant's injury was work related.

The witness characterized claimant as a good worker. He stated that under company policy employees are generally terminated after six months absence from work. Claimant's period for work return was extended for another six months because claimant was a good worker and needed his insurance coverage. The witness stated claimant could not perform any job for Walnut Grove with his current limitations and that claimant's termination was without malice.

On cross-examination, that witness stated he and the day foreman, rather than the employee, fill out change of status reports regarding work injuries. He admitted claimant's wife brought private disability insurance forms down [for his signature] a number of times. On redirect, he stated a work injury report would have been made had claimant stated he had a work injury. He could not recall anyone from claimant's family telling him claimant's injury was work-related.

Claimant testified on rebuttal. It was established that Mr. Straw's home is a substantial distance from claimant's and that several houses obstruct his view of claimant's activities.

Claimant stated the "trouble" with Mr. Straw occurred six months or more before the hearing; that claimant has not worked on cars since his injury and that claimant tries to do things.

Mrs. Danehy tesified that Mr. Straw had sexually "harrassed" their 12 year old daughter and charges were pressed. She reported the incident occurred approximately two years ago.

William Danehy, Jr., claimant's son testified that before the injury, claimant had worked on cars but has not done so since his injury. The witness stated he works on cars at his father's since he may not do so in the trailer court where he resides. The witness reported that he and a friend took down claimant's CB antenna while claimant backed up the truck.

Claimant's exhibit A is the deposition of James E. Crouse, M.D. The doctor first examined claimant February 23, 1982. He recited the following history:

> A. Mr. Danehy was seen for severe back pain. He claimed to have discomfort in the back and also right leg discomfort beginning in 1971 when he was knocked off a semi truck. He was initially treated for that injury, continued to work through the years but had intermittent trouble with his back. Until just prior to his evaluation the pain had become quite severe. Moving, standing and lifting activities all bothered him. He was having pain day and night. He came for evaluation of the pain and hopefully some relief of his pain.

The doctor noted the following findings on physical examination:

> A. Physical examination showed that he had tenderness throughout the lumbosacral area of the spine. Straight leg raising test aggravated his back pain on the right side; his knee reflexes seemed slightly diminished on the right compared with the left; ankle reflexes were intact. No calf atrophy was noted. Strength through the lower extremity was intact. X-ray examination showed spondylolisthesis on the L-4 L-5 level. So that flexion extension x-rays were taken and showed a Grade 2 spondylolisthesis and abnormal motion at the L-4, 5 disc space....

The doctor noted that spondylolisthesis may result from a stress fracture from repetitive stress to the back; he stated that one incident can produce a stress fracture which then develops into "full bloom" spondylolisthesis with slippage of one vertebra on the other. A grade 2 spondylolisthesis indicates moderate slippage. Claimant was treated with a complete laminectomy of L-4, hemilaminectomy on the right at L-5, and a bilateral lateral fusion from L-4 through the sacrum.

The doctor opined that, while claimant was released to light duty work with a 25 pound weight restriction as of February 25, [1983], "he is not going to be able to get back to work which requires heavy lifting or repetitive bending, stooping and lifting. The doctor characterized heavy lifting as anything more than 25 to 30 pounds on an occasional basis. In response to a hypothetical question posed by claimant's counsel, the doctor opined that claimant's back was injured in his 1971 fall and his back pain was exacerbated by his work. Defendants' objection to the hypothetical is overruled.

The doctor stated that his examination of the reports of claimant's 1977 x-rays revealed that claimant had had a progression of his back deformity from 1977 to 1982 and that this supported his opinion that claimant's condition was exacerbated by his work since:

> ...It's difficult to say when a spondylolisthesis started, but with a minimal change in 1977, it would certainly be reasonable that the defect began in 1971 and that it became progressive as he continued with the stooping and lifting which caused further deformity and obviously further pain and disability.

The doctor estimated claimant's permanent impairment as 30 percent of the body as a whole. He indicated he did not feel claimant would improve significantly beyond his condition on the deposition date, September 8, 1983.

Claimant exhibit B are medical and pharmaceutical statements regarding claimant's treatment and medication.

Claimant's exhibit C is the report of Ralph Scott, Ph.D., regarding claimant. The report states claimant's IQ falls in the borderline classification, meaning that while not retarded he is not performing in the average range, and that claimant is functionally illiterate.

Claimant's exhibit D is the curriculum vitae of Marion S. Jacobs.

Claimant's exhibit E is the Rehabilitation Resources Disability Report on claimant by Ms. Jacobs. Defendants' hearsay objection to such is overruled. The report concludes that claimant's stringent physical limits, his overlay of poor communication skills, and his functional illiteracy preclude him from transferring his pre-injury skills to a significant number of alternative work environments and leave him severely disabled vocationally. The report opines that claimant most viable employment alternative would be a work adjustment training program and on-the-job training within a "protective" work environment and that without such an environment claimant "may be unemployable with no capacity to earn." (Emphasis in the original). The report opines that in such an environment claimant's earning capaciaty would range from $4,430 to $7,000 per year. It recites that with literacy training claimant's earning capacity would range from $3.35 per hour ($7,000 per year) to $4.00 per hour ($8,320 per year).

Claimant's exhibit F are medical records from claimant's 1977 hospitalization at People's Memorial Hospital. A physical therapy record of January 31, 1977 notes claimant denies trauma relative to his back pain.

Claimant's exhibit G are medical records relative to claimant's 1980 hospitalization for excision of teeth. A physical examination report of January 10, 1980 notes as regards claimant's back: "Neg." [sic], and as regards to his extremities: "Full range of motion without tenderness or deformity."

Claimant's exhibit H is a May 11, 1983 statement of J. L. Mochal, M.D., that claimant had not been treated by his office for any workmen's [sic] injury since May 2, 1972.

Claimant's exhibit I are the medical records regarding his 1982 hospitalization. The consultation request and report of Dr. Crouse recites the following under findings:

> William Danehy is a 46-year-old, man with severe pain in his back and through his right leg. He has had trouble since 1971 when he was knocked off of a semi truck. He said he has continued to work, but has had severe pain moving, standing, lifting, all activities aggrivated [sic] discomfort. He has pain at night. He does fairly heavy work with alot of lifting which aggrivates [sic] the problem. Five years ago he had a long series of physical therapy with no relief. He has used a corset in the past, but quit wearing it about five months ago because it irritated him, really did not give any relief for the back and leg pain. The pain begins in the middle low back and extends into the right leg all the way down to the lateral toes on the right, and he feels he is getting worse, otherwise he is healthy.

Claimant's exhibit J is a work release for claimant of February 25, 1983 by Dr. Crouse restricting claimant to occasional lifting of 25 pounds with no repetitive bending, stooping or lifting.

Claimant's exhibit K are the medical records of claimant's 1971 hospitalization. The discharge summary recites the following brief history and essential physical findings: "This patient fell from the back end of a semi-trailer truck onto the ground, sustaining an injury to his left hip. Physical examination revealed extreme tenderness to palpation in the left hip; otherwise his examination was negative for injuries." No mention is made of back pain or trauma.

Claimant's exhibit L is a December 9, 1983 letter of Job Service of Iowa to Marian Jacobs in which Philip Clarkson MSC, employment counselor states: "It is my opinion that he is not prepared physically or educationally to be referred to any position we have open now or have had open in the last several years."

Claimant's exhibit M are want ads for a part-time janitor and a waiter from the Waterloo Courier.

Claimant's exhibit N is the medical records form claimant's 1977 hospitalization at Schoitz Hospital. The records note a clinical impression of acute back strain and recite that claimant was injured in 1971 when he was knocked off a semi-truck and has had back trouble ever since then with onset of disabling low back pain radiating into his right hip approximately four weeks earlier.

Defendants' exhibit 1 is copies of records and filings relative to claimant's 1971 workers' compensation injury.

Defendants' exhibit 2 is copies of health insurance forms relative to claimant's 1977 hospitalization. The answer "no" is checked in response to several queries as to whether the injury or sickness arose out of or was related to the patient's employment. Defendants' exhibit 3 is copies of further health insurance records relative to claimant's 1977 hospitalizations. On page 2 "no" is checked in response to a query as to whether the illness or injuries related to employment. Claimant's exhibit 4 is health insurance forms relative to claimant's 1982 problems. On forms dated February 1, 1982 and March 8, 1982 respectively, "no" is checked in response to a question as to whether patient's condition related to his employment. On subsequent forms dated February 9, 1982 and March 3, 1982, respectively, "yes" is crossed out and "no" is checked in response to a query as to whether patient's condition related to employment. Each contains the hand written notation, "per Bill April 12, 1982 Sharon". The former contains this handwritten, undated notation: "form came in with 10A completed [the employment query] as both yes & no - talked to Bill via phone on 4-12-82, said it was not work related."

Defendants' exhibit 5 are supervisors' reports relative to claimant's status, injuries and absences during his employment at Walnut Grove.

APPLICABLE LAW AND ANALYSIS

At the onset, it is determined that claimant earned a wage of $8.43 per hour, routinely worked a 40 hour week and apparently was paid on a weekly basis. Claimant was married and entitled to four exemptions. His compensation rate in event of an award is 210.70.

We now must address the first fighting issue in this case: whether claimant received an injury which arose out of and in the course of his employment.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on February 26, 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 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 Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The supreme court of Iowa in Almquist v. Shenandoah Nurseries, 218 Iowa 724, 731-32, 254 N.W. 35, 38 (1934), discussed the definition of personal injury in workers' compensation cases as follows:

> While a personal injury does not include an occupational disease under the Workmen's Compensation Act, yet an injury to the health may be a personal injury. [Citations omitted.] Likewise a personal injury includes a disease resulting from an injury....The result of changes in the human body incident to the general processes of nature do not amount to a personal injury. This must follow, even though such natural change may come about because the life has been devoted to labor and hard work. Such result of those natural changes does not constitute a personal injury even though the same brings about

impairment of health or the total or partial incapacity of the functions of the human body.

....

A personal injury, contemplated by the Workmen's Compensation Law, obviously means an injury to the body, the impairment of health, or a disease, not excluded by the act, which comes about, not through the natural building up and tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee. [Citations omitted.] The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body.

It is undisputed that claimant received an injury when he fell from a semitrailer truck in 1971. That injury arose out of and in the course of his employment. Medical histories taken upon claimant's hospitalizations in both 1977 and 1982 relate his back problems to the 1971 semi fall. Claimant continued to work for the employer from 1971 until the February 26, 1982 incident. His work involved lifting 50 to 100 pound sacks of feed, rappelling into grain bins to open clogged augers, assisting in concrete construction and removal, and performing numerous other heavy manual tasks as required by his employer.

Claimant suffered repeated episodes of back pain during this period. He sought medical treatment; was hospitalized on several separate occasions, and self-treated with vacations and bed rest.

Claimant's problems culminated in early 1982 when claimant attempted to alleviate his pain by taking a week vacation "to rest up his back." On his work return, claimant attempted to handle feed bags in the course of his duties for Walnut Grove. He attests he bent over and heard something "snap" and there upon experienced debilitating pain. Claimant's testimony in regard to this February 1982 work incident is unsubstantiated. Claimant appeared a credible witness whose demeanor throughtout hearing did not suggest he was dissimulating, however. Therefore, his account of the February 26, 1982 work incident is accepted as true.

Even if this account were rejected, however, claimant's own testimony and the medical histories of record support the conclusion that claimant's February 1982 back problems as well as his 1977 back problems are intertwined with his original 1971 work injury and his duties for Walnut Grove during the intervening years. Doctor Crouse, claimant's treating surgeon, stated that the progression in claimant's back deformity from 1977 to 1982 as revealed by x-rays also supported the opinion that claimant's original condition was exacerbated by his work. Thus, claimant sustains his burden of showing an injury to his back which arose out of and in the course of his employment.

We next must address the issue of whether defendants had timely notice that claimant alleged a work related injury as required by section 85.23.

The section 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.

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. Mefferd v. Ed Miller & Sons, Inc., 33 Biennial Report, Iowa Industrial Commissioner's 191 (appeal decision 1977).

The Iowa Supreme Court, by way of dictum, stated in Robinson v. Department of Transportation, 296 N.W.2d 809 (Iowa 1980), that two means exists by which an employer may receive notice of an injury under section 85.23. One is by actual knowledge of the occurrence of the injury; the other is by receipt of notice of the injury from the employee or his representative. Either method must be accomplished within 90 days of the date of the incident.

The supreme court noted in Robinson at 811: It logically follows that [the employer having] the actual knowledge has information putting him on notice that the injury may be work related.

The purpose of section 85.23 is to alert the employer to the possibility of a claim so that an investigation of the facts can be made while the information is fresh. See Knipe v. Skelgas Co., 229 Iowa 740, 748, 294 N.W. 880, 884 (1941). In view of this purpose, it is reasonable to believe the actual knowledge alternative must include information that the injury might be work connected. The test is whether a reasonably conscientious employer had grounds to suspect the possibility of a potential compensation claim. Robinson at 811.

In the instant case, it is undenied that claimant's employers had actual knowledge that claimant sustained a work related injury in his 1971 semi fall. Claimant missed work and underwent several hospitalizations in the intervening years because of his back problems. His employers were certainly aware of this fact. Thus, the salient issue is whether claimant's employers had information putting them on notice that claimant's back problems might be work related. Claimant's wife testified she made inquiry following claimant's 1982 hospitalization and surgery as to whether claimant was entitled to workers' compensation for his injury. She reports she was told claimant's 1971 injury was too long ago for any compensation claim to now be valid and that she should not pursue the matter farther. Defendants' witnesses deny ever discussing workers' compensation benefits with claimant's wife or claimant. Mrs. Danehy appeared a credible witness, however, and her testimony will be accepted as true. Moreover, Don T. Martin, the employer's plant manager, admitted that claimant's wife did bring private disability forms to him for his signature. This fact coupled with the fact that defendants knew of claimant's 1971 fall and of the grueling physical demands of claimant's work should have led claimant's supervisors as reasonably conscientious employers to suspect the possibility that claimant had a potentially compensable claim.

Furthermore, claimant or his wife as his representative initially completed medical insurance forms dated February 9, 1982 and March 8, 1982 respectively in a matter which indicated claimant was attempting to raise the possibility that his condition was work related. Apparently both "yes" and "no" boxes were checked in response to queries on each form as to whether claimant's condition was related to his employment. This fact also should have put defendants on notice that further investigation was necessary. The record does reveal that the employer's insurance clerk talked with claimant by phone on April 12, 1982 as to whether his condition was work related. Claimant apparently then said the condition was not work related or, at least, acquiesced to the clerk's changing the form to indicate claimant's condition was not work related. The clerk did not testify at hearing and the substance of this phone conversation was not offered. Claimant did testify that his supervisors had instructed him to report a work related toe injury on his health insurance forms as nonwork related in order to receive medical coverage. Claimant testified he believed an accident meant a one time incident and not an occurrence over time. Claimant testified he answered "no" to the question as to whether his condition was work related on the direction of his supervisor. These facts raise doubts as to whether the clerk while conversing with claimant thoroughly assessed his understanding of what was or was not a work related condition. Without such thorough assessment, claimant's employer remained under a duty to inquire further as to whether claimant had a potentially compensable claim. Thus, it cannot be said that the employer lacked actual knowledge that claimant's condition might be work related within ninety days of the onset of claimant's 1982 problems. Defendants' affirmative defense under section 85.23, therefore, fails.

Even if it should have been found that defendants did not have actual knowledge of claimant's February 1982 work related condition within the time prescribed in section 85.23 or that claimant's injury date must relate back to his 1971 injury, defendants' affirmative defense would fail under the discovery rule which governs the notice statute. Claimant's duty to give notice of his injury accrued when claimant learned that his condition was potentially compensable. See Jacques v. Farmers Lumber Supply Co., 242 Iowa 548, 47 N.W.2d 236 (1951).

In Robinson, the supreme court, at page 812, stated the following as regards our discovery rule.

Substantially the same statement of the discovery rule appears in 3A. Larson, supra, section 78.41 at 15-65 and 15-66: "the time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease." This statement accurately delineates when the employee's duty to give notice arises. The reasonableness of the claimant's conduct is to be judged in the light of his own education and intelligence. He must know enough about the injury or disease to realize it is both serious and work-connected, but positive medical information is unnecessary if he has information from any source which puts him on notice of its probable compensability.

At latest, claimant may be said to have delayed in informing defendants of his potential claim until such time as his petition was filed April 27, 1983. Claimant's witness testified she and claimant sought assistance from legal services following claimant's termination and their decision to pursue this claim apparently followed the consultation with legal services. Claimant needed the guidance of legal services before recognizing the compensable character of his injury. Such was reasonable given the intelligence and education of claimant as well as the totality of the circumstances in this case. Claimant is functionally illiterate; he has borderline intelligence; he can neither read nor write, he has completed only the third grade, and spent a substantial portion of his childhood at Woodward State School. As Ms. Jacobs testified and as was apparent at hearing, claimant's wife negotiates life for him. She testified that she "does not understand this stuff," meaning the fineries of medical and workers' compensation insurance coverage. It was apparent that this lady, like claimant, lacks intellectual sophistication and has difficulty thinking abstractly. Both she and claimant look to others for guidance. They first considered the possibility that claimant had a compensable work injury when a friend suggested claimant's medical bills should be paid by workers' compensation and not health insurance. Claimant's wife then sought guidance from Don Martin as to whether claimant's injury was compensable. She was told the semi incident had occurred too long ago. She and claimant, therefore, "let the matter drop." Thus, it appears the employer's own free hand advice on this occasion as well as in regard to the 1982 insurance forms delayed claimant's discovery of his compensation claim. Defendants may not now argue claimant behaved unreasonably for a man of his intelligence and education in relying on their guidance and instruction and, thus, hindering his own awareness that his injury was potentially compensable.

Claimant commenced his action within 90 days of his receipt of his termination notice; he consulted legal services following receipt of his termination notice. Thus, claimant gave defendants notice of his claim within 90 days of his discovery of its potential compensable character.

Next to be decided is whether a causal relationship exists between the injury and claimant's disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 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).

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).

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, 760-761 (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, 815 (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. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591, 595 (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 v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1960), and cases cited.

Claimant has established a causal connection between his current disability and his injury. Claimant's condition was diagnosed as a Grade 2 spondylolisthesis for which surgical intervention was warranted. Dr. Crouse, claimant's attending surgeon, opined that it was reasonable that claimant's spondylolisthesis began with his 1971 injury and became progressive as he continued with the stooping and lifting required in his work thereby resulting in further deformity and further pain and disability. Claimant's lay witnesses also give a history of claimant experiencing pain and difficulties from 1971 onward which cumulated and became disabling only in 1982. Claimant's work duties were described as well. These often consisted of grueling, grunt labor which could easily insult a back already weakened by a prior injury such as claimant's 1971 semi fall. Claimant is now precluded from returning to work, and from stooping, bending, lifting, and from engaging in his former life activities. These restrictions followed his surgery in 1982 for his work aggravated condition. Claimant has shown that his current disability resulted from an aggravation of his preexisting spondylolisthesis brought on by his work duties for employer. Claimant is entitled to payment of his outstanding medical costs in the amount of $200 and to reimbursement of his medical and travel expenses.

We now must decide the nature and extent of claimant's disability.

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).

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, 902 (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."

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 spplied 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, II Iowa Industrial Commissioner Report 39 (1981); Enstrom v. Iowa Public Services Company, II Iowa Industrial Commissioner Report 142 (1981); Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981).

Dr. Crouse believes claimant's permanent, functional impairment to be 30% of the body as a whole. Mr. Scott, by report, states claimant has a borderline IQ and that claimant is functionally illiterate. Indeed, at hearing, it became apparent claimant cannot distinguish the word "on" from the word "no." Ms. Jacobs noted claimant's speech impediment and resulting poor communication skills. These were also readily apparent at hearing. Claimant's only work experience is in heavy manual labor from which he is now permanently precluded. Claimant is highly motivated. He worked with pain long after many others would have succumbed to their physical difficulties. Yet, motivation alone will be insufficient to permit claimant to surmount the hurdles in his path to future employment. Claimant's lack of physical prowess when coupled with his lack of educational and intellectual training do not bode well for him. Ms. Jacobs, by way of report, has suggested literacy training for claimant. Even with training, however, it is doubtful claimant's intellectual acumen is such that he wold acquire more than subsistence literacy skills. Ms. Jacobs has further opined that claimant's best employment alternative would be a work adjustment training program and on-the-job training within a "protective" work environment. She suggests that outside such an environment claimant may be unemployable with no capacity to earn. She testified at hearing that she knows of no such environment in the Waterloo area. Claimant is 47 years old. He likely would have remained employed for approximately 18 more years. When claimant's age and physical limitations are considered with his intellectual handicaps, his functional illiteracy, and his inability to function outside of a sheltered work environment, it is found claimant is permanently and totally industrially disabled.

Claimant is also entitled to payment of his medical expenses including medical travel expenses as indicated on exhibit B. At hearing, the parties stipulated that $238.20 remains outstanding of a total charge of $2,199 from Orthopedic Specialists and that the difference between those charges was paid by an insurance program contributed to in part by the employer and subject to a credit pursuant to section 85.38 . Defendants shall, therefore, be given credit for the amount of coverage paid under the group plan.

The final question pending is whether defendants should be assessed a penalty under section 86.13 . The section provides in relevant part: "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."

Defendants, in this case, certainly behaved unthinkingly at times. They failed to take those steps necessary to adequately discern whether claimant's condition was work related and within the probable purview of the compensation statute. Their representati even discounted claimant's and his wife's murmurings as to the compensable nature of his condition. Yet, even after claimant's petition was filed, significant questions of law and fact remained unresolved. Therefore, it cannot be said that defendants acted unreasonably or without probable cause or excuse in failing to commence payment of benefits. Claimant's request for a penalty under section 86.13 fails.

FINDINGS OF FACT

WHEREFORE, it is found.

Claimant was employed by defendant as an elevator man and general laborer from 1967 until his injury date, February 26, 1982.

In the course of his duties for defendant, claimant routinely handled bags of feed and grain weighing fifty (50) to one hundred (100) pounds. He also carried heavy maintenance equipment, ran a jackhammer, used a sledgehammer to break up concrete, and rappelled into grain bins to clean augers.

Claimant was initially injured in the course of his employment in 1971 when claimant was knocked from a semitrailer truck and fell approximately thirteen (13) feet to the ground.

Claimant was hospitalized and missed work following this incident.

Claimant began to experience back pain following this incident.

Claimant was hospitalized in 1977 for back pain. Records from such hospitalization relate claimant's condition to his 1971 semi fall.

Claimant experienced severe back pain in 1982; he took a week of vacation to "rest up."

Claimant returned to work and experienced a "snap" in his back while catching feed bags.

Claimant subsequently had surgery.

Claimant was terminated by defendants following his injury.

Defendants were aware of the grueling nature of claimant's work.

Defendant employer's insurance representative discussed claimant's response to an an insurance form query as to the work related nature of claimant's condition with claimant. Following such discussion checks for "yes" and "no" were changed to "no" only.

Defendant's office manager executed private disability insurance forms for claimant and his wife. The office manager controlled whether claimant would receive health or workers' compensation insurance forms for medical payment.

Claimant did not assert his 1977 hospitalization was for a work related condition.

Claimant's wife completes all insurance and other forms. She has only minimal understanding of such matters.

Claimant and his wife sought assistance from legal services following claimant' termination. Legal services directed claimant to private counsel to discuss whether his claim was

potentially compensable. Claimant's petition was filed within ninety (90) days of his termination.

Claimant was diagnosed as having grade 2 spondylolisthesis and abnormal motion at the L-4 L-5 level. Spondylolisthesis may result from a one time stress fracture such as claimant's 1971 semi fall.

Claimant underwent a complete laminectomy of L-4, a hemilaminectomy on the right at L-5, and bilateral lateral fusion from L-4 through the sacrum.

Claimant's x-rays reveal a progression of his back deformity from 1977 to 1982, an indication the condition was exacerbated by the repetitive lifting and stooping required in claimant's work.

Claimant is forty-seven (47) years old.

Claimant has a functional impairment of thirty percent (30%) of the body as a whole.

Claimant has a borderline IQ and is functionally illiterate.

Claimant has a speech impediment and poor communication skills.

Claimant's only work experience is in heavy manual labor. Claimant is now permanently precluded from performing such labor.

Claimant's best employment alternative is work adjustment training within a "protective" work environment. Without such claimant may be unemployable and with no capacity to earn. No such environment is known to exist in the Waterloo area.

Claimant is highly motivated. He has sought employment since his termination but has found none within his physical and intellectual limits.

Claimant is permanently and totally disabled as a result of his work injury.

Defendants paid a portion of the health insurance premium which provided coverage of claimant's medical costs.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

Claimant has established an injury of Feburary 26, 1982 which arose out of and in the course of his employment.

Defendants have not established the affirmative defense that claimant failed to give timely notice of his injury.

Claimant has established that his injury is the cause of the disability on which he now bases his claim.

Claimant has sustained a permanent total disability as a result of his injury of February 26, 1982.

Claimant is entitled to payment of a bill in the amount of two hundred and thirty-eight and 00/100 dollars ($238.00) outstanding from Dr. Crouse.

Claimant is entitled to medical travel expenses.

ORDER

THEREFORE, it is ordered:

Defendants pay claimant permanent total disability benefits uring the period of his disability as provided in section 85.34(3), he Code, at the rate of two hundred ten and 70/100 dollars $210.70) per week.

Defendants pay accrued amounts in a lump sum.

Defendants pay claimant's medical costs for Orthopedic pecialists in the amount of two hundred thirty-eight and 00/100 ollars ($238.00).

Defendants reimburse claimant prescription costs in the mount of one and 50/100 dollar ($1.50) from Hess Pharmacy, ndependence, Iowa.

Defendants reimburse claimant prescription costs incurred ith Pinicon Pharmacy, Independence, Iowa between March 9, 1982 April 4, 1982.

Defendants reimburse claimant at the appropriate rate for is medical travel expenses upon a proper showing by claimant of ileage and time of such expenses.

Defendants pay interest pursuant to Iowa Code section 85.30 amended.

Defendants pay costs pursuant to Industrial Commissioner ule 500-4.33.

Defendants file a final report when this award is paid.

Signed and filed this ____ day of June, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JANET DANIELSON, Claimant, vs. WEBSTER CITY PRODUCTS CO., Employer, Self-Insured, Defendant.	File No. 645387 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 wherein claimant was denied permanent disability benefits beyond those temporary disability benefits previously received as a result of a work related injury. The record on appeal consists of the transcript of the review-reopening proceeding which contains the testimony of claimant, Kathy Danielson, and Loren Gene Painter; claimant's exhibits 1 through 52; defendant's exhibits A through L; and the briefs and filings of all parties on appeal.

ISSUES

Claimant states the issues as:

1. Whether the deputy erred in finding that claimant had failed to prove that her injury was permanent.

2. Whether the deputy erred in permitting the question of whether the injury was a scheduled or non-scheduled injury to become an issue in the case.

REVIEW OF THE EVIDENCE

The parties stipulate that the applicable rate of compensation is $143.04 a week. Unpaid expenses incurred for travel involving medical care are stipulated as fair and reasonable. (Transcript, page 2)

At the time of the hearing, claimant was 23 years old, single, and had one child. (Tr., pp. 6, 34, 51) She has a high school diploma and had worked at Taco Bell restaurant in Arizona prior to her employment with defendant. (Tr., pp. 6-7) In July of 1979 claimant was hired by defendant for subassembly. Claimant explained that her duties involved assembly of lint housings for dryers. (Tr., p. 7) After three months, claimant was moved to the dryer line where she installed doors with the aid of an air gun. (Tr., pp. 8-9) Claimant is right handed and during June of 1980 began to have problems with her right arm while using the air gun. (Tr., pp. 9-11)

> A. I was just working on the line and having to bend over and put these two bottom screws in, and then I went and put like seven other screws in, and I think the torque of the gun just kind of yanked my arm around, and I did it as long as I could, and then I would tell my foreman that I hurt my arm, and I went to the nurse, and I was off work. (Tr., pp. 9-10)

The record indicates that claimant did not report the injury as work related at that time. Claimant consulted her family doctor, John Birkett, M.D., who treated her over the next two months with Equanesic and physiotherapy. (Claimant's Exhibit 15) Dr. Birkett diagnosed the injury as biceps tendonitis of the upper right extremity and recommended minimal use of the right hand. (Cl. Ex. 15) After showing improvement with therapy, claimant was released to return to light duty work. (Cl. Ex. 15) Her arm continued to be painful and in September Dr. Birkett referred claimant to Mark Brodersen, M.D., an orthopedic surgeon. (Cl. Ex. 15; Defendant's Ex. A) Dr. Brodersen diagnosed claimant's injury as bicipital tendonitis. On October 17, 1980 he reported:

> She tells me that she has been off of work now for approximately one month since trying to return to work shortly after Labor Day. It is my impression that she is gradually improving and that she should be able to return to work as of 10/27/80. If possible, I think it would be advisable to have her change to a type of job which would not put so much stress on her right shoulder. I would generally consider her to have been temporarily fully disabled during the period of time that she has been off recently. (Def. Ex. A)

In November of 1980, claimant was further evaluated by C. O. Adams, M.D., an orthopedic surgeon.

> She says that the trouble she has in the arm is a tingling. It is not well localized in the arm, but starts up in the shoulder and goes on down into the muscles. She says it is always worse after she begins to work and has to use her arm for repetitive things or for using the air gun. She says at the present time the only treatment she is using is the use of heat which she perhaps uses every third night, and uses it for 10-30 minutes and she does pendulum type of shoulder exercises, perhaps for 10 minutes, but not more than once a day.
>
> The diagnosis in this case should be subdeltoid bursitis, shoulder, right.
>
> This may or may not be accompanied by some tendinitis. It may or may not have been accompanied with a sudden twist or strain on the arm that was an initiating factor. I do think that the repetitive use of an air gun would be a factor in the onset of this problem.

> Considering that people of this age do not usually have tendinitis in the shoulder region, I think it is reasonable to assume that this is a compensable problem and the work that she was doing could have very easily caused her problem and could have quite reasonably be the reason for a flare-up of her problem every time she returns to work. I think an additional factor in this case is this girl is overweight and apparently is not physically active and she is not in "good shape" for the kind of work she has been doing and therefore would be more likely to suffer injuries from minor traumas.
>
> ....
>
> I do not think this girl should return to work at this time to any kind of work that involves lifting or working over the shoulder level, or that involves lifting to exceed 25 lbs., or that requires the use of an air gun or any vibratory tool.
>
> ...
>
> I think the prognosis in this case is guarded. In the first place I think that eventually it will heal up and leave no residual and she will have a good shoulder again. However, I am pessimistic about trying to decide how soon this will be. If it is re-injured or re-aggravated over a period of time, it may be many, many months before it quiets down completely. If it is not re-irritated and she follows through with the exercises as advised, I think there is a good possibility that she will get everything quieted down and be in pretty good shape within three months time. (Def. Ex. C)

Following receipt of the reports of Drs. Brodersen, Birkett and Adams, a first report of injury was filed by defendant. (Cl. Ex. 42, p. 21) Claimant returned to work on light duties for a period of time and then was put on regular duty. (Tr., pp. 12-13) She testified that she again injured her arm in January of 1981 and remained off work through August. (Tr., p. 13) During this seven month period off work, claimant saw Albert Clemens, M.D., who found evidence of a right thoracic outlet syndrome and recommended a "transaxillary first rib resection." (Def. Ex. E) Claimant was referred by Dr. Birkett to the Mayo Clinic where claimant underwent extensive testing in July of 1981. (Def. Ex. I) J. Norman Patton, M.D., reported that claimant's complaints were "pain and paresthesias in the upper right extremity." (Def. Ex. I) No evidence of thoracic outlet syndrome was found. Dr. Patton reported the presence of weakness in the muscles of the right shoulder and noted that claimant had received instructions for heat and massage therapy and exercises for the shoulder. (Def. Ex. I) Claimant returned to light duty work in August 1981. (Tr., p. 13) She worked until January 6, 1982. Defendant's attendance records indicate claimant was off work for a week with illness. (Cl. Ex. 42, p. 36) Claimant testified that during this time she was taken off light duty and assigned to lifting drums off the line. (Tr., p. 13) She states that although the drums were within her lifting restrictions, the repetition of lifting and putting them down aggravated her arm. (Tr., pp. 13-14) Claimant returned to work on January 18, 1982. On March 3, 1982 claimant reported an injury while assembling wheels and railings for washers and dryers. (C. Ex. 42, pp. 4-5) Claimant testified that defendant sent her to Edwardo Reveiz, M.D., the company doctor. (Tr., p. 14; Cl. Ex. 49) Dr. Reveiz testified that claimant had injured the deltoid muscle of her upper right extremity while lifting at work. (Cl. Ex. 49, pp. 4-5) Dr. Reveiz placed claimant's arm in a sling and prescribed Norgesic and heat treatment. (Cl. Ex. 49, p. 5) Dr. Reveiz recommended claimant remain off work for ten days. (Cl. Ex. 49, p. 7) He stated that claimant would be unable to continue her present duties and could not lift 10-15 pounds above the right elbow. (Cl. Ex. 49, p. 8) Dr. Reveiz saw claimant on March 9, 1982 and noted that claimant was "doing better, keeping the arm in a sling, taking the analgesic." (Cl. Ex. 49, p. 22) Dr. Reveiz reported that claimant was improving and progressing satisfactorily. (Def. Ex. J) The record indicates Dr. Reveiz issued a release to return to work effective March 12, 1982. (Def. Ex. K) Claimant testified she understood she was to remain off work until the following week. (Tr., pp. 14-15) When claimant returned to work, she had been terminated for failure to return in time. (Tr., p. 15; Cl. Ex. 42, p. 38) Dr. Reveiz testified that he did not re-examine claimant after the March 9 appointment.

> Q. Did you examine-- Apparently you did not examine Janet again after March 9.
>
> A. No.
>
> Q. And she was released to return to work by you on March 12?
>
> A. Uh-huh. What happened, if I can elaborate again, probably the mistake was she didn't come back to the office, and she wasn't through with the problem, and she didn't come back to the office.
>
> Q. Had she been scheduled to come back to the office before she returned to work?
>
> A. I don't recall. I tried to look at the appointment books yesterday, and I didn't find her name. I didn't find that she missed any appointment. What I think could have happened is that I told Janet if you don't feel that you are improving, come back. If you feel that you are improving and it's over, then you go ahead and work on the 13th, but if you don't improve, come back, and I didn't give her an appointment. (Cl. Ex. 49, pp. 17-18)

Claimant testified that since her dismissal by defendant she has worked detasseling corn and as an aide at a county home. (Tr., p. 24) She was unable to continue at the home as her arm prevented her from performing the scrubbing and sweeping duties. (Tr., pp. 24-25) She testified that her arm injury has prevented her from being hired. (Tr., p. 27) Claimant had difficulty finding work during the latter part of 1982 because she was pregnant. (Tr., p. 40) Claimant has a nurse's aide certificate from high school, but stated she could not perform the duties of lifting patients. (Tr., pp. 26, 40) She has unsuccessfully sought employment from a number of restaurants, stores and gas stations. (Tr., pp. 28, 35, 41)

Claimant has continued to seek medical treatment for her arm Dr. Birkett reports he examined claimant in November 1982 and found normal range of motion at the right shoulder and intact neurological responses.

> With regards to your questions on permanency, I feel she is going to have permanent pain and discomfort in this arm anytime she does anything strenuous or anything that requires repetitive motion of this arm. In reviewing this in the permanent impairment guide there is nothing listed as far as percent disability when it is just a pain related factor. If she had restricted motion or definite loss of sensation, then the guidelines are fairly well laid out. I feel her case will have to be made more on a permanent pain basis and from her inability to handle any strenuous type work with her right arm from now on. (Cl. Ex. 51)

Claimant was referred by defendant to John Grant, M.D., an orthopedic surgeon, on February 10, 1983.

> Her current symptoms are of chronic aching, persistent pain in the right upper extremity. If she sleeps with the arm above her head, she develops a tingling sensation down the arm and has to change positions. She reports that she cannot sit and hold her one month old newborn in her right arm without it becoming increasingly uncomfortable and without experiencing a "tingling" down the entire arm. She must sit with the elbow resting against the arm of the chair and even with that cannot hold the infant long. She further reports that vacuuming is possible for a brief period of time and then the right arm becomes so uncomfortable that she either has to stop or do all the work with the left arm. She experiences some pain in the extremity when she holds a steering wheel to drive and occasionally develops some of the tingling described earlier. This tingling is typified by feeling that the fingers are asleep, especially the index and middle fingers. She wakes frequently at night and must change position of the arm.
>
> She has taken Darvocet-N 100 for control of pain over the past year and a half but lately has been trying to take no medication if at all possible. She does report some difficulty with writing as the hand becomes again uncomfortable with prolonged writing.
>
> This young lady had rather marked subjective complaints of discomfort in the right upper extremity that I feel are related to the employment she did, not only with the use of air powered equipment but the job forcing her to lift vigorously to remove a brace from a measuring bracket. Whether this is a reversible type of injury is open to question. Certainly, she has not made much progress since the initial injury despite not working for some period of time....If she is to return to any type of work at all, it is going to have to be tailored fairly carefully so that there is no calling for repetitious motion of the upper extremity, certainly no handling of any vibrating equipment and nothing that requires vigorous jerking or pulling. (Cl. Ex. 52)

Kathy Danielson, mother of claimant, testified that claimant has difficulty using her right arm and complains of pain and numbness in the arm. Mrs. Danielson stated she helps claimant with carrying and household cleaning. (Tr., pp. 45-49)

Loren Gene Painger, claimant's boyfriend, testified that claimant has difficulty carrying her baby in her right arm and in performing housework tasks such as vacuuming. (Tr., pp. 50-5

Ardith Gillespie, insurance coordinator for defendant, testified that claimant had been paid temporary disability benefits for the period of March 4 through March 11, 1982. (Cl. 42, pp. 6-9)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 23, 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.2 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodi 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).

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).

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., 222 Iowa 272, 268 N.W.2d 598.

Permanent disability means a disability that is lasting rather than temporary. The word permanent means for an indefinite and undeterminable period. Wallace v. Brotherhood of Locomotive Firemen and Engineers, 230 Iowa 1127, 1130, 300 N.W. 322, 324 (1941).

ANALYSIS

Claimant argues on appeal that she is entitled to permanent partial disability benefits as a result of the work-related injury. Defendants contend that medical evidence has failed to show any degree of permanency in the disability claimant incurred as a result of her injury.

While it is true that none of claimant's doctors gave a specific rating with regard to the functional impairment of claimant's right arm, they likewise did not state there was no loss of use. The most recent medical examination and report by Dr. Birkett indicated the presence of permanent pain in claimant's arm with strenuous or continuous motion. Dr. Grant, too, addressed the factor of chronic pain and discomfort that persisted with use of the right arm, and cautioned against repetitive or stressful use of the arm. Clearly, claimant has incurred some functional impairment of her arm based on pain factors which claimant's doctors apparently found too slight to be converted into a functional impairment rating. Based upon the doctor's recommendations of use restrictions and the absence of indicia that claimant had any limitations of her right arm prior to the work-related injury, claimant is found to have lost five percent use of her right arm.

With regard to claimant's second issue, the weight of medical evidence fails to support a finding that claimant has sustained a non-scheduled injury to the right shoulder. Over a two-year period, claimant has consulted a number of doctors and has received various opinions as to the source of her injury and complaints of pain. Following the June 1980 injury, the diagnoses of both Drs. Birkett and Brodersen were of bicipital tendonitis, which would locate the injury at a point between the joints of the elbow and shoulder. Following claimant's March 1982 report of injury to her arm, Dr. Reveiz testified to an injury of the deltoid muscle of her upper right extremity. The November 1982 and February 1983 reports of Drs. Birkett and Grant, respectively, refer solely to claimant's right arm or upper extremity as the site of pain. Neither doctor discusses shoulder involvement in claimant's complaints of pain or the recommendations of use restrictions, upon which claimant's disability is predicated. It is hereby determined that claimant has incurred an impairment in the function of her upper right extremity and as provided under section 85.34(2)(m), The Code, is entitled to permanent partial disability compensation based on a percentage of a period of 250 weeks.

FINDINGS OF FACT

1. Claimant sustained an injury to her upper right arm while working for defendant in June 1980.

2. Claimant was diagnosed as suffering bicipital tendonitis and remained off work until the fall of 1980.

3. In January 1981 claimant reinjured her arm and remained off work until August 1981, at which time she returned to light duties.

4. In March 1982 claimant suffered an injury to the deltoid muscle of her right arm while working.

5. Claimant was released to return to work and was terminated by defendant for failing to report to work on time.

6. Claimant is right handed and has continued to experience pain and weakness in her right arm when she attempts lifting or other strenuous tasks.

7. Claimant's recent medical evaluations have produced recommendations of use restrictions of her right arm.

8. Claimant had no restrictions on the use of her right arm prior to the June 1980 work-related injury.

9. The weight of medical evidence places the location of the injury as the muscles and tendons of the upper arm.

10. Claimant has a five percent (5%) permanent partial impairment of her right arm.

11. The applicable rate of compensation is one hundred forty-three and 04/100 dollars ($143.04) per week.

CONCLUSIONS OF LAW

Claimant has sustained the burden of proving a five percent (5%) permanent partial disability to her right arm which is causally related to her injury of June 1980.

WHEREFORE, the proposed review-reopening decision of the deputy is reversed.

ORDER

THEREFORE, IT IS ORDERED:

That defendant shall pay unto claimant twelve and one-half (12 1/2) weeks of permanent partial disability benefits under the terms of section 85.34(2)(m) at the rate of one hundred forty-three and 04/100 dollars ($143.04) per week. Such benefits are in addition to those temporary disability benefits previously paid to claimant.

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

That costs of this action are taxed to defendant pursuant to Industrial Commissioner's Rule 500-4.33.

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

Signed and filed this _____ day of May, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLIFFORD L. DILLINGER,	:	
Claimant,	:	
vs.	:	File No. 491443
CITY OF SIOUX CITY,	:	A P P E A L
Employer, Self-Insured, Defendant.	:	D E C I S I O N

STATEMENT OF THE CASE

In an arbitration decision filed in this matter on January 15, 1979 it was held that claimant's action was barred by his failure to file an original notice and petition within two years of the date of his injury as required by Iowa Code section 85.26. The deputy's decision was affirmed in a January 18, 1980 appeal decision and again in a June 18, 1980 district court ruling. On September 23, 1981 the Iowa Supreme Court entered a decision reversing and remanding this case to the industrial commissioner for an evidentiary hearing and decision in light of Orr v. Lewis Central School District, 298 N.W.2d 256 (Iowa 1980), which had been decided during the pendency of the judicial review.

Prior to the second arbitration hearing defendant requested leave to amend its answer to the original petition for arbitration by setting forth the additional affirmative defense of notice as is provided in Iowa Code section 85.23. Defendant's motion for leave to amend was granted in a June 22, 1982 order and notice of assignment for hearing. Defendant now appeals from the second arbitration decision filed in this matter wherein claimant's action was found not to be barred by either section 85.23 or section 85.26, and claimant was awarded 200 weeks of permanent partial disability benefits, healing period benefits, and medical expenses.

The record in this matter consists of the transcript of the original arbitration hearing taken September 26, 1978 and containing the testimony of claimant; the deposition of John J. Dougherty, M.D.; the medical records concerning claimant from the Veterans Administration Hospital in Sioux Falls, South Dakota; a letter from Don A. Manning, M.D.; the transcript of the second arbitration hearing taken July 13, 1982 and containing the testimony of Harry P. BeVer; defendant's exhibits A and B; joint exhibit 1; and the briefs and filings of both parties on appeal.

ISSUES

The issues stated on appeal by defendant are as follows:

1. Whether the deputy erred in finding that claimant had complied in timely fashion with Iowa Code section 85.26.

2. Whether the deputy erred in finding that claimant had complied in timely fashion with Iowa Code section 85.23.

3. Whether the deputy erred in determining that claimant had suffered a forty percent industrial disability as a result of the incident claimed in his petition.

In addition, claimant has stated the following cross-appeal issue:

1. Whether the deputy erred in permitting defendant to amend its answer on remand of this case to include a defense which had previously been withdrawn.

REVIEW OF THE EVIDENCE

At the time of the original arbitration hearing the parties stipulated as to the reasonableness of the medical expenses and to the time off work. (September 26, 1978 Transcript, pp. 4-5)

Claimant was born in 1939 and is a high school graduate. He worked for the Milwaukee Railroad as track maintenance worker before serving in the U.S. Marine Corps from 1961 through 1965. He subsequently held jobs in the parts department of a tool company, as a laborer for the Hoerner Waldorf Company, and as a deputy clerk of the Sioux City municiple court. Claimant testified that his duties as a deputy clerk included filing, desk work, and answering the phone. Claimant began working with the Sioux City water department reading water meters in either 1970 or 1971. He stated that his job as a meter reader required him to climb ladders, move heavy objects, scoop snow, crawl and bend. (Sept. 26, 1978 Tr., pp. 6-12)

Claimant testified that he received a job-related injury in March of 1973 while working for the Sioux City water department. He recalled that he hurt his back while lifting the door to a pit wherein a water meter was located. Claimant was hospitalized on March 31, 1973 under the care of D. H. Manning, M.D., and was in traction for over a week. He testified that he returned to work on April 12, 1973, but was back in the hospital two weeks later. (Sept. 26, 1978 Tr., pp. 13-15) A June 1, 1973 report from Dr. Manning indicated that claimant probably suffered from a herniated lumbar disc, but during the time that claimant was hospitalized his symptoms subsided, as did findings that would be associated with a herniated nucleus pulposis. (Veterans Administration Hospital records) Because it was claimant's understanding that Dr. Manning believed back surgery to be necessary, he visited Albert D. Blenderman, M.D., for a second opinion. Dr. Blenderman suggested that claimant try using a back brace for awhile and also gave him a lift for his left shoe. Claimant testified that he received workers' compensation benefits during his time off work in 1973. (Sept. 26, 1978 Tr., pp. 17-18)

Claimant resumed his job reading water meters on June 1973. He testified that despite wearing a back brace he continued to experience aching in his back which would sometimes radiate into both legs. Claimant testified that although he was able to perform his job satisfactorily and did not miss any work because of his back complaints, the ache in his back never subsided more than several days at a time. (Sept. 26, 1978 Tr., pp 17-18)

Claimant suffered a second work-related injury while working for defendant on October 8, 1975. He explained that he fell five feet into a pit when the ladder that he was descending broke. Claimant recalled that his back hurt him for two or three days, but the pain then subsided. He filed an accident report with defendant, but continued to work without taking any time off. Claimant testified that the pain which he experienced in his back following the October 8, 1975 accident did not differ from that which he had been experiencing since the March of 1973 accident. He noted, however, that the pain became a little bit worse each day until he felt that he could no longer perform his work in April of 1977. (Sept. 26, 1978 Tr., pp. 18-23)

Claimant found work with Lane's Bottling Company, but lasted only three days on the job because he found that he was unable to perform the lifting required. He made application with Hoerner Waldorf, one of his former employers, but was not hired after being examined by the company doctor. Claimant worked for approximately one month as a night auditor and clerk for a hotel in South Sioux. Claimant testified that he applied for social security disability benefits which led to his being examined by John J. Dougherty, M.D., on September 22, 1977. Social security benefits were denied in the fall of 1977. (Sept. 26, 1978 Tr., pp. 23-27)

Claimant sought out medical care on his own volition from Dr. Dougherty on November 11, 1977. He recalled being hospitalized on December 3, 1977, and undergoing back surgery which was performed by Dr. Dougherty. (Sept. 28, 1978 Tr., pp. 27-30)

Dr. Dougherty testified by deposition that he performed a disability examination of claimant on September 22, 1977. He recalled that x-rays were taken at that time, and that his diagnosis had been a possible lumbosacral sprain with early degenerated discs at L4, L5 and L5, S1, with a mild scoliosis to the left. Dr. Dougherty testified that he saw claimant at his office on November 11, 1977 and December 1, 1977 with little change in claimant's condition to report on either occasion. Claimant was hospitalized on December 3, 1977 and a myelogram performed by Dr. Dougherty on December 5, 1977 revealed a column defect at L4, 5 on the left which was compatible with a herniated disc along with a narrowing of the L5, S1 disc space. On December 8, 1977 Dr. Dougherty performed surgery which he described as a bilateral hemilaminectomy at L4, 5, removal of a herniated disc, and a spinal fusion from L4 to the sacrum. Dr. Dougherty testified that claimant was released from the hospital on December 22, 1977. (Dougherty Deposition, pp. 5-10)

Dr. Dougherty testified that he had last examined claimant on June 28, 1978. The doctor described claimant's condition at that time as follows:

> At that time he said he was not working. He had some charley horses in his leg, but overall he seemed to be getting along fairly satisfactory. He was able to walk well, walked at his toes and heels. There was still a slight tendency to a list to the left.
>
> He had some discomfort with forward bending, which was somewhat--was decreased. Other motions didn't seem to bother him. He didn't seem particularly tender. Reflexes seemed okay. He still had some restriction of straight leg raising, bilaterally; but it didn't seem to particularly bother him.
> (Dougherty Dep., pp. 10-11)

Dr. Dougherty was unwilling to state that claimant was totally disabled from September of 1977 until December of 1977, but noted that in light of his findings during surgery, claimant's activities would have been considerably restricted during that period. (Dougherty Dep., pp. 11-12) He did, however, believe claimant to be disabled following surgery:

> Q. Doctor, do you have an opinion as to whether or not Mr. Dillinger was totally disabled from performing any work from the period commencing in December when the--when the myelogram was performed until your last examination in June of 1978?
>
> A. Yes.
>
> Q. What is your opinion?
>
> A. I think he was disabled.
>
> Q. Was that--was that disability during this period of time total, in your opinion?
>
> A. Yes.
> (Dougherty Dep., p. 11)

Dr. Dougherty testified that when he last examined claimant in June of 1978, claimant had a permanent disability of 15 percent of the body. (Dougherty Dep., p. 12) He was also questioned as to the physical restrictions which claimant would have:

> A. Well, I think that anyone--my opinion is that anyone who has had back surgery such as his should not do a lot of heavy lifting. I think that he probably should be restricted. I don't think he ought to be at a job where he bends over frequently during the day, you know, constant bending over and straightening up. I think that-- Otherwise, I would feel that he could do pretty much what doesn't bother him, but I think he ought to limit how much he lifts and probably repetitive actions.
>
> Q. What--what do you consider weightwise, in pounds?
>
> A. Oh, I would say--I would just-- Now, he's tall and slender, and I would say that he probably should be limited by 30 to 40 pounds.
>
> Q. What--what about squatting and stooping, activity of that kind, Doctor?
>
> A. Oh, I think squatting's probably all right. Stooping over, I think that I would consider that he probably should not do that frequently during the day. I think he'd be all right squatting.
>
> Q. What about things like climbing, climbing ladders, for instance?
>
> A. Oh, I think that--that I would say that he should--he should not do it a lot.
> (Dougherty Dep., pp. 13-14)

With regard to the causation of claimant's back condition the following testimony ensued:

> Q. All right. Based upon the history that was obtained from the patient and based upon your training and experience and based upon your examination and care and treatment of this patient, Doctor, do you have an opinion within a reasonable degree of medical certainty as to whether or not the injury that you have described and the consequent disability that you have described is related to any work, employment, incident, or activity?
>
> A. Yes.
>
> Q. Will you state what that opinion is?
>
> A. Well, I think that--that his incident of '73 and his fall or '75 all should be taken into consideration, probably also the type of work he was doing, which entailed apparently squatting down and lifting doors and climbing under whatever you have to do to read meters.
>
> Q. Do you have an opinion within a reasonable degree of medical certainty based upon your history, your training and experience, and your care and treatment as to whether or not the patient had a ruptured intervertebral disc in the spaces that you described in 1975?
>
> A. Well, I would be inclined to think that he certainly probably had some evidence of--of a herniated disc in view of the fact that the history obtained from the patient was that they were considering surgery in--at the V.A. Hospital in Sioux Falls; and I'm sure that they were thinking along the lines of a herniated disc when they suggested this, although they did not do a myelogram.
>
> Q. All right. Doctor, with that in mind then, what role in your opinion did the fall when the ladder collapsed in '75 or '76-- what role did that play in this man's problems?
>
> A. I would feel that probably it aggravated what he already had.
> (Dougherty Dep., pp. 14-15)

On cross-examination, Dr. Dougherty stated that the scoliosis previously diagnosed probably did not have much to do with claimant's condition. (Dougherty Dep., pp. 16-17) The doctor was also questioned about length of time that it took before claimant became disabled by the herniated disc:

> Q. Would it be a usual situation for the pain in the back to be dormant for two years or more?
>
> A. I think this: That if you have a herniated disc with maybe only mild herniation, with conservative treatment the body may--body tries to heal this, of course.
>
> Q. Mm-hmm (Yes).
>
> A. And then it may--he may undergo a healing process until he receives another insult, which maybe is, so to speak, "undone" with what the body has been doing in the conservative treatment.
>
> Q. So you're--you're indicating that a patient may ignore the pain initially, and the body does some healing on its own, and the pain may go away or die down to a tolerable level until there is another insult, as you called it, a trauma causing it to flare back up again?
>
> A. I think that's a possibility, yes.
> (Dougherty Dep., pp. 20-21)

Claimant testified that prior to visiting Dr. Dougherty in

November and December of 1977 he had no idea that he had a condition in his back that had been caused or aggravated by his fall into the meter pit on October 8, 1975. He indicated that the pain after his October of 1975 fall was not at first substantially different from that which he had experienced since his 1973 injury. (Sept. 26, 1978 Tr., p. 30)

Harry BeVer, who is a workers' compensation claims investigator for the city of Sioux City, testified at the second arbitration hearing. BeVer testified that a first report of injury form, which had been prepared with regard to claimant's October 8, 1975 incident, had been received in his office no later than October 14, 1975, but had never been filed with the industrial commissioner because claimant did not miss any work as a result of the incident. BeVer also testified that subsequent to receiving the first report there was no contact with his office concerning the incident of October 8, 1975 and a potential workers' compensation claim until claimant's counsel personally contacted him in such regard after March 15, 1978. (July 13, 1982 Tr., pp. 11-18)

Claimant's original notice and petition in this action was filed on April 3, 1978.

APPLICABLE LAW

Iowa Industrial Commissioner Rule 500-4.35(86) provides:

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

Rule 88, Iowa Rules of Civil Procedure, provides:

> A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial calendar, the party may so amend it at any time within twenty days after it is served. Otherwise, a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

Upon remand of a case the trial court will have the same discretion to permit amendment to a petition as if the case had not been tried. The presumption is that after the remand the court's discretion in granting or denying leave to amend will not be abused. Williams v. Stroh Plumbing & Electric, Inc., 250 Iowa 599, 94 N.W.2d 750 (App.Ct. 1959). See also Correll v. Woodfellow, 255 Iowa 1237, 125 N.W.2d 745 (App.Ct. 1964); Webber v. E. K. Larimer Hardware Co., 234 Iowa 1381, 15 N.W.2d 86 (App.Ct. 1944).

Section 85.26, Code of Iowa 1975 provided, in part: "No original proceedings for compensation shall be maintained in any case unless such proceedings shall be commenced within two years from the date of the injury causing such death or disability for which benefits are claimed."

In Orr v. Lewis Central School District, 298 N.W.2d 256, 261 (Iowa 1980) the court stated: "The limitation period under section 85.26, The Code 1975, began to run when the employee discovered or in the exercise of reasonable diligence should have discovered the nature, seriousness and probable compensable character of the 'injury causing ... death or disability for which benefits [were] claimed.'"

Section 85.23, Code of Iowa 1975 provided:

> Unless the employer or his representative shall have actual knowledge of the occurrence of an injury, or unless the employee or someone on his behalf or some of the dependents or someone on their behalf shall give notice thereof to the employer within fifteen days after the occurrence of the injury, then no compensation shall be paid until and from the date such notice is given or knowledge obtained; but if such notice is given or knowledge obtained within thirty days from the occurrence of the injury, no want, failure, or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced thereby, and then only to the extent of such prejudice; but if the employee or beneficiary shall show that his failure to give prior notice was due to mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud, misrepresentation, or deceit of another, or to any other reasonable cause or excuse, then compensation may be allowed, unless and then to the extent only that the employer shall show that he was prejudiced by failure to receive such notice; but unless knowledge is obtained or notice given within ninety days after the occurrence of the injury, no compensation shall be allowed.

In Jacques v. Farmers Lumber Company, 242 Iowa 548; 47 N.W.2d 386 (1951) the court considered at what point an injury was deemed to have occurred in an occupational disease case. The court stated:

> Since the legislature made disease compensable under its term "injury" then clearly it must have meant the "occurrence" of this type of "injury" was when the employee found out about the disease. To hold otherwise would defeat the obvious legislative purpose. The employee could hardly be held under a duty to notify his employer of a disease of which he had no knowledge. It would be unreasonable to conclude that the legislature intended a construction of "occurrence of the injury"--and we substitute "occurrence of the disease"--to mean a point of origin before the employee found out about his disease.

The court further stated:

> Whether or not a person is suffering from a disease, or any particular disease, or the lighting-up of some latent disease, is generally a question to be determined by physicians. The condition must be said to occur, within a statute placing a burden of notice of occurrence on the employee, when the physician's diagnosis discloses to the employee the nature of his disability.

In Robinson v. Department of Transportation, 296 N.W.2d 809 (Iowa 1980) the court expanded upon Jacques in applying the discovery rule to the notice provision of the Code. The court stated:

> [T]he ... statement of the discovery rule appears in 3 A. Larson, supra, §78.41 at 15-65 to 15-66: "The time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease." This statement accurately delineates when the employee's duty to give notice arises. The reasonableness of the claimant's conduct is to be judged in the light of his own education and intelligence. He must know enough about the injury or disease to realize it is both serious and work-connected, but positive medical information is unnecessary if he had information from any source which puts him on notice of its probable compensability.

In discussing the alternative of "actual knowledge" of an injury on the part of an employer, the court in Robinson stated:

> 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 section 85.23.

ANALYSIS

The first issue which will be addressed herein is whether it was error to permit defendant to amend its answer on remand of this case to include the affirmative defense of failure to give notice of injury as provided in Code section 85.23. As was noted in the previous section, it is within the discretion of the deputy to permit a party to amend its pleadings upon remand of a case. The stated purpose of the reversal and remand of this case was to permit an evidentiary hearing in light of Orr v. Lewis Central School District. Orr was decided during the pendency of an appeal in this case and made the "discovery rule" applicable to Code section 85.26. Defendant's amended answer asserts the defense provided in Code section 85.23 which, like the provision of Code section 85.26, is interpreted as being subject to the discovery rule. Like Orr, the case of Robinson v. Department of Transportation, wherein the court affirmed the discovery rule to be applicable to Code section 85.23, was decided during the pendency of judicial review in this case. The application of the discovery rule to both Code sections are closely related, and due to the recent judicial interpretations of each, a hearing considering the application of the discovery rule to both sections is necessary to do substantial justice. It shall be found that there was not an abuse of discretion on the part of the deputy in permitting defendant to amend its answer and no error is found to exist.

The second issue which will be considered is whether the deputy erred in finding that claimant complied in timely fashion with Code section 85.26. Under Orr, the two year limitation period for commencing an action begins to accrue when the claimant discovers or, in the exercise of reasonable diligence, should have discovered the nature, seriousness and probable compensable nature of his injury. Claimant's original notice and petition was filed on April 3, 1978, which means that in order for him to bring an action he must have discovered the nature, seriousness, and probable compensability of this injury after April 3, 1976. Given the fact that many of the symptoms claimant exhibited following the October 8, 1975 accident were identical to those which had existed since his mishap in 1973, and further, that he was able to continue working until April of 1977, it is reasonable that claimant did not become aware of the nature, seriousness, and compensability of his back injury until a point sometime after April 3, 1976. As such, claimant's action is not barred by the application of Code section 85.26.

The third issue which will be considered is whether the deputy erred in finding that claimant complied in timely fashion with Code section 85.23. Under Robinson the 90 day period during which notice of an injury must be given to an employer does not begin to run until the claimant recognizes the nature, seriousness and probable compensable character of his injury. Furthermore, in order for an employer to be charged with actual knowledge, it must first be proved that the employer has some knowledge of facts which connect the claimant's injury with his employment. The deputy, in his arbitration decision, held that by promptly filing an accident report on October 8, 1975 claimant had complied with the notice requirement of Code section 85.23. If Orr and Robinson are read in light of one another, however, the point at which the two year limitation of actions and the 90 day notice period begin to accrue must coincide as the date at which claimant first knew the nature, seriousness and probable compensability of his back condition. If October 8, 1975 is the

date from which the period for giving notice began to accrue, so then must the statute of limitation begin to accrue. It has been decided supra, however, that claimant did not have cause to file his action until after April of 1976. Like claimant, the defendant in this case should not be charged with knowledge of a potential claim as of October 8, 1975, especially in view of the fact that claimant continued to read water meters for 18 months. The testimony of Harry BeVer to the effect that defendant did not receive any notice of an injury and potential workers' compensation claim with regard to the October 8, 1975 accident until March 15, 1978 is unrebutted. Under the Robinson rationale a claimant may be charged with knowledge of the nature, seriousness, and compensable character of his injury if reasonable in light of his own education and intelligence. Furthermore, positive medical information is unnecessary if claimant recognizes the probable compensability of his injury. There appear to be several duties upon which claimant could reasonably be charged with such knowledge. Claimant's stated reason for leaving his employment with the city of Sioux City in April of 1977 was that his back pain had become intolerable. Subsequent to leaving the meter reading job claimant went to work for Lane's Bottling, but quit after three days due to continued back pain. When claimant applied for a job at Hoerner Waldorf he was rejected only after failing to pass a preemployment physical. All of the above, coupled with claimant's knowledge that an injury report concerning his back had been filed in April of 1977 could reasonably be seen as alerting claimant to the nature, seriousness, and compensable character of his back condition. Claimant could not be said to be blind to the mechanics of the workers' compensation system, as he in fact received workers' compensation benefits following his back injury in 1973. Claimant certainly must have recognized the seriousness of his back condition in September of 1977 at which time he made application for social security disability benefits. When claimant sought treatment for his back from Dr. Dougherty on November 11 and December 1 of 1977 he did so at his own expense, and of his own volition. Claimant was hospitalized on December 3, 1977 due to his back condition. It seems inconceivable that claimant would not have recognized the nature, seriousness, and compensable character of his back condition on December 5, 1977 when a myelogram performed by Dr. Dougherty revealed a herniated intervertebral disc. The latest conceivable date on which claimant could reasonably have recognized the nature, seriousness, and compensable character of his back injury, however, was December 8, 1977 at which time a bilateral hemilectomy was performed, with removal of a spiral disc and a spinal fusion from L4 to the sacrum. It is wholly reasonable that a man of ordinary intelligence who has a high school diploma and has been a past recipient of workers' compensation benefits should recognize the nature, seriousness, and compensable nature of his condition following major back surgery. The time period between the latest possible "discovery" date and the point at which claimant's counsel first contacted defendant concerning claimant's injury on, or after, March 15, 1979 exceeds the 90 day notice limitation. As such, claimant's recovery is barred by Iowa Code section 85.23.

Because claimant's recovery has been barred, the issue as to extent of industrial disability need not be addressed.

FINDINGS OF FACT

1. Claimant began work as a meter reader for Sioux City in 1970 or 1971.

2. Claimant injured his back in a work-related accident in March of 1973.

3. Claimant was treated and returned to his job reading meters in June of 1973.

4. Claimant continued to experience symptoms of back pain following his return to work in 1973.

5. Claimant fell into a five foot deep pit on October 8, 1975 while working for Sioux City.

6. Claimant filed an accident report on October 8, 1975 with his employer.

7. Claimant experienced immediate back discomfort, with the pain subsiding somewhat three days later.

8. Claimant returned to work immediately, without taking any days off.

9. Claimant continued to experience symptoms of back pain very similar to those which had existed since March of 1973.

10. Claimant quit his meter reading job in April of 1977 because his back pain had increased to the point that he could no longer tolerate the work.

11. Claimant found work with a bottling company soon after he quit working for the city of Sioux City, but quit after three days because his back could not tolerate the required lifting.

12. Claimant's application for employment at Hoerner Waldorf was rejected following a preemployment physical.

13. Claimant retained knowledge that an accident report had been completed on October 8, 1975.

14. Claimant is a high school graduate.

15. Claimant received workers' compensation benefits following an injury to his back in 1973.

16. Claimant applied for social security in September of 1977 because he believed the condition of his back to merit disability benefits.

17. Claimant sought treatment for his back from Dr. Dougherty at his own expense on November 11, 1977 and December 1, 1977.

18. Claimant was hospitalized on December 3, 1977, with a myelogram performed by Dr. Dougherty on December 5, 1977 revealing a column defect at L4-5 on the left that was compatible with a herniated disc, along with narrowing of the L5, S1 disc space.

19. Claimant underwent surgery on December 8, 1977, at which time a bilateral hemilaminectomy was carried out at L4-5 with removal of a herniated disc and spinal fusion from L4 to the sacrum.

20. Claimant, in light of his education, experience, and previous workers' compensation award should reasonably have recognized the nature, seriousness, and compensable character of his back condition.

21. Claimant notified defendant of his injury and potential claim on or before March 15, 1978.

22. Claimant did not discover the nature, seriousness and probable compensability of his injury until after April 3, 1976.

23. The period between the time that claimant discovered the nature, seriousness, and probable compensability of his injury and the time that claimant notified defendant of the injury exceeded 90 days.

CONCLUSIONS OF LAW

Claimant's action is not barred by the operation of Iowa Code section 85.26.

Claimant's recovery is barred by the operation of Iowa Code section 85.23.

ORDER

WHEREFORE, the deputy's decision filed November 10, 1982 is reversed.

THEREFORE, claimant is ordered to take nothing from these proceedings.

Costs of the arbitration proceeding are taxed to defendant. Each party shall stand their own costs of the appeal. Defendant shall stand the cost of the transcript.

Signed and filed this 31st day of August, 1983.

Appealed to District Court;
Reversed and Remanded
Appealed to Supreme Court;
Pending

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CARL D. DUCEY,	:	
Claimant,	:	File No. 692305
vs.	:	
HYZER BROKERAGE CO.,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
AETNA LIFE & CASUALTY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This matter came on for hearing at the Wapello County Courthouse in Ottumwa on August 26, 1983 at which time the record was closed.

No filings were made prior to the filing of the original notice and petition. The record consists of the testimony of the claimant and Claudia "Sheree" Swain; the depositions of Michael Badeaux and William E. Bell; claimant's exhibits 1 through 4; and defendants' exhibits A through F.

ISSUES

The issues for resolution are:

1) Whether claimant gave notice pursuant to section 85.23, Code of Iowa;

2) Whether claimant sustained an injury arising out of and in the course of employment; and

3) The nature and extent of disability.

Since the first issue is resolved in defendants' favor, the medical issue will be dealt with in a cursory fashion.

STATEMENT OF THE EVIDENCE

Claimant, age 31 at the time of hearing, was employed by Hyzer Brokerage Company in June 1980. Claimant had worked part-time for a Hy Vee store in high school in 1970. He worked full-time for about nine years and became produce manager. He testified that in early 1976 he fell at work hurting his back and neck. Claimant testified that he was off about a week and was continued on salary. He quit because he did not get along with the store manager. He left Hy Vee in 1979 to become employed by defendant.

Defendant Hyzer is a food brokerage firm and claimant was a sales representative for them. Claimant testified that his duties entailed calling on supermarkets and introducing new products to be sold to stores. Claimant testified that he would occasionally be called upon to set up product displays. Claimant testified that his area included Southern Iowa, Missouri and a part of Illinois. He had a company car. He testified that he was paid a flat salary with an occasional incentive for promoting a new product. Claimant testified that he supplemented his income by playing in a band. Claimant indicated that there was lifting involved in setting up for performances. The claimant testified that he sometimes lifted from thirty to thirty-five pounds.

Claimant testified that his back gave him no problems until May 1980. Claimant testified that his back, right hip and right leg started giving him problems. Claimant indicated that he worked through this period and that pain became extremely severe on June 9, 1980 while claimant was stocking freezers in Quincy, Illinois. Claimant testified that his back and leg hurt so much that he could hardly get out of bed the following morning. He went home and saw J.W. Brindley, M.D., on June 11, 1980. The history recorded in Dr. Brundley's notes indicate no specific work-related incident, but noted pain "for the last week or two." Dr. Brindley put claimant on bedrest and when his condition did not improve, caused him to be hospitalized from June 16, 1980 through about June 21, 1980. Claimant testified that he informed Sheree Swain, defendant's office manager, of the alleged injury.

Dr. Brindley thought claimant had a herniated disc so he referred claimant to John T. Bakody, M.D., a Des Moines neuro-surgeon. He hospitalized claimant and treated him conservatively with physical therapy directed to the low back to include moist heat, light massage and intermittent pelvic traction supplemented with pelvic traction in his room.

Claimant's chief treating physician appears to have been Stuart R. Winston, M.D., an associate of Dr. Bakody. Dr. Winston noted that claimant had lifted heavy equipment, i.e., band instruments (report dated December 28, 1981). It was noted that claimant had intermittent back strain and awoke in June 1980 with right leg pain and back pain. Claimant testified that his heaviest work was for the brokerage firm rather than with the band.

It was noted that claimant was hospitalized at Mercy Hospital from July 27, 1980 to August 9, 1980. A myelogram was normal as was an epidural venogram. When Dr. Winston wrote claimant's employer on October 17, 1980 he stated that he saw no reason why claimant could not return to work. He recommended that claimant perform any duty as long as it did not entail heavy lifting.

Claimant testified that when he returned to work in 1980 he could only work with difficulty. He went to work for another Des Moines brokerage firm in the same territory in mid-August 1980. Claimant testified that he informed his new employer of his back problem. Claimant testified that he worked for his new employer until December 1980. Claimant testified that during this period of employment he had pain at times. Claimant continued working part-time with his band. Claimant testified that these activities started taking more and more of his time so he quit his job in December 1980. Claimant continued his musical activities while managing a booking agency.

Claimant testified that from August 1981 through May 1982 he worked in a men's store as a retail clerk. He was paid about $200 a week. He then became a life insurance salesman until the week before hearing. At that time he was unemployed.

Claimant testified that he did not see a doctor for his back after August 1980. He did get some collateral benefits including disability from Blue Cross/Blue Shield. He complained of back problems at the hearing.

On cross-examination, claimant disputed the evidence of Dr. Bakody indicating that he had hurt his back lifting band equipment. He also testified that he left defendant's employ because his next employer offered him more money. In regard to the notice issue, claimant testified that he did not tell Mike Badeaux, his supervisor, of the injury when Badeaux visited him in the hospital. He testified that he would have no reason to doubt that the employer first had knowledge of the injury when the original notice and petition was filed in January 1982.

Sheree Swain is defendant's office manager and as such handles all insurance claims. She testified that claimant had some prior back problems (which claimant readily admits). She stated that she first received notice in December 1981.

On rebuttal claimant testified that he first became aware of the compensability of the claim when he saw counsel, although his visit was generated by a domestic dispute.

Michael Badeaux testified by way of deposition. He is president of Hyzer Brokerage Company. He testified that claimant performed quite well when he became employed but that claimant's domestic problems affected his performance in the early part of 1980. The witness testified that when he visited the claimant in the hospital claimant indicated that he had injured his back while he was hauling band equipment. Badeaux testified that claimant never reported to him that he had injured his back in any way while employed by Hyzer.

On cross-examination, Badeaux indicated that store personnel commonly stocked shelves, while the Hyzer employees would be concerned with shelf position of products to be sold.

William Bell is employed by Des Moines Brokerage Company, with whom claimant became employed after he left Hyzer. He was aware of claimant's back problems and testified that his understanding of claimant's departure was that claimant's band activities were taking more and more of his time. He testified that claimant may have been required to lift from fifty to sixty pounds at most.

APPLICABLE LAW

1. Sections 85.3 and 85.20, Code of Iowa, confer jurisdiction upon this agency with jurisdiction in Workers' Compensation cases.

2. Section 85.23, Code of Iowa, states:

> Unless the employer or his representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employer or someone on his behalf or a dependent or someone on his behalf shall give notice thereof to the employer witnin ninety days from the date of the occurrence of the injury, no compensation shall be allowed.

3. Section 85.24, Code of Iowa, states:

> No particular form of notice shall be required, but may be substantially as follows:
> To_____
> You are hearby notified that on or about the _____ day of _____, 19___, personal injury was sustained by _____, while in your employ at _____
> (Give name and place employed and point where located _____; when injury occurred.)
> and that compensation will be claimed therefor.
>
> Signed_____
> 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.

3. The case of Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980) stated that it is necessary to allege that the injury was work-connected when giving notice. The court quoted from 3A Larson, Workmen's Compensation, §78.41 at 15-65 to 15-66: "The time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease." Robinson, 296 N.W.2d 809, 812.

ANALYSIS

Based on the foregoing principles, it is found that claimant did not establish that he gave notice and defendants prevailed in showing that they did not receive notice. Hyzer obviously knew that claimant was hospitalized for back problems while he was employed by them. Health and Accident benefits were paid. The history from the doctor indicates a non-occupational cause and is consistent with Mr. Badeaux's testimony.

Additionally, claimant's demeanor indicated that he was of sufficient intelligence to have been charged with the knowledge of the work-connected nature of the injury shortly after it occurred.

The record supports a finding that claimant had knowledge of the compensable nature of the injury in the summer of 1980 and that defendants received notice or knowledge in December 1981.

FINDINGS OF FACT

1. Claimant was employed by defendant Hyzer Brokerage Company on June 9, 1980.

2. Claimant alleges an injury arising out of and in the course of his employment on June 9, 1980.

3. Claimant had knowledge of the possible compensable nature of his back ailment in the summer of 1980.

4. Claimant gave notice to his employer in December 1981.

5. The employer did not have actual knowledge of the possible compensable nature of the claimant's back ailment until December 1981.

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties and subject matter.

2. Claimant's action is barred by operation of section 85.23, Code of Iowa.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing further from these proceedings.

Costs of this proceeding are taxed against defendants.

Signed and filed this 16th day of February, 1984.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY L. DUTCHER,	:	
	:	FILE NO. 456434
Claimant,	:	
	:	R E V I E W -
vs.	:	
	:	R E O P E N I N G
IOWA BEEF PROCESSORS, INC.,	:	
	:	D E C I S I O N
Employer,	:	
Self-insured,	:	
Defendant.	:	

This is a proceeding in review-reopening brought by the claimant on May 7, 1981 asking for additional benefits pursuant to section 85.27 of the Iowa Code by virtue of an admitted employment injury on August 5, 1976.

This matter came on for hearing on November 21, 1983 at the Webster County Courthouse in Fort Dodge, Iowa and considered as fully submitted at the conclusion of the hearing.

Based upon the undersigned's notes, this record consists of the oral testimonies of Mrs. Gary Dutcher and James Metsger, the evidentiary deposition of Charles L. Dagle, M.D., together with claimant's exhibits 1-25.

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

Claimant sustained a personal injury arising out of and in the course of his employment on August 5, 1976 while employed by the Iowa Beef Processors, Inc. plant at Fort Dodge, Iowa receiving brain injuries and as a result is an aphasic quadraplegic. The record further reveals that on the advice of doctors that he may possibly respond in a family environment, hospital facilities were set up in the home and he is presently cared for by his wife, Judy Dutcher. The entire family, including the injured employee and Judy Dutcher, the wife, and the children, received special training at the Craig Institute in Denver, Colorado for the purpose of caring for the claimant in his home. The record further reveals that Mrs. Dutcher received special nurse's training as to how to care for an aphasic quadraplegic such as Gary Dutcher and if it were not for Mrs. Dutcher's services, the claimant would have to be hospitalized and receive special nursing services.

The claimant is receiving weekly workers' compensation and in addition, thereto, Mrs. Dutcher is receiving special nursing benefits of $650.00 per month. She now asks for an order for an increase in the special nursing allowance as well as allowance for an Electrovan Lift and van. The purpose of the lift and additional facilities inside the van and the van is for the purpose of transporting the injured claimant from place to place.

It is clear from the record already made that the claimant is permanently, totally disabled.

It is unusual for a woman like Judy Dutcher to be able to care for the injured claimant, her husband, in their home in the manner in which she has proved she can do. In this connection, Dr. Dagle says in his deposition on page 11 as follows:

> Q. What type care does he need?
>
> A. Well, here again supportive. He's not able to even take care of his basic bodily functions as far as toilet care, feeding, and so forth. He needs this.
>
> He needs to be watched very carefully that he doesn't even choke on his own spit, and that he's able to -- to sustain himself as much as possible. He needs help in sustaining himself.
>
> Q. Is he receiving this care at his home, Doctor?
>
> A. To my knowledge, yes. His wife is taking care of him.
>
> Q. Have you had some occasion to work with her and visit with her and know something about her?
>
> A. Yes.
>
> Q. Does she appear to be giving him as good a care as she can?
>
> A. Seems to be giving him excellent care and seems to be an extremely dedicated wife.
>
> Q. That is rather unusual in a situation such as this; is it not?
>
> A. Well, it is, but these sort of things bring out certain psychological traits in all of us. And apparently she has found her niche in this world in taking care of this man.

Mark P. Cilo, M.D., of the Craig Institute under date of November 16, 1983 in a letter directed to Mr. Herbert Bennett, finds that the patient (claimant) is totally dependent and his wife is providing his care. In Dr. Cilo's opinion, the patient requires approximately eight hours a day of direct care from his wife, seven days a week. Dr. Cilo states that this is based on his knowledge of the patient's neurological problems and experience with other patients at his level of function. This care obviously includes feeding, transfers, skin care, bowel and bladder care, transportation, medications, etc., but it does not include general companionship which would be the responsibility of his wife regardless of the patient's injury.

Accordingly, it is clear from Dr. Cilo's letter from the Craig Hospital at Englewood, Colorado, that at least eight hours a day, seven days a week, is required for special nursing by Judy Dutcher, and would be a fair allowance of special nursing at this date. She is currently receiving $650.00 a month. Evidence showed that trained LPNs, which means licensed practical nurses, receive up to $6.53 an hour, whereas registered nurses receive more money, if they are available. James Metsger, Administrator of the Medical Center at Friendship Haven at Fort Dodge, Iowa, testified that nurse's aides run from $3.48 an hour up to, after seven years, $4.70. These nurse's aides apparently are not LPNs. The eight hours a day, seven days a week at $6.53 per hour based upon Dr. Cilo's evaluation, amounts to $365.68 per week for special nursing, or $1,462.72 per month. The $4.70 an hour allowed for nurse's aides with seven years experience would be most likely comparable to Judy Dutcher's experience and that would be $4.70 times 56 hours per week, or $263.20 per week, or $1,052.80 per month.

As the defense attorney, Mr. Bennett, so ably points out on page three of his most excellent brief: "Once the number of hours have been ascertained, then a fair compensation for this has to be determined."

The defendant points out that Judy Dutcher is performing a service and should be compensated for it but in determining the amount one must be practical and objective.

Based upon the record it appears that $4.70 per hour would be the proper hourly rate for Mrs. Dutcher and based upon Dr. Cilo's report from Craig Hospital, 56 hours a week of direct care would be fair, which would be $1,052.80 per month. Accordingly, the defendant will be required to pay $1,052.80 per month in special nursing benefits directly to Judy Dutcher in addition to other workers' compensation benefits that they are paying under the Iowa law.

The next issue is for an allowance of a van and lift and those items that go into the van that must be used to transport the claimant. As Mr. Bennett so ably points out in his brief, the annotations to section 85.27 of the Iowa Code show that the Legislature added "physical rehabilitation" and "ambulance" to the section in 1973 and in 1976, and provided for allowance of reasonably necessary transportation expenses incurred for such services. There is testimony that the van is used as an ambulance at certain times to take the claimant back and forth to the doctor and to the dentist and to the hospital, when needed. If the van were not used, then, of course, an ambulance would have to be utilized. By the same token, the van is used for personal purposes for the family so that the claimant can be with his family when they are traveling outside the home. The van has also been used for transportation of the claimant back and forth several times to Craig Hospital in Denver, Colorado, and also back and forth to Fort Dodge Medical Center to see Dr. Charles Dagle, and also to Trinity Regional Hospital. The van is not used exclusively for an ambulance, based upon this record, so no allowance is made for ordering the employer to furnish the van. It appears reasonable that since the van is used for purposes under section 85.27 and since the lift is necessary and the used one is no longer operable, and a special bed is needed in the van to transport the claimant, that the defendant will be required to furnish a proper, modern lift for the van as well as a special bed in the van and the other items within the van as recommended in the various reports from Craig Hospital, Denver, Colorado.

There is evidence offered as to the cost of the lift and special bed and other items that go into the van and those items should be taken into consideration by the parties in carrying out this order.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 5, 1976 is causally related to the medical care and treatment 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 applying the foregoing legal principles to the case at hand, it is clear that the claimant has sustained his burden of proof.

After having seen and heard the witnesses in open hearing and after taking into account all of the credible evidence contained in this record, the following findings of fact are made:

1. That this agency has jurisdiction of the parties' subject matter.

2. It is hereby found that the claimant, Gary Dutcher, sustained an injury arising out of and in the course of his employment on August 5, 1976, and the result is an aphasic quadraplegic, and he is permanently, totally disabled.

3. It is further found that Judy Dutcher has been specially trained to care for her husband, an aphasic quadraplegic, and to take care of him in their home.

4. It is further found that Judy Dutcher received special training at Craig Hospital in Denver, Colorado, for the purposes herein.

5. It is further found that the $650.00 per month special nursing is inadequate and shall be raised to $1,052.80 per month and the defendant is ordered to pay that amount each month hereafter from this order for special nursing care.

6. It is further found that the claimant may be in need of a new van but the same on this record does not fall within the interpretation of an ambulance though it is used for that purpose at times.

7. It is further found that the employer must furnish reasonable transportation expenses for purposes of medical treatment and hospitalization and for physical rehabilitation.

For that reason, it is necessary that a proper lift to be installed in the van and also a special bed in the van shall be furnished by the defendant for the benefit of the claimant, in addition to other items in the van as recommended by the reports from Craig Hospital in Denver, Colorado.

IT IS THEREFORE ORDERED that the defendant pay a special nursing allowance to Judy Dutcher in the amount of one thousand fifty-two and 80/100 dollars ($1,052.80) per month commencing with the date of this decision.

IT IS FURTHER ORDERED that a proper lift be installed in the van and also a special bed in the van shall be furnished by the defendant for the benefit of the claimant, in addition to other items in the van as recommended by the reports from Craig Hospital in Denver, Colorado. Said lift and bed are to be furnished within sixty (60) days from the date below.

Costs of these proceedings are taxed to the defendant pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 27th day of March, 1984.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JULIE A. DYSON,	:	
Claimant,	:	
vs.	:	
	:	File No. 697110
ROCKWELL INTERNATIONAL,	:	
Employer, Self-Insured,	:	A P P E A L
	:	
and	:	D E C I S I O N
	:	
SECOND INJURY FUND OF IOWA,	:	
State of Iowa, Defendants.	:	

STATEMENT OF THE CASE

Defendants, Rockwell International and Second Injury Fund of Iowa, appeal from a proposed arbitration decision wherein claimant was awarded permanent partial disability benefits based upon a finding of 12 percent industrial disability of the body as a whole. Five percent of the disability was assessed to defendant employer and the remainder to the Second Injury Fund. Additional healing period benefits and medical expenses were also awarded.

The record on appeal consists of the transcript of the arbitration proceeding which contains the testimony of the claimant; defendants' witnesses Margaret Dare, Wanda Mayer, and Albert C. Victor; claimant's exhibits 1, 2, 3, 5, 6, 7, and 8; defendants' exhibits A, B, and C; the depositions of Jerome G. Bashara, M.D., and William J. Robb, M.D.; and the briefs and filings of all parties on appeal.

ISSUES

1. Whether claimant's injury arose out of and in the course of claimant's employment.

2. Whether claimant has sustained a permanent partial disability as a result of that injury.

3. Whether claimant is entitled to second injury fund benefits.

REVIEW OF THE EVIDENCE

The parties stipulate that the rate of compensation is $182.78. (Transcript, pp. 3-4) Claimant, who was 33 years old at the time of the hearing, is a high school graduate. (Tr., pp. 6-8) Her previous work experience includes factory assembly lines and running a Xerox machine in an office. (Tr., p. 7) She first worked for defendant employer in 1969 for a year and a half, building parts into radios. (Tr., p. 9) Claimant returned to work for defendant employer on May 30, 1972. Her duties involved assembly. (Tr., p. 9) In February of 1980, claimant was performing work involving plating. (Tr., p. 10) She consulted William J. Robb, M.D., an orthopedic surgeon, with a complaint of pain in her right wrist and hand. (Tr., pp. 10-11) Dr. Robb's diagnosis was carpal tunnel syndrome. Carpal tunnel decompression was performed by Dr. Robb on March 3, 1980. (Robb Deposition, p. 6) Claimant returned to work for defendant employer in plating on May 21, 1980. (Tr., p. 12) On June 17, 1980 Dr. Robb noted that he had written defendant employer advising a change of work: "...if she goes back to her old job she will have the same problems." (Claimant's Exhibit 3) Claimant continued to work in plating. (Tr., p. 12)

In October of 1980 claimant saw Jerome G. Bashara, M.D., an orthopaedic surgeon, for an evaluation of the right carpal tunnel syndrome. (Cl. Ex. 7) Dr. Bashara recommended lifting restrictions for her right wrist of eight pounds maximum for frequent lifting and 36 pounds maximum for occasional lifting. (Cl. Ex. 7)

Claimant was given a two percent permanent partial disability rating to her right upper extremity. (Industrial Commissioner's file No. 626718)

In November 1980 claimant was switched from plating to inspection of circuit boards. She testified that the new job was within the lifting restrictions. (Tr., pp. 12-13) Claimant was laid off the following August 1981 and recalled by defendant employer on January 18, 1982. She began working as an assembly welder. She testified that during the next two months her left wrist, hand and arm began to cause her pain.

Q. And when you returned to work on January 18th, 1982, how did your left wrist, hand and arm feel?

A. Fine.

Q. Had you been having any trouble with it during the past period of months?

A. No.

Q. How did your right hand and arm feel at this time?

A. It was sore when I used it but not -- you know, once I started using it, it would get sore.

Q. What job did you go to then on January 18th, 1982?

A. I think it was assembly-welder or solderer.

....

Q. Tell us now what was required to do this solderer's job? What movements of your body did you go through and what was it you were trying to accomplish?

A. Okay, you held a welding torch in your right hand, and in your left hand you held the welding material and a pair of pliers sometimes, but not always, but you always had to hold the welding material and then just take pieces and turn them around different directions and use part of them to weld the seams shut.

Q. Now, this thing you are holding in your right hand, this torch, how do you turn that off or on?

A. You have a little lever that you clamp to make the gas come out.

Q. And the welding material, I believe is the word that you used, did you indicate that that is held between your thumb and your forefinger?

A. Yeah.

Q. And if you are holding pliers at the same time as this welding material, in which fingers do you hold the pliers?

A. The last three.

Q. Now, what kind of materials did you work on?

A. Steel.

Q. And when you were using pliers, what were the pliers used to hold?

A. The small pieces. You would have to turn them different directions to get the right seams so you could solder it and pick them up and put them in a tank of water to cool them.

....

Q. Now, as you were doing this job between January 18th, 1982 and March 31st, 1982, what did you feel in your left wrist, hand and arm?

A. It just got progressively sore. It started out with just a general soreness in my forearm and it ended up being a constant pain where I couldn't hardly move my arm to pick anything up, and then my fingers started going numb and when I would stretch them out, I felt like I was getting shocked. (Tr., pp. 13-16)

Claimant consulted her family physician on March 3, 1982 and was referred to Dr. Robb. He examined claimant's left wrist and made a diagnosis of carpal tunnel syndrome. In his March 10, 1982 report, Dr. Robb states:

> Her symptoms first became somewhat evident six weeks ago when she was called back to work. This job that she performs does require a lot of wrist action and using pliers as she does the line work. With the continuation of her job, she noticed increased pain and numbness and tingling and for the last four weeks this has been severe with pain at night as well as numbness and tingling in the fingers and this pertains to the thumb, index, and middle fingers of the left hand. (Cl. Ex. 3)

Surgery to the left wrist was performed on March 15, 1982. Dr. Robb released claimant to return to work on April 19, 1982. (Cl. Ex. 3) Claimant returned to her assembly soldering duties for two weeks and was then laid off. She has not returned to work since that time. (Tr., p. 19)

On May 5, 1982, claimant was notified by defendant employer

that based on recent information of Dr. Robb, it had been determined her injury was not work-related. Claimant consulted Dr. Bashara on May 13, 1982 for examination of her left extremity. He noted the need for lifting restrictions in her duties when she returned to work and determined her impairment was work-related. (Bashara Dep. Ex. 4) On September 10, 1982 Dr. Bashara found that claimant had a two percent permanent partial physical impairment of her upper left extremity and to the carpal tunnel syndrome of the left wrist, both of which were believed to be work-related. (Bashara Dep. Ex. 4)

Claimant testified that she presently has pain in her arms, wrists and hands. It is difficult for her to hold a pen or pencil for writing. (Tr., p. 18) Her arms hurt if she tries to lift and hold objects. (Tr., pp. 33)

Defendant employer asserts that claimant has suffered other injuries which were not work-related. Claimant was treated for soreness in both elbows in 1975. (Robb Dep., pp. 10-11) Claimant injured her left shoulder in a fall in 1980. (Tr., p. 25) Wanda Mayer, occupational health nurse for defendant employer testified she saw claimant fall and be dragged by a horse in 1981. (Tr., p. 45) Dr. Robb stated that claimant's job activities as described by defendant employer would not place undue strain on the wrist. (Robb Dep., p. 9) Albert Victor, manager of safety and health services for defendant employer, testified that he had never had a carpal tunnel syndrome complaint for claimant's type of job. He stated that the duties involved light physical effort most of the time. (Tr., pp. 56-57)

Second Injury Fund of Iowa contends that claimant suffered carpal tunnel syndrome simultaneously in both hands at the time of claimant's February 1980 injury. Dr. Robb testified that claimant suffered bilateral carpal tunnel syndrome in February of 1980. (Robb Dep., p. 15)

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on March 2, 1982 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).

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, 760-761 (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, 815 (1962).

The job related injury need not be the sole proximate cause of the present disability and may be but a contributing factor. Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971)

ANALYSIS

The analysis of the arbitration decision is adopted herein. Although defendant appellants present many hypotheses as to wny the deputy could have concluded that claimant had failed to prove a causal relationship between the injury of January 1982 and claimant's subsequent disability, the deputy accepted the version of the claimant and concluded the disability is causally related to the employment and the extent of the industrial disability is 12 percent of the body as a whole. The employment which aggravated a preexisting condition in the right wrist, later caused similar injury to the left wrist and entitles claimant to second injury fund benefits. The evidence is sufficiently convincing to support the findings and conclusions of the deputy and the proposed arbitration decision should be affirmed.

WHEREFORE, the deputy's decision filed July 18, 1983 is affirmed.

FINDINGS OF FACT

1. Claimant is thirty-three (33) years old and a high school graduate.

2. In February of 1980, claimant injured her right wrist while working for defendant employer.

3. Claimant underwent carpal tunnel decompression of her right wrist on March 3, 1980.

4. Claimant sustained a two percent (2%) permanent loss to the right arm.

5. On May 21, 1980 claimant returned to work.

6. Between January 18 and March 2 of 1982, claimant aggravated a preexisting condition of her left wrist while working.

7. The injury to the left wrist constituted a separate injury.

8. Claimant returned to work on April 19, 1982.

9. Healing period benefits are payable for the 47 days between March 3 and April 19, 1982.

10. The injury to the left upper extremity caused a permanent industrial disability to the extent of five percent (5%) of the body as a whole.

11. Claimant's total industrial disability as a result of both injuries is twelve percent (12%) of the body as a whole.

12. The rate of compensation is one hundred eighty-two and 78/100 dollars ($182.78) per week.

CONCLUSIONS OF LAW

Claimant is entitled to healing period benefits from defendant employer for 6 5/7 weeks. Claimant is entitled to permanent partial disability benefits from defendant employer for 25 weeks commencing April 19, 1982.

Claimant is entitled to permanent partial disability benefits from defendant Second Injury Fund commencing October 10, 1982 for 30 weeks ending May 7, 1983.

WHEREFORE, the deputy's proposed arbitration decision is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant Rockwell International pay unto claimant six and five-sevenths (6 5/7) weeks of healing period compensation at the rate of one hundred eighty-two and 78/100 dollars ($182.78 per week.

That defendant Rockwell International pay unto claimant twenty-five (25) weeks of permanent partial disability compensati at the rate of one hundred eighty-two and 78/100 dollars ($182.78 per week.

That defendant Rockwell International pay unto claimant the following approved medical expense:

William J. Robb, M.D.	$36.00

That defendant Second Injury Fund pay unto claimant thirty (30) weeks of permanent partial disability compensation at the rate of one hundred eighty-two and 78/100 dollars ($182.78) per week. Interest is to accrue from the date it became due.

That costs are to be divided equally by defendants.

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

Signed and filed this 29th day of February, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES MICHAEL EASTER, Claimant, vs. ORBA JOHNSON TRANSSHIPMENT CO., Employer, and WAUSAU INSURANCE CO., Insurance Carrier, Defendants.	FILE NO. 696651 R E V I E W - R E O P E N I N G D E C I S I O N

This is a proceeding in review-reopening brought by James Michael Easter against Orba Johnson Transshipment Company, his employer and Wausau Insurance Companies, the insurance carrier. The case came on for hearing at the Henry County Courthouse in Mt. Pleasant, Iowa on April 22, 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 10, 1982. A memorandum of agreement was filed on that same date. A Form 2A on file reveals that the claimant has been paid permanent partial disability benefits for disability extending to 10 percent of the body as a whole.

The record in this matter consists of the transcribed testimony of the claimant, James Michael Easter, Gerald Jiranek, James Lee Raid, Nancy Sue Easter, William Turley; claimant's exhibit 1, and defendants' exhibits 1 through 5, inclusive. The evidentiary deposition of Dr. Koert Smith and the depositions contained therein are considered part of the record in this case.

The issues to be resolved in this proceeding include whether there exists a causal relationship between the claimant's injury of March 1980 and his resulting disability as well as the nature and extent of that disability.

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

At the time of hearing the parties stipulated that the applicable rate in the event of an award is $252.31.

The claimant, James Michael Easter, is 38 years of age and a resident of Argyle, Iowa. He is married and the father of two children.

He began his employment relationship with Orba Johnson Transshipment Company in December of 1977. Mr. Easter confirms that he was their employee on the date of injury in March 1980. On the date of injury the claimant was working as an electrical supervisor. Mr. Easter then testified at length concerning the facts of the incident which precipitated his injury. While engaged in the activity described claimant felt discomfort "[b]etween the shoulder blades, above -- about below the top, where the neck meets the cross part of the shoulder, between the shoulder blades, it seemed like it got stiff and contracted on me". (Transcript page 9, lines 16-19) Claimant reported the incident to his employer in a timely fashion.

The day following the incident claimant experienced constipation. Sensing that there might be a relationship between this problem and his upper back injury claimant consulted Dr. Lee and then Dr. Williams, a chiropractor. Claimant continued to receive treatments from Dr. Williams for an extended period of time. Subsequently, claimant was both examined and treated by Dr. Paul W. Saxton. Dr. Saxton's involvement in the case ceased when he moved from the geographic area.

Claimant was also examined at the request of the employer and insurance carrier by Dr. Koert Smith.

Mr. Easter testified that he lives on a small acreage. He stated that he has noted some difficulty post-injury in performing many of the chores on this property. He stated he must hire help in order to finish certain jobs. He concedes, however, that prior to the incident in question he was also required to hire help to complete the chores on this property. (Trans. p. 15, ll. 15-16)

Claimant is of the opinion that his work as an electronics technician is not up to par, post-injury. He does not lift anything over 40 pounds. He avoids overhead work whenever possible. He is unable to work under his car or work on his knees as he did prior to the date of injury in question. Mr. Easter is of the opinion that his job performance post-injury declined due to the incident in question.

Mr. Easter testified that he was fired from his employment on or about November 10, 1982. He indicates that since that date he has sought other employment without success. He denies that this employer has offered him a new position.

On cross-examination claimant states that the correct date of injury is March 9, 1980. Mr. Easter confirms that his complaints upon seeing Dr. Lee on the day after the incident were "nausea, back hurt" and constipation. (Trans. p. 25, ll. 20 and 21). He also indicates that his back hurt between his shoulder blades. These same complaints were articulated to Dr. Williams. Mr. Easter denies any low back involvement. He concedes, however, that he fractured his pelvis in 1964. He further indicates that he was treated by Dr. Williams for low back complaints in 1974.

Claimant admits that he received numerous chiropractic treatments from Dr. Williams post-injury. Mr. Easter's complaints of bowel and stomach difficulties were, according to him, relieved by these treatments.

As of the date of hearing, claimant denies continuing low back problems. He has continuing complaints of discomfort between the shoulder blades.

Claimant concedes that on April 1, 1980 after the injury in question he received a $1,000 increase in pay. Further, on October 15, 1980, Mr. Easter was promoted to facility supervisor. An $1,800 per year pay increase accompanied this promotion. On January 1, 1981 claimant received another salary increase of more than $2,000 per year. On January 1, 1982 claimant's salary was again increased by $1,900 per year.

Defendants' exhibit 1 outlines claimant's educational background and experience. That document has been reviewed and considered in the final disposition of this case.

Claimant admits that he was not fired because of his work injury. He also concedes that he was not fired because he refused to accept a settlement offer in this case.

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

Gerald Jiranek testified on behalf of the claimant in these proceedings. This individual has worked on claimant's acreage at various times over the past two years. He indicates that he does all of the heavy lifting for the claimant in conjunction with the management of this property. The balance of this witness' testimony has been reviewed and considered in the final disposition of this case.

James Lee Raid, a former co-employee of claimant's at Orba Johnson testified on his behalf. This individual began working with claimant in May of 1980. He confirms that claimant often complained of back discomfort. He further states that claimant had difficulty getting into and out of a desk chair. On cross-examination this witness concedes that he did not know what the claimant's job performance was prior to the date of injury in question.

Nancy Sue Easter, the claimant's spouse of 14 years, testified on his behalf. She indicates that there are activities, particularly around the house, that claimant did prior to his injury which he does not do now. On cross-examination she conceded that there are physical activities which the claimant performs in conjunction with the operation of his acreage.

William Turley, the general superintendent of Orba Johnson testified on their behalf. This gentleman was claimant's immediate supervisor in late 1980. He indicates that he would see and/or speak with the claimant on a daily basis. He confirms that Mr. Easter supervised four other employees during his tenure with this defendant. Defendants' exhibit 2 is a position description for the job facility supervisor which claimant held. Defendants' exhibit 3 is a compilation of the physical requirements of the position of facility supervisor. This witness indicates that claimant never indicated that he was unable to perform the physical activities associated with this position.

This witness indicates that claimant was terminated in April of 1982 for poor job performance and poor attitude. According to this witness, Mr. Easter had a difficult time working with people generally and specifically people under his direct supervision. This inability entered into the decision to terminate him. Mr. Turley denies that claimant's injury had any bearing on the decision to terminate. The balance of this witness' testimony has been reviewed and considered in the final disposition of this case.

Claimant was recalled to the stand to testify on rebuttal. Claimant denies that he was terminated for poor job performance. He testified to the procedures the company followed when preparing to terminate an employee. He is of the opinion that the employer engaged in a certain amount of deception in dealing with their employees generally. On cross-examination the claimant denied that he was a disgruntled employee. The balance of this witness' rebuttal testimony has been reviewed and considered in the final disposition of this case.

In a physician's first report dated May 12, 1980, Dr. Williams notes under the diagnosis portion of the form "Acute distortion of lumbar spine and pelvis accomanpanied [sic] by sciatic radiculitis". He indicates that there will be no permanent disability.

Dr. Williams notes on April 30, 1981 the claimant is making satisfactory progress. Again no permanent disability is anticipated.

Martin Carrillo, M.D., reports that he examined claimant on April 23, 1981 for complaints in the "Dorsal Spine Region". An x-ray was taken and the dorsal spine was reported as normal. This physician suggested that claimant return for x-rays of the lumbar spine. Claimant did not return to the physician for these additional studies.

Paul W. Saxton, D.O., states in a report prepared in early 1982 that claimant has a functional impairment of 15 percent. He recommends that further osteopathic manipulations be undertaken.

Koert R. Smith, M.D., an orthopedic specialist, indicates in a report of June 7, 1982 that claimant has sustained a permanent impairment of 10 percent to the body as a whole.

Mr. Marc J. Williams, D.C., reports in a letter dated August 31, 1982 that in his opinion the claimant has an impairment rating of 25 percent of the whole man. This rating appears to be based on an evaluation of the complete spine. The report is silent concerning the existence of a causal relationship between the injury described by claimant and the impairment rating provided by this physician.

Koert R. Smith, M.D., testified by deposition in these proceedings. He specializes in the area of orthopedic surgery. Again, Dr. Smith reiterates his opinion that claimant has sustained a permanent functional impairment of 10 percent of the body as a whole as a consequence of the work incident. The balance of Dr. Smith's testimony has been reviewed and considered by the undersigned in the final disposition of this case.

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 9, 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).

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

It is undisputed that on the date of injury claimant was an employee of Orba Johnson Transshipment Company. The employer and insurance carrier filed a memorandum of agreement in this proceeding. By that unilateral act, they admit that the claimant sustained a personal injury which both arose out of and in the course of his employment relationship with them.

Based on a review of the record, substantial reliance will be placed on the testimony of Dr. Koert Smith with respect to the medical issues involved herein. This is primarily due to the fact that this physician possesses a specialty in the area of orthopedic surgery. Additionally, his testimony is direct and concise on the issue of medical causation. Dr. Williams' rating of impairment is to the entire spine while claimant testifies only to an upper back injury. Dr. Smith appears to be better qualified than Dr. Saxton.

Dr. Smith indicates that the claimant has a permanent functional impairment of 10 percent to the body as a whole. According to this physician there exists a causal relationship between the work injury and this impairment.

The record is clear that the claimant has received several promotions post-injury. The facts of this case indicate that his salary has increased almost $7,000 since the date of injury. Based on this palpable increase in pay the claimant is, in the opinion of the undersigned, hard pressed to argue that he has somehow sustained a diminution in his earning capacity as a consequence of the injury in question.

Mr. Easter intimates that he was terminated from his employment because of his refusal to settle this worker's compensation case.

A thorough review of the record leaves the undersigned to believe that he was not terminated for this reason. Based upon the testimony in the record the undersigned is of the opinion that claimant was terminated as Mr. Turley indicated for poor job performance and a poor attitude.

Based upon the record as a whole and taking into consideration all of the industrial disability considerations it is the opinion of the undersigned that the claimant has not sustained his burden of proof and has not established an entitlement to compensation benefits over and above the amounts previously paid.

THEREFORE, after having seen and heard the witnesses in open hearing and after taking into account all of the credible evidence contained in this record, the following findings of fact are made:

1. That this agency has jurisdiction of the persons and the subject matter.

2. That on March 9, 1980 the claimant was an employee of the defendant.

3. That on March 9, 1980 claimant sustained a personal injury which arose out of and in the course of his employment.

4. That the claimant continued to work post-injury.

5. That claimant received consecutive raises in salary in April 1980, October 1980, January 1981 and January 1982.

6. That the total raises exceeded $6,000.

7. That in April of 1982 claimant was terminated from his employment at Orba Johnson Transshipment Company because of poor job performance and a poor attitude.

8. That the claimant is 38 years of age.

9. That the claimant has extensive supervisory experience.

10. That the claimant has sustained a permanent functional impairment of 10 percent of the body as a whole as a consequence of this work incident.

11. That the claimant has sustained an industrial disability of 10 percent of the body as a whole as a consequence of this work injury.

12. That the claimant has failed to sustain his burden of proof and has not established an industrial disability greater than the 10 percent for which he has already been compensated.

THEREFORE, IT IS ORDERED that the claimant shall take nothing further from these proceedings.

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

Signed and filed this 16th day of January, 1984.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RON G. ELLIS	:	
	:	
Claimant,	:	
	:	FILE NO. 747523
vs.	:	
	:	A R B I T R A T I O N
JOHN SNYDER TRUCKING, INC.,	:	
	:	D E C I S I O N
Employer,	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Ron G. Ellis, against his alleged employer, John Snyder Truck, Inc., to recover benefits under the Iowa Workers' Compensation Act as a result of an injury allegedly sustained October 13, 1983.

This case was heard before the undersigned deputy industrial commssioner at the juvenile court facility in Cedar Rapids, Iowa, March 13, 1984.

A review of the industrial commissioner's file does not indicate that a first report of injury has been filed.

The record in this matter consists of the testimony of claimant, Ron G. Ellis and of John Snyder; of claimant's exhibit A and; of Defendant's exhibits 1 through 3.

ISSUE

The issue to be resolved in this decision is whether an employee-employer relationship exists between the claimant and the defendant. Defendant asserts by way of affirmative defense that claimant was an independent contractor.

REVIEW OF THE EVIDENCE

Claimant, Ron G. Ellis, testified in his own behalf. Claimant testified that he is a high school graduate who has also completed a six week truck-driving course offered through Kirkwood Community College in Cedar Rapids, Iowa. Claimant stated the college referred him to Mr. John Snyder, President of John Snyder Trucking, Inc., regarding a trucking job. Claimant contacted Mr. Snyder by phone October 9, 1983 and then at his home October 10, 1983. Mr. Snyder apparently told claimant all available jobs were skid loads hauling beer from Fort Dodge, Iowa to Milwaukee, Wisconsin. Claimant began work by riding a "round" with Mr. Snyder. A round consists of the trip to Milwaukee back to Fort Dodge and then apparently back to Mr. Snyder's farm. Mr. Snyder drove this first round, claimant then drove a second round. John Snyder Trucking, Inc., was painted on the truck claimant drove, and claimant understood Mr. Snyder owned both the trucking firm and the farm.

Claimant stated he did not understand the rounds to be set. He indicated Mr. Snyder told him meat hauling rounds might also be available and that claimant would be expected to run these as well.

Claimant ran his first solo round October 11 and 12, 1983. Claimant explained that Mr. Snyder filled out blank, bank checking drafts for those service stations at which claimant was to refuel. Mr. Snyder also designated the route claimant was to follow. Claimant was instructed not to drive through Dubuque because of potential problems negotiating the big hill there. The truck broke down on this first solo round. Claimant called Mr. Snyder who directed claimant to a service station and then to a repair station. Claimant paid for the repairs with one of the checks Mr. Snyder had previously prepared.

Claimant met with Mr. Snyder the following morning near Waterloo. Mr. Snyder told claimant he had a meat load which he wanted claimant to haul. Claimant had had no experience or training in meat hauling. Mr. Snyder instructed claimant to pick up the meat from the cold storage plant in Fort Dodge and deliver it to the Carnation Company in Jefferson, Wisconsin. Mr. Snyder also instructed claimant to avoid weigh stations since the firm was not authorized to haul in Wisconsin and to tell Carnation personnel that the truck was owned by Fort Dodge Cold Storage since a John Snyder truck would not be unloaded.

Claimant delivered the meat. He injured himself while unloading the meat. Claimant reported his injury as a snap in the lower back with lots of pain. Claimant called Mr. Snyder. His wife answered. Mr. Snyder then called claimant back and instructed him to lie down until he felt better and then to continue on to pick up beer in Milwaukee. Claimant apparently did so. Claimant reports he arrived back at Mr. Snyder's farm early Saturday morning and found no one awake. Claimant went to his own home and then visited a doctor.

After visiting his doctor, claimant asked Mr. Snyder whether the firm carried workers' compensation insurance; Mr. Snyder told claimant it did not. Claimant reported Mr. Snyder stated the firm would pay claimant's first medical bills and give claimant a $500 loan at 12 percent interest if claimant would execute an agreement releasing the firm from liability for his injury. Claimant apparently refused. Claimant later telephoned Mr. Snyder and asked him to sign forms activating claimant's personal loan disability insurance as claimant's employer. Mr. Snyder refused; stated claimant was an independent contractor; and hung up.

Claimant reported he had no written employment contract with Mr. Snyder or the firm but rather an oral understanding that claimant would receive 20 percent of the return from each load. Claimant explained that he understood 20 percent return to be a commission such as he would receive in a sales job. Claimant was paid on a weekly basis with each check being received the following weekend.

On cross examination, claimant stated he understood he could not select which loads he would haul but rather was to haul what his employer instructed. He stated he understood he would receive a fixed percentage of load receipts once a written contract was drawn and that he was to receive $125 per round until then. Claimant admitted he was told of defendant's change in its business arrangements; he denied being told all employees would become independent contractors. Claimant agreed that taxes were not withheld from his checks; he stated he was paid on a straight commission basis. It was established that claimant hired a second truck driver to unload the truck following claimant's injury. Claimant states either Mr. Snyder or the firm paid this individual.

John G. Snyder next testified. Mr. Snyder testified that John Snyder Trucking, Inc., is a corporation licensed to do business in Iowa; that its corporate papers are filed in Buchanan County; that the witness is the corporation's registered agent and its president and; that the witness' wife is the corporation's vice president, secretary and treasurer. The witness stated the firm primarily hauls beer but does not have a hauling contract with any particular beer company. He reported that the firm has an Interstate Commerce Commission permit to haul beer. The firm does not have a meat hauling permit. It was established that the state of Iowa requires such of meat haulers.

The witness stated the firm owns two trucks, each of which has the firm name designated on its side.

Mr. Snyder explained the firm was changing the nature of its operation at the time claimant was hired and that after October 1, 1983 all its drivers were to be independent contractors with individual responsibility for taxes and medical and workers' compensation insurance. The witness stated a truck lease back purchase agreement was being drawn up at the time claimant began work. He testified such agreement would set forth the responsibiliti of both parties under the contemplated new arrangement. The witness admitted claimant had not seen, read, nor signed such contract as of the injury date. Mr. Snyder stated the firm paid road taxes assessed on each truck and liability insurance required for each truck. He stated truck maintenance was the joint responsibility of the operator and the firm.

The witness stated he understood claimant paid for the unloading of the meat following claimant's injury. The witness

admitted he and claimant discussed claimant's work relationship with the firm after claimant's injury. Defendant's objection to this testimony is overruled.

When questioned by defense counsel, the witness stated he had sought legal advice as to what matters to discuss with potential independent contractors and had discussed such matters with claimant. Mr. Snyder stated claimant had orally contracted as an independent contractor and not as a firm employee. Claimant's objection to testimony regarding the terms of the written contract is overruled. It was established that that contract by its terms made each contractor responsible for his own equipment, tools, bedding, routes, and assistants; it was also established that the witness had not reviewed this contract before discussing the firm work agreement with claimant. The witness stated his belief that defendant's exhibits 1 through 3 evidence the oral contract between claimant and the firm. Claimant's objections to the exhibits are overruled.

The witness explained that Interstate Commerce Commission beer hauling permits are difficult to obtain and, therefore, independent contractors often operate under the contracting firm's permit. The witness further explained that the service and fuel checks issued claimant were an advance on claimant's income and that those amounts would then be deducted from claimant's percentage. The witness stated his belief that claimant could elect whether to haul a specified load and that claimant elected to work the week following his injury. The witness denied claimant would have been able to drive the firm's second truck had the first truck been disabled. He stated the second truck had been "sold to someone else." The witness admitted that had claimant not agreed to deliver the meat round, the witness would likely have used the first truck to haul the load himself. The witness denied ordering claimant to pick up beer in Milwaukee following his injury.

Claimant's exhibit A is the letter of Sharon L. Staude of Carnation to claimant's counsel with attached bill of lading signed by claimant. The bill of lading states claimant delivered frozen beef lobe lungs originating in Fort Dodge, Iowa to Carnation's Jefferson, Wisconsin plant October 13, 1983.

Defendant's exhibit 1 is an undated, unexecuted independent contractor agreement with no designated carrier or contractor. Defendant's exhibit 2 is an undated, unexecuted equipment purchase agreement with no designated debtor or security [sic] party or lender. Defendant's exhibit 3 is an undated, unexecuted addendum to independent contractors [sic] operating agreement with no designated contractor or carrier. Defendant's exhibits 1, 2 and 3 were fully reviewed in the disposition of this case.

APPLICABLE LAW AND ANALYSIS

Iowa Code sections 85.61(2) and section 85.61(3)(6):

> 2. "Worker" or "employee" means a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer, every executive officer elected or appointed and empowered under and in accordance with the charter and bylaws 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.
>
> "Worker" or "employee" includes an inmate as defined in section 85.59.
>
> 3. The following persons shall not be deemed "workers" or "employees":
>
> 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, 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 Caterpillar 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 285 (Iowa 1971). (Emphasis added).

Claimant has established a prima facie case for an employer-employee relationship. Defendant had the right to employ claimant at will; he had the right to discharge claimant or terminate the relationship, a fact evidenced by its president's summary dismissal of claimant following his injury. Defendant was responsible for paying claimant a fixed percentage from each load. Defendant reserved the right to control the work claimant did for the firm. Its president exercised this right routinely. He instructed claimant as to which loads to haul, which routes to take, and which service and refueling stations to use. The employer was identified as the authority for whose benefit the work was performed. The firm's name was on the truck claimant drove. The firm's president negotiated the load hauling contracts. The firm's president drafted and executed on the firm's behalf the blank checks claimant was to use for required goods and services. The intent of the parties as gleamed from the evidence was that an employer-employee relationship exist.

Where a claimant has established a prima facie case for the existence of an employer-employee relationship, the defendant may assert the affirmative defense that claimant was an independent contractor. The test for meeting the burden or proof on this affirmative defense derives from Mallinger v. Webster City Oil Co., 211 Iowa 847, 851, 234 N.W. 254 (1981). There, 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, 67 N.W.2d 549, 553 (1955).

Defendant has failed to show that claimant was an independent contractor. Defendant alleges an oral contract with claimant establishing claimant's independent contractor status. The terms of such oral contract were supposedly identical to those of an unexecuted written contract establishing such status. It is not necessary here to decide whether such written contract would have established independent contractor status for claimant had that contract been executed. It is apparent that the alleged oral agreement did not establish that status. Claimant's business was not of an independent nature; claimant was not obligated to furnish his own tools, supplies or materials. Claimant apparently could not employ assistants or even contract for truck repair services without defendant's direction and acquiescence. Claimant had little control over the progress of the work. He was obliged to haul those loads defendant's agent directed and follow those routes defendant's agent outlined. Claimant did not have the right to refuse to haul the loads defendant directed. Finally, claimant's work was part of-indeed, the substance of defendant's regular business. The fact, even without more, strongly suggests claimant was defendant's employee and not an independent contractor. When this fact is coupled with the failure of the Mallinger tests previously discussed, it is obvious defendant has not established claimant was an independent contractor.

FINDINGS OF FACT

WHEREFORE, it is found:

Claimant commenced work for defendant October 10, 1983. Claimant operated a truck owned by defendant and with defendant's firm name imprinted on it.

Claimant hauled beer rounds for defendant from Fort Dodge to Milwaukee, Wisconsin.

Claimant operated under defendant's beer hauling permit.

Claimant drove routes designated by defendant's agent, claimant could only contract for truck repair or employ assistants at defendant's direction.

Claimant hauled other loads as directed by defendant.

Claimant did not have the right to refuse to haul a load.

Claimant was injured October 13, 1983 while hauling beef lobe lungs at defendant's direction.

Defendant executed bank check drafts with which claimant purchased fuel and services for the truck which he operated.

Defendant could terminate claimant at will and did terminate claimant following claimant's work injury.

Claimant was not obligated to provide his own tools, supplies, or materials.

The work of truck load hauling is the substance of defendant's regular business.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

Claimant has established that he was an employee of defendant October 13, 1983.

Claimant was not an independent contractor.

ORDER

THEREFORE, it is ordered:

This case is returned to the docket for the purpose of issuance of analysis of status/certificate of readiness for prehearing conference relative to the remaining matters at issue.

Pursuant to Industrial Commissioner Rule 500-4.2, this order is interlocutory for purposes of appeal.

Defendant pay costs of this proceeding.

Signed and filed this ____ day of June, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RUBY A. ELSBURY,	:	
Claimant,	:	File No. 632890
vs.	:	A P P E A L
WILSON FOODS CORPORATION,	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

Defendant appeals from an order overruling its motion for summary judgment.

Rule 4.2 of the industrial commissioner provides, in part, that "[i]f the order on the separate issue does not dispose of the whole case, it shall be deemed interlocutory for purposes of appeal." 500 I.A.C. section 4.2(86). See Frost v. S.S. Kresge Co., 299 N.W.2d 646, 647 (Iowa 1980).

The general rule regarding appeals which has been propounded by the Iowa Supreme Court on many occasions is found in Crowe v. DeSoto Consolidated School District, 246 Iowa 38, 66 N.W.2d 859 (1954). The court pointed out that an appeal is proper only after a final judgment has been granted and held that "[a] final judgment or decision is one that finally adjudicates the rights of the parties, and it must put it beyond the power of the court which made it to place the parties in their original positions." Id. at 40. In a 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.

Furthermore, the relief requested by defendant is not available to them. Even if there were an unreasonable refusal to submit to an examination or treatment would not justify dismissal of claimant's petition.

Defendant contends claimant's refusal to submit to "treatment" by Michael Taylor, M.D., in Des Moines is unreasonable. this tribunal must look at the whole record in this case in the light most favorable to the claimant. Defendant has the burden to show the absence of a fact issue. Summary judgment is not appropriate if reasonable minds may draw different inferences from them. Tasco, Inc. v. Winkel, 281 N.W.2d 280, 282.

Whether or not claimant's refusal to submit to treatment or examination by Dr. Taylor in Des Moines is unreasonable is a fact issue about which there is genuine and serious dispute and which cannot be determined on a motion for summary judgment.

THEREFORE, defendant's appeal is hereby dismissed.

Signed and filed this 22nd day of December, 1983.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LAWRENCE A. ENOS,	:	
Claimant,	:	File No. 456496
vs.	:	A P P E A L
JOHN DEERE DES MOINES WORKS,	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendants.	:	

By order of the industrial commissioner filed May 12, 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. Both sides appeal the decision and rehearing decision of the hearing deputy.

The record in this case consists of the transcript; claimant's exhibits 1, 2, 3 and 4; and defendant's exhibit A, all of which evidence was considered in reaching this final agency decision.

The result of this appeal decision will modify the rehearing decision of the hearing deputy and reinstate the result of the review-reopening decision filed November 24, 1982.

REVIEW OF THE ACTION

Claimant was hurt at work on August 11, 1976 and defendant filed a memorandum of agreement on August 23, 1976. (The parties stipulated that the permanent partial disability rate in the event of an award was $160.) Claimant filed a review-reopening petition on March 8, 1982, and a hearing was held on October 18, 1982 followed by a decision on November 24, 1982 which denied recovery beyond a ten percent permanent partial disability which defendant had already paid to claimant. The rehearing decision was issued on April 5, 1983 and resulted in the same denial of benefits but also held there was no causal relationship between the injury and any permanent partial impairment. Both sides then appealed.

REVIEW OF THE EVIDENCE

The hearing deputy's review-reopening decision contains a good review of the entire record. For purposes of this appeal decision, the following summary of the record is sufficient.

Basically, claimant had two back injuries, one in July 1973, for which he had surgery to his low back in 1974 and an injury in August 1976, for which he had surgery to his low back in 1978 and subsequent surgery to remove scar tissue. It is emphasized that claimant seeks compensation only as a result of the 1976 injury.

The treating physician through most of the case was Sidney H. Robinow, M.D., a qualified orthopedic surgeon, who first saw claimant on November 23, 1973. Claimant's back condition did not improve, so Dr. Robinow performed a laminectomy at L4-5 on the left. After a slow recovery, on November 20, 1975, Dr. Robinow rated claimant's permanent partial impairment at 10 percent of the body as a whole.

Dr. Robinow also treated claimant for the 1976 injury and, in May 1978, performed a lumbar laminectomy at the same level, L4-5, this time on the right. In February 1979, Dr. Robinow performed the surgery to remove the scar tissue.

After Dr. Robinow's death, Marshall Flapan, M.D., a qualified orthopedic surgeon, took over the case. As of July 29, 1981, Dr. Flapan rated claimant's permanent partial impairment at 20% "as a result of the numerous surgeries." (Exhibit 1)

Further, Dr. Flapan's notes show that on February 12, 1981, claimant was able to work full-time as a forklift driver; on April 17, 1981 claimant was "coming along well"; on July 29, 1981, claimant was "coming along fairly well."

Claimant was laid off in September 1982. He had worked as a material handler and industrial truck driver before the layoff. Three supervisors testified that he did his work well and without incident.

ISSUES

The hearing deputy concluded in her rehearing decision that, although claimant had been injured at work, that evidence did not support a finding that claimant had any industrial disability resulting from the 1976 injury. In the original review-reopening decision, the hearing deputy had assessed costs to defendant. She confirmed that ruling in the rehearing decision.

Defendants state the issues:

1. Whether there is a causal relationship between the injury of August 11, 1976, and the claimant's present disability.

2. The extent of industrial disability resulting from the August 11, 1976, injury.

3. Whether it is an abuse of discretion for the Industrial Commissioner to tax costs to a wholly successful party.

Claimant states the issues:

1. Whether there is a causal relationship between the injury of August 11, 1976, and the claimant's present diability.

2. The extent of industrial disability resulting from the August 11, 1976, injury.

Thus, the issues are causal relationship, extent of industrial disability, and who should be assessed costs.

APPLICABLE LAW

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). Direct evidence is not always essential to establish the permanency or future effects of an injury, and they may in some cases be inferred from the nature of the injury alone. Kaltenheuser v. Sesker, 255 Iowa 110, 121 N.W.2d 672 (1963) Claimant does not have to prove that the 1976 injury was the sole proximate cause of his present disability. Langford v. Kellar Excavating & Grading Co., 191 N.W.2d 667 (Iowa 1971) "The agency's experience, technical competence, and specialized knowledge may be ultilized in the evaluation of the evidence." Section 17A.14(5)

Claimant has the burden of proof to the extent of his permanent disability. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963) Industrial disability is the reduction of earning capacity, 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. Id., at 1112, 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).

Section 86.40 states that "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." The last sentence of Industrial Commissioner Rule 500-4.33 states that "[c]osts are to be assessed at the discretion of the deputy commissioner or industrial commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery." Section 625.1, The Code, states that "[c]osts shall be recovered by the successful against the losing party." With respect to the question of discretion, defendant cites inter alia State v. Warner, 229 N.W.2d 776, where at p. 783 the court states:

> The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.

ANALYSIS

The long and short of the facts show that claimant's 1973 injury and subsequent surgery resulted in a 10 percent permanent partial impairment and that, after his 1976 injury and two surgeries, he had a 20 percent permanent partial impairment, albeit that the impairment ratings were by different physicians. One's experience in these cases, especially those where scarring problems result, suggests that a permanent partial impairment would have resulted from the 1976 injury and subsequent surgeries. It is sufficient to say that impairment results from the 1976 injury and surgery and it is not necessary to assign a certain percentage number to the impairment. See Yeager v. Firestone Tire and Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961) to the effect that direct evidence of a percentage of an impairment is not essential to a determination of the disability. One concludes, therefore, that a permanent partial impairment did result and that such impairment in turn was a part of some additional industrial disability.

One agrees with the original findings and conclusions of the hearing deputy with respect to the extent of industrial disability, that being 10 percent, and adopts her reasoning and result.

The above cited law shows that the method of assessment of costs in workers' compensation cases differs from the method in civil cases. A comparison of the two statutes would invite one to emphasize that difference, and not to reason that one should follow the civil statute. Section 86.40 (and the industrial commissioner rule) being different then suggests that the hearing deputy and the agency should examine each case and exercise discretion, not limiting that discretion to a bare view of who won the case. Here, one agrees with the hearing deputy to the effect that the discretion used in taxing costs to defendant is within the spirit of the workers' compensation law.

Finally, one would point out that claimant does not exactly lose the case: defendant disputed a causal relationship between the injury and any permanent disability, and claimant prevailed on that point, thus preserving a right to reopen within three years of the last payment of compensation.

The following findings of fact, conclusions of law and order are those of the hearing deputy in the review-reopening decision except that finding of fact #7 is slightly modified and #8 is that of the undersigned.

FINDINGS OF FACT

1. That claimant was injured on August 11, 1976 as he lifted a box of hardware which had fallen from a tractor train he was operating at defendant's place of business.

2. That claimant had surgery in May 1978 to remove a large requestered segment.

3. That subsequent to surgery, claimant developed a disc space infection.

4. That claimant was hospitalized for alcohol abuse in the fall of 1978.

5. That claimant had additional surgery in January 1979.

6. That claimant's care eventually was transferred to Dr. Slapan.

7. That claimant now carries a rating of twenty percent permanet partial impairment of the body as a whole related to his surgeries.

8. That a portion of claimant's permanent partial impairment of twenty percent of the body as a whole was caused by the injury of August 11, 1976.

9. That claimant was paid medical expenses, healing period and ten percent permanent partial disability as a result of his August 11, 1976 injury.

10. That claimant, a high school graduate, is thirty-seven years of age.

11. That claimant's work experience has been in various jobs for defendant employer.

12. That claimant returned to work in December 1980.

13. That claimant prefers work as a forklift driver.

14. That claimant is currently on lay-off status and intends to remain in that status until there is a job available he can handle.

15. That claimant has chosen hourly work.

16. That claimant's supervisors since his return to work have observed no back problems and have heard no back complaints.

17. That claimant continues to have pain in his lower back, left leg and across his hips.

18. That claimant has repeatedly been advised to lose weight.

19. That claimant's present lifting restriction is forty-five pounds.

20. That claimant had back complaints in 1973.

21. That claimant had a degenerated intervertebral disc removed from L4, 5 on the left.

22. That claimant returned to light duty with a fifteen pound weight restriction.

23. That on November 20, 1975 claimant was given an impairment rating of ten percent of the body as a whole.

CONCLUSIONS OF LAW

WHEREFORE, IT IS CONCLUDED:

That there is a causal connection between claimant's injury of August 11, 1976 and his present disability.

That claimant is entitled to no additional permanent partial disability beyond that which has already been paid as a result of his injury of August 11, 1976.

ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing further from these proceedings.

That defendant pay costs pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed at Des Moines, Iowa this 21st day of July, 1983.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

THOMAS G. FARLEY,	:	
Claimant,	:	File No. 698813
vs.	:	D E C I S I O N
ROBERTS CORP.,	:	O N
Employer,	:	85.27 B E N E F I T S
and	:	
AMERICAN MUTUAL INSURANCE,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding brought by Thomas G. Farley, claimant, against Roberts Corp., employer, and American Mutual Insurance, insurance carrier, defendants, to recover benefits under Iowa Code section 85.27, allegedly relating to an injury on March 5, 1982. It came on for hearing on August 11, 1983 at the Bicentennial Building in Davenport, Iowa. It was considered fully submitted at the time.

A first report of injury was received by the industrial commissioner on March 26, 1982. A Form 2 received March 21, 1983 shows a payment of 52 weeks and 5 days temporary total benefits, and $3,768.63 in medical benefits.

The record in this matter consists of the testimony of claimant, Todd Wendland, Robin Little, and Deborah Farley; defendants' exhibit 1, a letter from J. Larry Troxell, D.C., dated March 6, 1982; defendants' exhibit 2, a letter from Herbert R. Wood, D.C., dated March 29, 1982; defendants' exhibit 3, a letter from Mark Odell, M.D., dated May 24, 1982; defendants' exhibit 4, letter from Richard L. Kreiter, M.D., with accompanying notes dated May 24, 1982; defendants' exhibit 5, a letter from Dr. Kreiter with accompanying notes, dated June 14, 1982; defendants' exhibit 6, a letter from William Catalona, M.D., dated August 6, 1982; defendants' exhibit 7, a letter from Dr. Catalona with accompanying notes, dated August 27, 1982; defendants' exhibit 8, a letter from Patrick G. Campbell, M.D., dated August 31, 1982; defendants' exhibit 9, undated notes from the University of Iowa Hospitals and Clinics; defendants' exhibit 10, a letter from Dr. Catalona, dated December 16, 1982; defendants' exhibit 11, a letter from Dr. Kreiter with accompanying notes dated January 19, 1983; and defendants' exhibit 12, a letter from Dr. Kreiter dated April 13, 1983.

ISSUES

The issues in this matter are whether further care for claimant is necessary, and if further care is necessary who should be authorized to provide that care.

STATEMENT OF THE CASE

Thirty-five year old married claimant who has an eleventh grade education testified that he became part of the carpenters' union in 1968 and the millwright union in 1972. He said that he drew unemployment for six weeks in the year of his injury.

Claimant recalled that at the time of his injury he was working on a powerhouse with hours from 8:00 a.m. to a little past 4:00 p.m. He was hurt early in the morning and placed on light duty working with an apprentice. After the 2:00 p.m. break he went to the nurse's station. Shortly after that he was advised there would be a layoff.

Claimant reported being told that he could see a doctor of his choice and started seeing Dr. Troxell. Although he thought Dr. Troxell was doing a fine job, he saw Dr. Karr, an assistant of Dr. Troxell's when Dr. Troxell went out of town. Claimant did not remember Dr. Troxell mentioning that he should be off work for four weeks. Because he wanted only one doctor to treat him, he changed to Dr. Wood, another chiropractor.

After he had seen Dr. Wood, he received a letter from the insurance carrier instructing him to see Dr. Odell, a general practitioner, who sent him to Dr. Kreiter, who at some point referred him to Dr. Campbell, a psychiatrist. Claimant stated that he told Dr. Odell he wished a physician closer to where he lived. He denied suggesting Dr. Kreiter, himself.

Claimant said that he was next instructed by the insurance carrier to see Dr. Catalona, who referred him to Iowa City where an electromyography was done and TENS unit ordered. He was sent back to Dr. Catalona. Claimant said that bad August weather--rain--and a car problem kept him from keeping an initial appointment with Dr. Catalona. He understood he was to go to Iowa City and be an inpatient, but he thought there had been some mixup with papers.

In November of 1982 claimant was sent back to Dr. Kreiter with whose care he has "not really" been satisfied. Claimant expressed the feeling that Dr. Kreiter does not wish to be involved with his case. He recollected that since his CT scan the doctor's only examination is to have him turn his head and squeeze his fingers. Dr. Kreiter gave him some drug samples and prescribed Motrin as well. Claimant contended that he and the doctor have a personality conflict.

Claimant recalled being seen in the emergency room following a fall off a two step ladder and onto a sulky when his back locked as he was attempting to get oats for a horse. He went to the emergency room.

As to his present complaints, claimant asserted his back locking and producing extreme pain causing him to become paralyzed. The locking occurs without predictability and may not happen each day or may happen several times in one day. His remedy is to sit and wait for the pain to subside.

Claimant thought that Drs. Kreiter, Odell and Catalona had told him to stay off work.

He said that since his injury he has tried to find work at such things as landscaping, roofing and contracting. In addition to making his own search, he also has sought work through the union hall. He first obtained a job on July 19, 1983 putting in a monorail system. When he was unable to maintain the workload, he was laid off.

Claimant indicated his desire to be allowed to seek Dr. Daugherty, an orthopedic surgeon, who had been recommended to him by friends and by his union.

Thirty-three year old Todd Wendland, a union apprentice, testified to working with claimant on his most recent job and on other occasions. He said that he was working on the second day of the job on the monorail in an area where claimant was doing overhead welding on a scaffold. Claimant let out a yell when his back locked. After claimant was helped down, he rested fifteen to twenty minutes and was able to return to work. The witness acknowledged he was not watching claimant work but he had heard the commotion.

Regarding the work of a millwright, Wendland stated that tools are not usually carried with the exception of a striker or tape measure. Heavy lifting is assisted by a hoist. He evaluated claimant as a good worker and as one to watch to learn the trade. The witness said the job commencing on July 19, 1983 was the first work he had in this year.

Twenty-five year old Robin Little, a journeyman millwright, who worked with claimant on his most recent job and who had worked with him on other jobs from time to time, testified to an incident on that most recent job. The workers were putting up a radius turn. Claimant was cranking up a lift when his back locked and he went to his knees. Pain was visible in claimant's face. After claimant rested he came back to work, but his co-workers did the heavy tasks. On the following day, according to Little, claimant was laid off, but he did report for work that day.

The witness characterized claimant as a "good hard worker."

Twenty-eight year old Deborah Farley, who is claimant's spouse of less than one month, and who began dating him more than a year ago, said she has observed his back problem in that she has seen his back quiver and pulsate. She recalled the incident in which claimant fell as they were feeding her horse.

Medical evidence shows claimant was seen by J. Larry Troxell, D.C., who on March 6, 1982 expressed the opinion that claimant should be off work for four weeks.

On March 29, 1982 Herbert R. Wood, D.C., wrote that he was seeing claimant and that claimant should remain off work.

Mark Odell, M.D., wrote that claimant was seen in the Muscatine Health Center, on April 6, 1982 at which time he gave a history of slipping at work, sliding down a hill and landing on his back. Claimant complained of back spasms. Examination showed decreased range of motion and tenderness in the paraspinous muscles in the interscapular area. X-rays of the thoracic and cervical spine were unremarkable. Heat and bedrest were prescribed.

Claimant returned on April 16, 1982 at which time he was not improved. Physical therapy was arranged.

By April 20, 1982 claimant had some improvement, but spasm continued. Claimant told the doctor he would like to have an orthopedic consultation through an orthopedic surgeon he knew. Claimant, according to Dr. Odell's letter of May 24, 1982, arranged to see Dr. Kreiter. Dr. Odell's diagnosis was cervical thoracic strain with secondary muscle spasm. He did not anticipate long-term disability.

Richard L. Kreiter, M.D., saw claimant on May 21, 1982. He took a history in addition to a fall down an embankment of a car accident some fourteen to fifteen months prior to that in which claimant injured his neck and upper back. On examination claimant was tender in the trapezius, the mid line of the upper dorsal back and the vertebral borders of the scapulae. X-rays revealed no bony abnormalities. Dr. Kreiter's impression was contusion of the dorsal spine. He proposed commencing an active exercise program, Nalfon and Darvocet N 100. Claimant was to return in a week and it was the doctor's hope that he would be ready at that time to return to work.

On May 28, 1982 claimant was improved, but he continued to complain of mid dorsal back pain with tenderness along the vertebral border of the scapulae and in the mid dorsal area. When the doctor suggested a return to work, claimant said he would be unable to tolerate any work. Dr. Kreiter elected to send claimant to Dr. Campbell, a psychiatrist.

Patrick G. Campbell, M.D., saw claimant on June 8, 1982. Dr. Campbell wrote: "In my opinion, Mr. Farley has a condition not attributable to a mental condition that is the focus of attention and examination called malingering (DSM-III) V65.20."

William Catalona, M.D., orthopedic surgeon, wrote on August 6, 1982 that claimant did not appear for a scheduled appointment. Claimant did, however, see the doctor on August 16, 1982.

X-rays were normal. Electromyography was scheduled which showed C7 radiculopathy. Halter traction was advised. Claimant was fitted with a collar. He was to take aspirin and he was referred to Iowa City. In late August, Dr. Catalona reported claimant's claim of inability to return to work because of pain.

Dr. Catalona's letter to the insurance carrier of August 27, 1982 states: "Because of the persistence of his cervical brachial pain I advised him to seek a neuro-surgical consultation for the possibility of need of an antercervical [sic] fusion...."

When claimant was seen on September 21, 1982 he had a low back contusion which he got from a fall at home.

Dr. Catalona on October 13, 1982 recorded a hostile threatening phone call from claimant as follows: "States I told him he needed surg. on his neck & that I had ref. him to Dr. Rovin none of which is true."

When claimant was seen in Iowa City he gave a history of his back locking and of right arm numbness. Electromyography was evaluated as normal. Claimant had tenderness between his shoulder blades which was increased with some movement. There was mild decrease in sensation over the right arm. X-rays were within normal limits except for some spondylolisthesis at L5,S1. Claimant was to be followed by Dr. Catalona.

On November 19, 1982 Dr. Catalona apparently arranged at claimant's request an appointment with Dr. William Daugherty.

On December 16, 1982 Dr. Catalona wrote that claimant could return to work and expressed the opinion "that if he returned to work and would gradually increase his activity that he could return to his previous level of work. For the present, he might be restricted in overhead working or twisting and turning of his neck."

Claimant was seen by Dr. Kreiter on January 18, 1983 at which time he complained of pain at the base of the neck and between the shoulder blades without radiation. Claimant was described as tremulous on examination, but in no acute distress. Dr. Kreiter also wrote "He needs to get back to some type of gainful employment even if limited duty as soon as possible." In a letter to the insurance carrier following the examination Dr. Kreiter wrote that on physical examination claimant has "no significant disability whatsoever."

Claimant failed to appear for appointments with Dr. Kreiter on Feburary 7, 11 and 22.

APPLICABLE LAW AND ANALYSIS

The issue in this matter is 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. The employer shall also furnish reasonable and necessary crutches, artificial members and appliances but shall not be required to furnish more than one set of permanent prosthetic devices.
>
> 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.

The opinion of the California Supreme Court in Zeeb v. orkmen's Compensation Appeals Board, 62 California Reporter 3, 432 P2d 361 (1976) discusses the philosophy behind harging the employer with responsibility of providing medical are. The opinion stated 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 and 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.

This case presents a difficult dilemma described in Odie v. dustrial Commission, 431 N.E.2d 374 (Ill. 1982) wherein the inion at 376 urged cautious application of the statute re- iring services reasonably required to cure or relieve the fects of an injury "so that the industrial commission does not t itself up as the arbiter of what is proper satisfactory dical practice. On the other hand, the statute must be plied vigorously and rationally enough to prevent unnecessary dical and hospital charges."

Overall the defendants cannot be faulted in their handling this claim unless allowing claimant to choose care initially unwise. Experience has shown the importance of establishing good doctor-patient relationship from the time of injury ward. Defendants seem to have made a good faith effort to vide claimant with medical treatment. After claimant was owed to see a chiropractor the insurance carrier switched him a general practitioner. Later he arranged through that eral practitioner to see an orthopedic surgeon. Claimant was erred by that physician to a psychiatrist. Claimant then saw additional orthopedic surgeon and was sent to Iowa City for luation as well. Now it appears claimant is disillusioned h the orthopedic surgeon that he was instrumental in selecting tially.

Although claimant's most recent examination failed to over significant disability, although claimant failed to keep ointments with Dr. Kreiter, and although claimant's perception his medical treatment was sometimes different from what his tor's records show transpired, the testimony of claimant and the other lay witnesses in this matter would indicate claimant tinues to have trouble with his back. Claimant's complaints o January of 1983 have been consistent. Claimant attempted return to work, albeit work which was probably ill suited to return in that he did not follow Dr. Catalona's advice of dually increasing his activity which might have resulted in being able to work.

The record reviewed as a whole convinces this deputy industrial missioner that claimant should be provided with a treating sician other than Dr. Kreiter with whom the doctor-patient ationship seems to have broken down. However, she is unwilling allow claimant to make the selection of that physician. The tute which charges defendants with the responsibility of viding medical care also gives them the choice in selecting care. Defendants should provide to claimant a list of e physicians they are willing to authorize as treating sicians from which claimant may select one.

FINDING OF FACTS

WHEREFORE, it is found:

That claimant was injured on March 5, 1982 as he was working powerhouse.

That claimant has received temporary total and medical fits as a result of his injury.

That claimant was first allowed to see a doctor of his ce.

That claimant's first choice of physicians was a chiropractor.

That claimant was sent to Dr. Odell, a general practitioner.

That claimant arranged to see Dr. Kreiter, an orthopedic surgeon.

That claimant was referred to Dr. Campbell, a psychiatrist, by Dr. Kreiter.

That claimant was sent by the carrier to Dr. Catalona, an orthopedic surgeon who referred him to Iowa City where testing was done and a TENS unit prescribed.

That claimant's doctor-patient relationship with Dr. Kreiter has deteriorated.

That claimant experiences locking in his back.

That other persons have witnessed claimant's back locking.

That claimant was unable to work when he attempted to do so in July 1983.

That claimant would prefer to see Dr. Daugherty.

That claimant should gradually increase his activity.

That claimant's most recent physical examination uncovered "no significant disability whatsoever."

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant is in need of a physician to provide him with additional care pursuant to Iowa Code section 85.27.

ORDER

THEREFORE, IT IS ORDERED:

That defendants provide claimant with a list of three (3) authorized treating physicians from which he is to select one to provide his medical care.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 23rdday of August, 1983.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAUL A. FEGLEY,	:	
Claimant,	:	File No. 632442
vs.	:	
CROUSE CARTAGE COMPANY,	:	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 is a proceeding in review-reopening brought by Paul A. Fegley, claimant, against Crouse Cartage Company, employer, and Liberty Mutual Insurance Company, insurance carrier, defendants, to recover additional benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of his employment on March 24, 1980. It came on for hearing on December 29, 1983 at the office of the industrial commissioner in Des Moines, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file shows a first report of injury received April 7, 1980. A memorandum of agreement was filed May 1, 1980.

The parties stipulated to a rate in the event of an award of $206.64.

The record in this matter consists of the testimony of the claimant, Lucille Fegley, Aldo Battani and Hans Nissen; claimant's exhibit 1, a series of medical reports; claimant's exhibit 2, reports from Peter D. Wirtz, M.D.; claimant's exhibit 3, office notes from G. Charles Roland, M.D., and Dr. Wirtz; claimant's exhibit 4, the deposition of Jerome G. Bashara, M.D.; defendants' exhibit A, various medical documents; and defendants' exhibit B, a statement to the insurance carrier by claimant. Defendants submitted a brief.

ISSUES

The issues in this matter are whether or not there is a causal relationship between claimant's injury and any disability he now may suffer and whether or not claimant is entitled to further permanent partial disability benefits.

STATEMENT OF THE CASE

Sixty-four year old married claimant testified to a ninth grade education. He reported flunking a couple of grades and finding math hard. He left school when his parents could not afford the expense of educating him.

After leaving school he did farm work for three months and then participated in the civilian conservation corps for three years. His first job after he was out of the corps was as a truck driver picking up freight. He left this work for a position with better pay at which he worked until the company went bankrupt. He did servicing and tire work, including changing tires, oil and batteries and doing small repairs but no engine work. His salary when the company shut down was $8.45 per hour. Following loss of this job he drew unemployment and did minor repair work for people. From November 1978 to February 1979 he worked for the school system as a janitor and did primarily sweeping and mopping with earnings of $5.00 per hour.

On February 12, 1979 he commenced work for defendant employer. He described a typical day as follows: He spent the first half hour or so of each day checking the dock to see if there was freight that needed to be moved to another area. Typical items to be transported would be tires weighing 150 to 170 pounds, cylinder heads and crankshafts. His next hour or two would be used to sweep the shop and empty the trash. He then would spend from one to three hours running for parts using a pickup. He carried parts weighing small amounts to as much as 120 pounds from the suppliers to his truck and then from his truck to the shop. His major task particularly in the winter was to service all trucks. To do this he had to climb in and out of the semi-tractors which he fueled. He also checked under the hood for oil. He bent to check air in the tires. He changed flat and low tires using a power wrench and then in some cases pounding off the tires. He estimated that he changed ten to twelve tires each week. He did other duties as they were assigned such as sweeping and cleaning up the dock. His regular work hours were from 3:30 p.m. to 11:30 p.m. with a half hour for lunch and authorization for two fifteen minute breaks. He routinely worked a forty hour week with occasional overtime. His earnings at the time of his injury were $9.59 per hour. Claimant denied any criticism by his employer of how he did his work and any trouble with absenteeism or tardiness.

Claimant testified that prior to this injury for which he makes claim, he was in good health. He had a traumatic injury in 1972 when he fell from as he was checking on a trailer. He broke a bone in his foot and had cuts and abrasions on his face. His foot was treated for several months and gave him no further trouble. He then began to have pain in his neck, shoulder and arm down through his thumb and fingers. Dr. Wirtz performed surgery in 1975 to fuse claimant's neck. After a recuperation of five or six months he went back to the same job. He sometimes had difficulty lifting as his arm or fingers would go numb. He took no further time off and learned to live with his complaints.

Claimant also reported having high blood pressure and elevated triglycerides and cholesterol--conditions for which he was treated by Dr. Salama. He claimed no loss of employment because of any of these conditions.

Claimant recalled the circumstances involving his work-related incidents as follows: On March 3, 1980 he was changing a tire. He was going to get a jack. He slipped on antifreeze. His right leg twisted out from under him. He fell backwards. He had pain in the back of his knee which felt like a pulled muscle. His knee swelled. He wrapped it, and otherwise treated it at home. On March 23, 1980 he went to go up the steps on a tractor. He felt pain in his knee and had to crawl down. He was sent to the company doctor, Dr. Foley, who x-rayed him and then referred him to Dr. Roland who hospitalized him and did an arthroscopy. He continued to have swelling and aching and to be unable to be on his leg. He returned to work in June of 1980. He did some light duty work as the janitor on the dock doing sweeping, emptying trash barrels, cleaning up restrooms and running errands. His right hip commenced to bother him and was painful particularly with walking. He mentioned his hip to the doctor who took x-rays, but provided no treatment. He was off work from November 5, 1980 until December 3, 1980 and then off from February 5, 1981 at which time another arthroscopy was done. Aching and swelling persisted without improvement. He began to have back complaints. He spoke to Wirtz about them, but nothing was done. In March of 1982 he had a third procedure to remove cartilage. When Dr. Roland left town, Dr. Wirtz took over claimant's care and eventually released him in December of 1983 with no restrictions on work he could perform.

Currently claimant complains of hurting in his right hip, leg and knee, occasional pain in his left hip, difficulty getting up and down, and trouble walking after as little as a half block. He has developed a technique of rolling up on his left side to enable him to get up and down. His sleeping is disturbed as often as twelve times a month. He said that he did swimming for awhile until the pool grew too crowded and that he tries to walk daily. He also did some weight lifting with his upper body and with a weighted shoe. He acknowledged that he has been advised to lose weight. His weight which was 215 at the time of his injury is now around 255. He contended that he is still trying to lose weight, but that he is unable to get proper exercise. He takes medication for his blood pressure and elevated triglycerides and two Extra Strength Tylenol at night. He has not seen a doctor for treatment since he was last seen by Dr. Wirtz.

Claimant testified that he could not do his old job as he would be unable to stand on his feet. He spends more of his time around the house just sitting. He no longer does painting, and mowing takes him a half day.

He retired in 1981 because he understood he would not be able to return to work. Initially, he got social security payments of $500 for himself and $450 for dependents. He now gets $500 and $233 for his child under 18. He also has a lifetime pension of $300 from the machinists union.

Claimant admitted that he never made back complaints to Dr. Foley or Dr. Roland. He asserted that he told Dr. Wirtz about his back in late 1982 at which time Dr. Wirtz took x-rays but did not treat him. He did not tell a representative of the insurance company of any back problems, but he said that he did not have back complaints at the time of the interview. Claimant agreed that he has been told that he has arthritis in his hips. At the time of answering interrogatories on March 17, 1982 claimant responded, "pain on inside right knee" in answer to a question regarding complaints.

Claimant reported being sent to Dr. Bashara by his attorney. He said that Dr. Bashara's mention of pain developing in his back a year after the fall was incorrect. According to claimant, Dr. Bashara discussed neither stenosis nor surgery with him. He did not tell the doctor of his 1972 injury or his 1975 surgery; however, Dr. Bashara had his answers to interrogatories.

Lucille Fegley, claimant's spouse of 19 years, testified that before his injury claimant did things around the house such as repairs, yardwork, painting and cooking. She said that she was first aware of claimant's back problem at the time of his last surgery. She observed that claimant cannot stand on his feet too long, that he does no climbing, that he is forgetful at the grocery store, that he no longer delivers the children all the places they need to go, that he walks "hobbly" and slow, that he has trouble getting up and down, that he rolls and tosses at night, and that he is up to the bathroom more frequently.

Aldo Battani, a friend of claimant's and a shop foreman who has worked for defendant employer for five and one-half years, testified to knowing claimant. He learned of claimant's injury "through the boys." He characterized claimant as a good dependable worker. Although he had not had a detailed discussion with claimant of his injury, he did not remember any back complaints.

Hans Nissen, a mechanic for defendant employer for five and one-half years, testified to working with and to helping claimant on a daily basis. He saw claimant get up from his fall. He did not think claimant was the kind to complain, but he knew of no back complaints being made by claimant. He, too, denied a specific discussion of the injury.

Notes from Dr. Roland reflect claimant was seen on March 27, 1980 at which time he gave a history of slipping on antifreeze and having his knee give out. Range of motion was 10 to 90 degrees with slight tenderness at the medial joint. The patella was tender. X-rays showed a questionable loose calcific body in the middle knee joint. There was superficial osteophyte formation.

On March 28, 1980 an arthroscopy was done which showed a loose body which was removed. There was evidence of early degenerative arthritis at the patella and both the medial and lateral femoral condyles.

Post-surgery claimant had tenderness and effusion. Isometric exercises were started. Claimant was released to return to work on June 3, 1980.

On November 5, 1980 claimant was seen with effusion in the right knee, pain in the right hip and occasional ankle swelling. The right knee and hip were x-rayed. The knee had early degenerati arthritis at the medial compartment. There was osteophyte formation at the anterior lateral joint. Claimant was kept off work and started on a therapy program for quaqriceps atrophy. He was sent back to light duty on December 3, 1980.

A second arthroscopy was done on February 5, 1981 to ascertain if there was internal derangement of the medial compartment. Diffus early degenerative arthritis was found more medially than laterally. Debridement was discussed, but the doctor thought staying off strenuous work and losing thirty pounds was the preferable treatment. At the time of this arthroscopy, x-rays were taken of claimant's right hip which showed early osteophyte formation with joint spaces preserved.

On April 20, 1981 claimant reported right knee and bilateral hip pain. X-rays of the right leg showed early degenerative arthritis. Claimant was encouraged to lose weight. When claimant continued to have problems and to gain weight, Dr. Roland on September 25, 1981 recommended hospitalization, a bone scan and standing AP films. Those recommendations were not carried out until March of 1982.

On March 23, 1982 claimant underwent an arthroscopy with partial lateral and medial meniscectomy. Findings were consistent with a tear of the cartilage and arthritis. A later medial meniscectomy was viewed as a possibility. Claimant was started on a rehabilitation program.

Claimant had continued symptoms in his leg post-surgery and he was started on Indocin in August.

On October 8, 1982 Dr. Wirtz wrote: "This patient's degenerati arthritis was aggravated by his activities at work. The work activities over a long period of time could be the contributing factor to degenerative arthritis but general degenerative arthritis is a natural disease process that is only aggravated by work." This letter seemingly relates to the condition of claimant's knee.

According to a letter from Dr. Wirtz dated January 24, 1983 claimant reached maximum recuperation on October 20, 1982. The orthopedist suggested claimant limit his walking, standing, pushing and pulling. Intermittent sitting also was advised.

On January 24, 1983 claimant was given a 32 percent impairment of the lower extremity based on loss of motion and cartilage removal in office notes. Dr. Wirtz's letter of January 24 gives a ten percent impairment of the lower extremity: "The bilateral cartilage removal and loose body removal which are related to his March 1980 injury, leaves him with a 10% impairment of the lower extremity." That letter relates claimant's back condition to degenerative disc disease and muscular strain. Dr. Wirtz wrote: "His bilateral condition of the numbness in the back would not directly relate this to his right knee problem. This patient has a muscular back problem and does not have an impairment of his body."

Claimant's case was reviewed by Donald W. Blair, M.D., on May 13, 1981. In reviewing claimant's case Dr. Blair noted: "His most recent report dated April 20, 1981 describes some early degenerative changes in the right hip. These would not be considered to be related to his fall of March 1980."

Dr. Blair did a second review on January 14, 1982. He attributed the condition of claimant's knee to degeneration which existed prior to his fall and which would continue with claimant's aging.

Jerome G. Bashara, M.D., board certified orthopedic surgeon, examined claimant at the request of claimant's attorney on March 4, 1983. The doctor had available to him a letter of introduction from claimant's attorney; notes from Drs. Roland and Wirtz; letters from Dr. Wirtz dated January 24, 1983, November 22, 1982, October 20, 1982 and October 8, 1982; letters from Dr. Roland dated July 9, 1982, July 2, 1982, June 4, 1982, May 14, 1982, April 23, 1982, April 9, 1982, December 18, 1981, November 6, 1981, September 25, 1981, July 22, 1981, May 15, 1981, April 20, 1981, March 2, 1981, January 21, 1981, December 3, 1980, November 5, 1980, June 30, 1980, June 2, 1980, May 16, 1980, April 21, 1980, April 7, 1980, and March 31, 1980; a letter from Dr. Boulden dated December 24, 1980; letters from a physical therapist dated December 3, 1980 and November 21, 1980; records of hospitalizations of March 27, 1980, February 5, 1981 and March 24, 1982; and letters from Dr. Blair dated January 14, 1982 and May 13, 1981. The doctor also looked at x-rays from January 24, 1983 and March 25, 1980.

Dr. Bashara took a history of claimant's slipping on antifreeze at work on March 3, 1980 and sustaining a twisting injury to his right knee with symptoms of back pain and intermittent numbness and tingling of the lower back, both buttocks and thighs which was aggravated by walking, developing approximately a year after the fall.

On examination claimant had mild lumbar paraspinous muscle spasm and tenderness at L5-S1. Straight leg raising produced pain in his lower back and both lower extremities. Reflexes were absent below the knees. There was mild synovial enlargement, effusion and varus deformity.

Twenty percent impairment was assigned to the right lower extremity. At the time of his deposition a 28 percent permanent partial impairment rating was offered based on the motion found by Dr. Wirtz. He consulted both the AMA and the Orthopedic Guides. Dr. Bashara causally related impairment in claimant's lower extremity to his injury.

Dr. Bashara reviewed x-rays of the spine as showing generalized degenerative arthritic changes with narrowing at L2-3. X-rays the right knee from March 25, 1980 were interpreted to show mild spurring along the patella. He saw no evidence of arthritis at that time. More recent films evidenced advanced narrowing of the medial compartment. Claimant was sent for a CT scan. Dr. Bashara reported its showing severe spinal stenosis at L3-4, L4-5 and L5-S1 with more permanent narrowing on the left. Other findings from the scan were a small lumbar spinal canal which combined with degenerative disease meaning "disks have narrowed or worn out and the spine then is collapsed some; and then as it collapses, spurs form around the little joints in the back." The doctor said, "As the spine collapses, because the disks become narrowed, the small joints that are on either side of the disks shorten; and they form spurs of bone. And those spurs of bones, those spurs, push into the spinal canal and cause spinal stenosis."

The doctor diagnosed post-traumatic degenerative arthritis to the medial compartment of the right knee related to the accident of March 3, 1980 and severe spinal stenosis with nerve root compression aggravated by the accident of March 3, 1980.

On March 14, 1983 Dr. Bashara rated claimant's permanent physical impairment of the body as a whole at 20 percent based on "indefinite stiffness in his back, pain in his back and both of his legs, and some nerve symptoms in both of his legs."

As to degenerative disease, he testified:

> Degenerative or the term degenerative is a very vague and all encompassing term. Degenerative means to degenerate, to go from healthy to unhealthy. Now, you can go from healthy to unhealthy or from a nondiseased state to a diseased state for lots of reasons.
>
> Now, when you have somebody's back involved, let's say, and let's talk about the disk, strictly about the disk, as we grow older and what you were referring to, there is some, what we call or a lot of doctors call, degenerative disk disease meaning that we're not as healthy. Our disks aren't as healthy or as normal when they're sixty they [sic] as they are when they're twenty. So we call that degenerative disk disease.
>
> Now, there are injuries that occur to the disk as we age which also cause the disk to go from healthy to healthy [sic] from a nondiseased state to a diseased state. In this patient it would be almost impossible to separate out what effect his age had on this process, what effect the injury that he had in 1980 had or any other previous injury that he might have had.
>
> Taken in light of the patient's history as to when he began to have problems and with some knowledge of the mechanics of his back and legs, it's my opinion that much of his back difficulties came on as a result of his injury in March of 1980 and subsequent difficulties that he had with his knee with shortening of his leg; and it's a very complex problem, but that's my opinion. (Bashara dep., p. 41 ll. 6-25; p. 43 ll. 1-11)

Responding to questioning regarding spinal stenosis the orthopedist said:

> A. Well, spinal stenosis is a narrowing of the canal through which the nerves to your lower extremities and legs goes through. And nerve root compression means that after this narrowing takes place and then there's subsequent injury, it can lead to some inflammation around the nerves which produces pain and numbness and in some cases paralysis, and that's basically what spinal stenosis with nerve root compression is.
>
> Q. Now, how would an injury of the kind that he had cause the aggravation of this type?
>
> A. Well, in a couple of ways. It can either be a direct cause of the fall, and you can have a twisting injury where you fall and twist your back and it causes this swelling around the nerves; or because of an injury to one of your legs which then throws your walking off and produces a limp, that can affect your back and produce the type of swelling that I think he has around the nerves. So in this case it could be related to either the fall itself or to the knee problem which aggravated his back symptoms or brought them on. (Bashara dep., p. 13 ll. 21-25; p. 14 ll. 1-17)

Later he was asked:

> Q. So if I understand your testimony, you're saying that there was a pre-existing condition that you've described as spinal stenosis; is that correct?
>
> A. Yes.
>
> Q. And the accident aggravated that condition?
>
> A. It aggravated that condition and produced what I think is called nerve root compression which then formed the symptoms that he had. He really wasn't having any difficulties with his back prior to a year or so after the accident. And a year or so after the accident, he started having back pain and leg pain, stiffness; and I believe that the nerve root compression was brought on by the accident and that the spinal stenosis was pre-existing. (Bashara dep., p. 16 ll. 10-25)

The doctor said symptoms of spinal stenosis, a continuing process, would manifest themselves as early as the first day after a traumatic occurrence to several months later. The doctor was unable to place an outside limit. X-ray changes would be seen in two or twenty years.

Dr. Bashara acknowledged that based on his review of the medical records there was no corroborative medical evidence of claimant's complaining of any problems associated with his back. The doctor had not been told of claimant's having any prior traumatic occurrence.

Dr. Bashara said that the increased stress on claimant's lower back would be from the shortened extremity and not from the hip. More specifically he referred to the shortness of the leg throwing the back into a twisted position.

A report of computerized scanning of the lumbar spine done March 11, 1983 carries this impression from George H. Holmes, M.D.: "Congenitally small lumbar spinal canal with combined degenerative disc disease and degenerative articular facet disease causing spinal stenosis as described."

APPLICABLE LAW AND ANALYSIS

The first issue to be decided is whether or not there is a causal relationship between claimant's injury and present disability. The claimant has the burden of proving by a preponderance of the evidence that the injury of March 24, 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 testimony of the medical expert may be rejected when the opinion is based upon an incomplete and inaccurate history. Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967). The weight to be given to expert opinion is for the finder of fact. Bodish, 257 Iowa 516, 133 N.W.2d 867 (1965).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 760-761 (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, 815 (1962).

There does not seem to be any question but that claimant does have disability in his lower extremity related to his injury of March 24, 1980. The question which resulted in this litigation is whether or not claimant's back complaints which have developed subsequent to the injury are causally related to that injury thereby making claimant's injury one to the body as a whole rather than one to a scheduled member.

Claimant asserted that he told Dr. Wirtz of back pain in late 1982 and Dr. Wirtz took x-rays at that time. Dr. Wirtz's letter of January 24, 1983 to claimant's counsel refers to claimant's back condition and such reference may very well conform with claimant's testimony as to when he first complained of his back in late 1982. He claimed not to have back pain when he was interviewed by an insurance company representative. He said Dr. Bashara's history of pain developing a year after his fall was incorrect. On March 17, 1982 when claimant answered his interrogatories his only complaint was right knee pain. According to claimant his back complaints developed after his second surgery.

Claimant's spouse first became aware of claimant's back complaints after his last or third surgery. Claimant's co-employees did not remember his complaining of his back.

Claimant's initial complaints were of his knee. By November of 1980 he was complaining of right hip pain. X-rays showed early degenerative arthritis. X-rays in February 1981 showed early osteophyte formation.

Dr. Wirtz, claimant's second treating physician, attributed claimant's back condition to degenerative disc disease and muscle strain. Dr. Blair, a reviewing physician, did not consider the degenerative changes in claimant's right hip as being related to his fall of March 1980.

Dr. Bashara is the sole physician to causally relate claimant's back trouble to his fall. Dr. Bashara, who saw claimant for examination purposes, based his opinion on a history of claimant's developing symptoms of back pain and intermittent numbness and tingling of the lower back, both buttocks and thighs approximately a year after his fall. Even claimant himself said this history was not correct. Dr. Bashara seems to have assumed claimant fell injuring his knee and twisting his back. He did not note the preexisting arthritis or spurring in claimant's knee reported by other physicians. However, Dr. Bashara has additional records from various sources which he reviewed. Dr. Bashara offers two theories as to the manner in which claimant's spinal stenosis could have been aggravated by his injury; i.e., directly by the fall or by the injury throwing off claimant's gait. Later Dr. Bashara said: "The increased stress on the lower back is not from the limp but from the shortening of an extremity due to an injury."

Claimant broke a bone in the top of his right foot in 1972. Claimant has arthritis in his hip.

On May 16, 1980 Dr. Roland noted claimant was "ambulatory without a gait." No other reference is made to gait until Dr. Bashara notes a limping gait. Claimant did not testify to gait problems other than those he currently experiences. His wife testified that he walks "wobbly." At another point Dr. Bashara expressed the opinion "that much of his back difficulties came on as a result of his injury in March of 1980 and subsequent difficulties that he had with his knee with shortening of his leg." A shortening of the leg was not documented. Although claimant clearly had hip complaints early on, Dr. Bashara specifically said that the increased stress on the lower back would come from a shortened extremity rather than from the hip.

Dr. Bashara's history was inaccurate and somewhat inadequate. Some gaps were filled in. Dr. Bashara's testimony became inconsistent. The record viewed as a whole contains just too many gaps. There was a substantial period of time before claimant made any back complaints. Overall, Dr. Bashara's opinion causally relating claimant's back problems to his injury must be given lesser weight. Claimant's treating physician saw him less than two months before he was seen by Dr. Bashara. Greater weight will be given to the treating physician's opinion in light of his greater familiarity with claimant's case.

Claimant has been paid for a ten percent impairment to his lower extremity. Clearly, claimant has impairment to that lower extremity from his March 1980 injury. Dr. Wirtz placed a 32 percent impairment rating in his notes and then wrote a letter on the same day rating claimant's impairment at ten percent seemingly solely based on the removal of the calcific body and ignoring loss of motion. The notes indicate claimant has 70° of retained motion resulting in a 28 percent impairment. Dr. Wirtz may have attributed that loss of motion solely to degenerative arthritis, but he wrote that the "degenerative arthritis was aggravated by his actitivies at work." Dr. Bashara rated claimant's impairment of the right lower extremity at 20 percent based on the injury with subsequent surgeries and post-traumatic degenerative arthritis. Based on Dr. Wirtz's range of motion and using the AMA Guides Dr. Bashara agreed with a 28 percent impairment rating.

Although claimant's back complaints are not found to be causally related, claimant's lower extremity disability seems to be greater than that paid to him thus far. He has had three procedures to his knee. He has lost a considerable amount of motion. Claimant will be awarded an additional 18 percent permanent partial disability for his lower extremity.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is 64 years of age.

That claimant has a ninth grade education.

That claimant participated in the civilian conservation corps for three years.

That claimant has some experience as a truck driver and some as a janitor.

That claimant had long experince with tire work servicing trucks.

That claimant performed various duties for defendant employer including transporting freight, cleaning, running parts, servicing trucks and changing truck tires.

That claimant had a cervical fusion in 1975.

That claimant has high blood pressure and elevated triglycerides and cholesterol which have not resulted in time off work.

That on March 3, 1980 while at work claimant slipped on antifreeze and experienced pain in the back of his right knee.

That after March 3, 1980 claimant had swelling in his knee.

That claimant had a second work incident on March 23, 1980.

That claimant was released to work in June 1980.

That claimant developed right hip pain.

That claimant missed work off and on and did some light duty.

That claimant currently complains of hurting in his right hip, leg and knee, occasional pain in his left hip, difficulty in getting up and down and trouble walking distances.

That claimant last saw a doctor on January 24, 1983.

That claimant take two Extra Strength Tylenol at night.

That claimant's activities have decreased.

That claimant is overweight.

That claimant retired in 1981.

That claimant draws social security and a union pension.

That claimant broke a bone in his right foot in 1972.

That claimant had preexisting degenerative arthritis in the knee.

That claimant had a congenitally small lumbar spinal conal.

That claimant had preexisting spinal stenosis.

That claimant has degenerative disc disease and degenerative articular facet disease.

That claimant had an arthroscopy and removal of a loose calcific body on March 28, 1980 at which time there was evidence of early degenerative arthritis.

That claimant had a second arthroscopy on February 5, 1981.

That claimant had early osteophyte formation in his right hip in February of 1981.

That claimant had a third arthroscopy with a partial lateral and medial meniscectomy on March 23, 1982.

That claimant must limit his walking, standing, pushing and pulling.

That claimant has lost motion in his right knee.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed to establish by a preponderance of the evidence a causal relationship between his injury of March 24, 1980 and any disability in his back.

That claimant has established by a preponderance of the evidence a causal connection between his injury of March 24, 1980 and disability in his right lower extremity.

That claimant has established a 28 percent permanent partial disability to his right lower extremity.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant an additional thirty-nine and six-tenths (39.6) weeks of permanent partial disability at a rate of two hundred six dollars and 69/100 dollars ($206.69) with payments to commence on January 5, 1984.

That defendants pay amounts due and owing in a lump sum.

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

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

Signed and filed this 5th day of March, 1984.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM FISHER, JR.,	:	
Claimant,	:	File No. 447773
vs.	:	DECISION
FIRST ASSEMBLY OF GOD CHURCH,	:	ON
Employer,	:	85.27 BENEFITS
and	:	
THE HARTFORD INSURANCE GROUP,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding brought by William Fisher, Jr., claimant, against First Assembly of God Church, employer, and Hartford Insurance Group, insurance carrier, defendants, to recover additional benefits under the Iowa Workmen's Compensation Act and more specifically under Iowa Code section 85.27 for an injury arising out of and in the course of his employment on February 9, 1976. It came on for hearing on March 29, 1984 at the office of the Iowa Industrial Commissioner in Des Moines, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file shows a first report of injury received February 19, 1976. A memorandum of agreement was received July 11, 1976. Payments to claimant are continuing.

The record in this matter consists of the testimony of claimant and of Edwin Mohler; claimant's exhibit 1, a letter from Marvin H. Hurd, M.D., dated December 29, 1982; defendants' exhibit 1, a prescription for a van from Dr. Hurd; defendants' exhibit 2, an estimate for building a ramp; defendants' exhibit , the video tape deposition of Robert Ray Jackson, Jr., M.D., with accompanying exhibits and a transcript.

ISSUE

The sole issue in this matter is claimant's entitlement to benefits under Iowa Code section 85.27.

STATEMENT OF THE CASE

Twenty-eight year old claimant, who has a GED, testified to being injured on February 9, 1976 and to being confined to a wheelchair since that date. He recalled his living arrangements since his injury thusly: When he was discharged from the hospital, he lived with his fiance at her parents' home for about a year and three months. Those persons assisted with his care. He next resided with his brother and was aided by him for three to four months. He then lived for somewhat longer than two years with another brother who helped him to reach a point where he could care for himself. In order to go to school he moved to Des Moines, lived in an apartment and had a homemaker helper and nurse who helped with his care. He had assistance from his spouse for a year and a half. In December of 1983 they separated, and he moved to a trailer home where he is helped by his mother and older brother.

Claimant characterized his living conditions as poor because his home needs alterations. More specifically, he complained of a ramp which he said was "very treacherous." He is unable to negotiate it alone and must have help to get in and out. He reported that the bathroom needs modification to enable him to get in and out of the shower without assistance. At the present time he has to be lifted in and out of the tub. Claimant reported that he is unable to vacuum or to clean his bathroom, but he does cook "to a certain extent" exercising care to avoid burns.

Because of a partial commutation, some of which was used to purchase furniture, he receives compensation payments three times each month of $76.51. He is given $35.00 each week by his conservator for groceries, cigarettes and gas. The funds retained by the conservator are used to pay insurance on his van and to perform maintenance. He indicated he is not eligible for social security, supplemental security income or benefits under title 19. Since approximately June of 1977 he has had a conservator. He agreed that his problem is that his check is not large enough.

Claimant testified to acquiring the "very well equipped van" in March of 1977. Its special equipment includes electric windows, a CB, an electric side door, a lift and a drop floor which enables him to drive in his wheelchair. Claimant has had five accidents with the van. He asserted that he has had maintenance problems. Because of repairs done by a former employer who made no charge for labor with claimant providing the parts, the engine and transmission are now dependable. The body, however, remains in poor shape. He feels the hand control is not in good order. He must have someone travel with him to open the door as his electric door opener no longer functions. Neither can he operate the lift which has both wiring and engine problems without help. Claimant doubted if the air conditioner which he said was necessary to keep him from having convulsions in hot weather could be repaired. During the time claimant was enrolled in Area 11, his van sat and he used paratransit. He was unable to go anywhere on weekends or evenings. Claimant acknowledged that his van means a lot. He declared that it would be in better condition if he had funds to care for it properly. The van now has over 300,000 miles. He contended that his van usage has lessened because he can no longer afford to drive. He stated that he has had the van appraised at an auto dealership by someone having knowledge of the special equipment. The value was under $1,000.

Claimant traded his van for a car which he kept for five weeks. When he found he had trouble getting in and out and a problem getting his chair in the back seat, he got his van back.

In addition to providing the van, the insurance carrier has paid claimant's rent, utilities and phone bill. Claimant indicated he would be unable to continue his present living arrangements were it not for those payments by the insurance carrier. As a result of some high bills, the carrier has placed a restriction on claimant's calls. He professed to needing the phone to summon assistance and to make calls regarding his treatment. Claimant told that his mother supplies him with groceries and clothing.

In addition to vitamins, claimant takes 5 mg. of Valium four times a day and Dalmane as needed for sleep.

Claimant has both an electric wheelchair and a push chair. The push chair gives him trouble on ramps. He attributed his difficulty to lack of strength in his hands. In his opinion maintenance is needed three or four times a year to keep chair tires, belts, batteries and upholstery in good repair. Claimant also has been provided with braces which allow him to use crutches for mobility. His use of crutches has been limited by the development of pressure sores on his feet.

Claimant recalled spending six months in an Area 11 program before starting a course in auto repair which he did not complete. He indicated that he has attempted to get a job, but that he has been unable to do so and has not worked since his injury.

Claimant remembered that at the time of his injury at age 19 he had five cars and two motorcycles. He had done work as a mechanic and fixed up and sold cars.

Edwin Mohler, claims supervisor for the insurance carrier, testified that he has supervised claimant's file since the date of injury. Subsequent to that time a memorandum of agreement was filed. Up until shortly before the hearing, claimant had been paid $35,449.94 in weekly benefits and in excess of $165,000 in medical expenses with monthly medical expenses for the preceding year exceeding $200.

He recalled that Dr. Hurd had prescribed the van for claimant. Claimant's desires were discussed with him and a van was purchased for around $11,000 with $3,700 of that amount attributable to special items. He said that the insurance company was not involved when claimant traded the van for a car, but that the commutation had a part in getting the van back.

A waterbed and air conditioner recommended by Dr. Hurd also were purchased by the carrier. To allow claimant to live independently, his rent of $275, utilities averaging $115, water averaging $7.48, garbage averaging $3.38 and phone bills averaging $39.14 have been paid. Because of large phone bills a monthly limitation of $68 has been placed on claimant's calls.

According to Mohler, claimant first asked for a ramp and provided an estimate in January. He did not feel the presentation made by claimant was reasonable as it appeared to be a deck. He was in the process of checking with various companies to see what sort of ramps are available.

A van equipped for a quadriplegic including an electric lift was prescribed for claimant by Marvin M. Hurd, M.D., on June 8, 1976.

A letter from Rick Harry, rehabilitation counselor, and Walter Verduyn, M.D., attending physician, dated December 1, 1976 points out the importance of "an adequate means of transportation" to allow claimant to pursue vocational training and daily necessities. As equipment for the van they proposed a hydraulic or electric lifting device, a lock down system to stabilize claimant's wheelchair, an extended roof, a lowered smooth floor, an extended steering wheel, special seat belts, a removable driver's seat, air conditioning, power steering, power brakes and a CB.

The letter proposed for claimant's home an outside ramp with a non-slip surface, a heating element, a railing and a wheelchair shower perhaps of the preconstructed type. Help with heavy housekeeping also was advised.

In a letter dated December 29, 1982 Dr. Hurd wrote the claimant would be best managed in an accessible home with a ramp with a heating element, a non-slip surface and a railing; doorways to accommodate a wheelchair; a wheelchair shower; and air conditioning. Dr. Hurd believed that gas, electricity, water and a phone should be provided.

The doctor advised a van with an extended roof, extended steering wheel, special seat belts, power steering, power brakes, air conditioning, a CB and a lift. He felt a garage attached to the house would be necessary as well.

Dr. Hurd proposed periodic hospitalization and recognized claimant's continuing need for medical supplies and medications.

Robert Ray Jackson, Jr., M.D., former medical director at Craig Hospital which focuses its primary attention on spinal cord injuries and brain trauma, testified to familiarity with C-7 quadriplegia. In preparation for his testimony he had reviewed a large number of records. He had not, however, examined claimant.

Dr. Jackson generally described the C-7 quadriplegic:

> Those of us in the field of rehab such as Dr. Verduyn and Dr. Hurd talk of levels of injury. We talk neurological level, not bony level. One can have several segments of difference between the bony injury and the neurologic deficit. We are talking a C-7 quad. We are talking a gentleman such as Mr. Fisher who has good shoulders, elbow extension that ranges all the way from fair to normal on a grading system that goes from zero to normal, five grades. We are talking an individual who has wrist extensors, should be normal, who probably has functional grade but not normal strength wrist flexors, maybe, maybe not fingers.

> Generally the fingers, if present, are not a functional grade. (Jackson dep., p. 13 ll. 10-23)

As to whether someone with a C-7 injury would be capable of independent living he said:

> Some are, yes. It takes a lot of work. It takes great drive. Most C-7's choose manual chairs unless there is a lot of distance to be covered at home or at work or at school, at which point I have no hesitation to provide a power chair. I know not the reason power was chosen for Mr. Fisher, but I have no quarrel with that. (Jackson dep., p. 15 ll. 4-13)

He discussed medical needs:

> First, because of the exposure that people with cord injuries have for skin, respiratory and most particularly urinary tract problems, I want annual review,....
>
> As part and parcel, as I have already mentioned, equipment review because that is the greatest protection we have against skin breakdown in this population which has no sensation on the pressure points so that we can pick up minor equipment problems and correct them at the annual review. That's, I think, imperative in this population.
>
> These folks need modest amounts of medication. I noticed in review of these files that as of the last stuff listed, this gentleman was on Vitamin C, which is frequently prescribed to assist in keeping the urine acid--which helps prevent stone formation. He was using Dulcolax suppositories to help with bowel evacuation. He was using Colace as a stool softener, which is generally desired. Then he was on Valium twice daily.
>
> Now, I didn't see where this guy had major spasticity. I would hope in the course of time, as the last of these reports that had been reviewed, because Valium is an addictive drug. (Jackson dep., p. 16 ll. 3-5 and 12-25; p. 17 ll. 1-6)

He continued:

> I don't know exactly how much of this sort of stuff Mr. Fisher needs or uses at the present time, but assistive devices. As a C-7, he probably would not use any hand splinting, but he might well if he were going to be independent. For example, as Craig indicated, he might well be emplacing his own suppository or additional stimulation of the sphincter. He might need that kind of equipment depending upon the strength in his hands. He may need reachers and pinchers and graspers, in other words, smaller but still very useful assistive devices for his motor vehicle.
>
> He will certainly require, assuming he uses a van-- So many of these people do even though they can get in and out of ordinary cars--he would need a lift and he would need wheelchair tie-downs. He would need hand controls. He would need repositioning of the dimmer switch, sometimes alterations in the ignition key, et cetera. These are pretty standard revisions. Any agency with experience that does van modifications could outfit any of our folks with what they need. The van is the vehicle of choice in this day and time. (Jackson dep., p. 18 l. 25; p. 19 ll. 1-22)

He also recommended:

> I prefer to use a platform lift, the Wheelevator, the Chainy, R.J. There are a whole bunch of good ones. All of these devices, while they're electrically powered, can be lowered by gravity or manually. Now, the reason I suggest those for the mobile home rather than grade ramp system is that when you're dealing with the height of the floor level, most of these places, is that takes a heck of a lot of ramping and many feet of ramping. So I've had better luck using these lifts with the safety feature of self-lowering if need be, if there is a power failure or whatever. You don't get into all the problems with ice and snow and that sort of thing. (Jackson dep., p. 23 ll. 12-24)

He later suggested:

> For an individual who is going to be, as virtually without exception, in my experience, able to be multiple hours a day alone, as C-7 quads are, then the doorways are going to have to accommodate his wheels. There are on the market for example, if he chooses a mobile home-- Modular homes of California, for example, Coast Homes, a place out of Georgia, build wheelchair accessible units. But it's easy to alter these things unless you go out and buy a hopeless design, as some people do. So generally, modification of the door width, especially into the bathroom. Both in fixed houses and in mobile homes, bathroom doors tend to be quite narrow. I want our guy to be able to get into the bathroom to empty his leg bag, for example, which even higher level quads can do independently these days. So those are the main things we need in the house.
>
> If he is skilled at transfers, then I would want a shower seat or a tub seat, depending on his choice of how he is going to bathe. If he chooses shower, then I want a thermostatically--in fact, in both tub and shower, thermostatically controlled water valve and a hand held. This can be adapted even for the high quads to have a cuff slip on a showerhead. Those will generally take care of it.

He believed a window air conditioning unit to be a good investment because it could be moved with the person.

The doctor anticipated a van would cost between $20,000 and $22,000. He said that equipment for such a van would be transferable. A power assisted and a manual wheelchair both were recommended for claimant. Maintenance costs for the chair were estimated at $200 to $400 a year with replacement of the primary chair every four to five years. He expected a chain drive lift to be good for a very long time. As to who should provide maintenance he said:

> The van and its adaptations, in my experience--and I cannot speak for you or your client. In my experience, the individual provides the operating stuff, replacement of tires, keeping up the oil, gasoline; but since we are going to alter this van with a mechanical or hydraulic lift, that, I consider part of the medical need after this kind of injury. The hand control is the same thing. (Jackson dep., p. 40 ll. 9-16)

Dr. Jackson said that he has not experienced phone bills charged as medical expenses. He thought claimant should have a panic button for his phone. Although he had seen rent supplement he had not seen payments for full rent and utilities. It was the doctor's opinion that some income supplements serve to create dependence. He testified:

> I would choose to have for Mrs. Fisher a couple of hours, mornings, and a couple of hours evenings to get him up, get him town time so that she can have some time to herself; or if he and she choose that they continue with what they have been doing, then I would like to see somebody in for a couple or three hours a day so that Mrs. Fisher can carry on with her life, go out with her lady friends, go to a movie, whatever. (Jackson dep., p. 28 ll. 5-18)

Dr. Jackson was questioned:

> Q. They indicate that a person, such as Mr. Fisher, is subject to depression and that mobility and being able to participate in activities and that kind of thing are important. Would you agree with that?
>
> A. Yes.
>
> Q. So it would be important for him to be able to transport himself from one place to another to participate in activities?
>
> A. I don't know if the word important is the operating word, but highly desirable, yes, sir. Where I can, I always want these folks to be mobile.
>
> Q. Does that assist, then, in their mental and physical health generally?
>
> A. It seems to be important to help the individual reenter social activitiy and get himself comfortable with his altered body image and get on with the business of living and working.
>
> Q. I would like you to relate that, if you would, please, to his mental well-being as well as his physical well-being. Is that something that is important to him?
>
> A. Mobility is important to most, in fact, if not all young people. I am sure you can remember, sir, the thrill of getting your license and then that first set of wheels, how important that was to you.
>
> ....
>
> Q. So if I understand what you are saying, Doctor, is that transportation and being able to function as close as they can to quote normal, able persons is important to their mental and physical well-being?
>
> A. It's important to me that they be mobile if possible, yes, sir. (Jackson dep., p. 33 ll. 18-25; p. 34 ll. 1-24)

APPLICABLE LAW AND ANALYSIS

At the outset this deputy industrial commissioner must compliment the defendants on the handling of this claim. Overall, they have done a very good job of meeting claimant's needs. It is apparent that claimant will have continuing requirements, and the parties seek guidance and direction in defining their accountabilities.

An employer's responsibility for furnishing medical care and services is found in Iowa Code section 85.27 which at the time of claimant's injury provided:

> The employer, with notice or knowledge of injury, shall furnish reasonable surgical, medical, osteopathic, chiropractic, podiatrial, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor. The employer shall also furnish reasonable and necessary crutches, artificial members and appliances but shall not be required to furnish more than one permanent prosthetic device.
>
> 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.

Overall, section 85.27 has been interpreted by agency decisions as requiring the employer to furnish those things which are reasonably necessary to treat an injured employee's compensable injury. See generally Zimmerman v. L.L. Pelling Co., II Iowa Industrial Commissioner Report 462 (App. Dec. 1982); Shilling v. Martin K. Eby Construction Co., II Iowa Industrial Reports 350 (App. Dec. 1981).

Dr. Hurd proposed periodic hospitalization and Dr. Jackson suggested an annual medical review. It seems plain that such a review is contemplated by the statute. Equally obvious would be prescribed drugs, vitamins and assistive devices described by Dr. Jackson and referred to by Dr. Hurd.

A telephone with a panic button for arranging medical care and for summoning assistance will be ordered. Claimant's phone bills have been a source of contention in the past. Claimant has been given a $68.00 limit on his monthly bills. The undersigned finds that to be overly generous. Defendants are to pay the basic monthly charge and long distance charges for calls to claimant's physician or to members of his immediate family--father, mother, brothers and sisters. At the current rates, a maximum of $50.00 per month will be imposed.

Independence for the disabled person is important. Claimant's inability to obtain employment and his reliance on his workers' compensation for all his financial needs make it difficult for him to assert much to independence.

His van has given him some degree of independence. Very early on claimant's doctors pointed to the necessity for adequate transportation and a van actually was prescribed. Dr. Jackson agreed "that a person, such as Mr. Fisher, is subject to depression and that mobility and being able to participate in activities and that kind of thing are important." He stated "I always want these folks to be mobile." Claimant is not in a location which allows for his use of public transportation. He does not live with a family member who can assist with his transportation needs. Providing him with transportation will be found to be necessary.

Dr. Jackson indicated that van is the vehicle of choice. The physicians who have worked with claimant have provided a list of those modifications they find valuable. Dr. Jackson explained that routine maintenance matters normally are not covered by the insurance carrier. Maintenance on such devices as the hand control, however, is included. Of particular importance at the time of hearing were the malfunctioning of claimant's electric door opener and his lift. Maintenance of these items is the responsibility of defendants and should be handled so that claimant is able to travel without assistance.

Mobility within his home and access to that home are also necessities. Claimant apparently is unable to leave his home without help. Either a ramp or a lift should be granted to claimant. He needs a wheelchair and a backup for moving from place to place. Again, routine annual maintenance should be undertaken by defendants. Avoidance of pressure sores is important to claimant's medical condition.

Adequate skin care necessitates provision of a means by which claimant can bathe alone and of air conditioning for his home. Air conditioning is required to avoid overheating because of damage to claimant's parasympathetic nervous system. A portable unit was suggested by Dr. Jackson.

In addition to cleanliness of claimant's person, cleanliness of his environment is desirable. Claimant testified of some difficulty with performing certain household tasks. Dr. Jackson proposed rather extensive household help even when claimant had a spouse to handle the housework and to aid him. Part of the reason for the extended hours was to permit claimant's spouse some time for herself. As claimant and his wife have separated the large number of hours seems inappropriate. As a portion of the reason for outside assistance no longer exists, defendants are to offer claimant help on an as-needed-basis with a maximum of five hours weekly. This time allowance is more in keeping with that recommended by Harry and Dr. Verduyn.

The most difficult decision to be made herein is whether or not defendants are responsible for payment of claimant's rent and utilities. Defendants have been paying those expenses. The undersigned does not believe those payments are binding in any way. However, she believes that under the particular circumstances here presented, defendants' instincts in commencing those payments were correct. As it was discussed above, claimant's independence as a disabled person is of particular importance. His achievement of some degree of indpendence results in his having an extraordinary dependence on defendants for financial matters.

Although Harry and Dr. Verduyn were talking primarily of claimant's need for a van, the opinion expressed in a letter of December 1, 1976 seems to apply to other areas of his life as well. They wrote:

> We have found that an individual who is disabled through an accident many times becomes depressed since he is limited in what activities he can participate in. Much of this depression can be averted if adequate steps are taken initially to place the individual back into an acceptable life situation. It has, unfortunately, been our observation that such depressions can result in medical setbacks such as the occurrence of decubitus ulcers which can easily cost in the neighborhood of $6,000 to $7,000 for skin repair per ulcer. It is for this reason that we encourage our patients to become highly involved with both work and leisure time activities in an attempt to build self esteem which is the key to avoiding medical complications. To reach this high level of function in these activities, it is imperative that adequate transportation be available.

Dr. Hurd's letter of December 29, 1982 again while dealing primarily with the van is worthy of consideration in other regards. The doctor wrote:

> The medical necessity for a van includes proper mobility to transport him to and from medical assistance as needed and equally important allowing him some psychosocial interchange and involvement in life outside his home, as an isolated living situation without social interchange can lead to a significant discouragement and depression even to the point of interference with proper sleeping patterns, appetite loss with resultant metabolic imbalances and insufficiency which ultimately could result in severe skin problems based on nutritional status and weight loss with occurrence of decubitus ulcers or GI disturbances with gastric or duodenal ulcers, etc. A van can accommodate a quadriplegic such as Bill to permit him to be involved psychosocially and feeling that he is a useful integrated individual with adequate interpersonal involvements and appropriate self-esteem.

Ultimately, the doctor concluded:

> In essence, I have been very pleased with Bill Fisher's responsibility in looking after his personal medical needs in the past and feel pleased that he has been able to live outside an institutional setting for nearly seven years now and feel that projections for continued independent living, that is, outside the nursing home or institutional setting look very good at this point warranting the medical support as noted above for his continued management.

Dr. Jackson was unaware of situations in which full payment of rent and utilities was made, but he was not aware that workers' compensation is claimant's only financial resource.

After being asked to assume a number of factors in claimant's situation he said that he "would have to choose that we seek some form of help within the form of rent subsidies which are available through public programs, if need be, this sort of thing to make living away from an institution continue to be practical."

Although claimant's physical disability is an obvious one, avoidance of further disability due to depression cannot be overlooked. Dr. Jackson testified that it "takes a lot of work" and "great drive" for a person with a C-7 injury to live independently. Claimant has achieved an independent existence. Both Drs. Jackson and Hurd recognized that keeping claimant from an institutional setting is important. Without defendants' helping to provide a home for him, claimant might be placed in a county home. Such a placement could affect his mental attitude and, thereby, based on the opinions of the experts, his physical well-being. Should claimant's medical condition deteriorate to the point that he would need either hospital or nursing home care, defendants' expenses would be considerably greater. Overall, payment for rent and utilities seems to be in the best interest of the parties.

This deputy commissioner would encourage the parties to continue to work for an alternative living arrangement for claimant. Defendants' counsel had some excellent ideas at the time of hearing regarding claimant's living situation. The possibility of some sort of subsidized housing should be explored. Of course, it must always be kept in mind that whatever housing is provided to claimant must have the accessibility required by his disability. Should claimant go back to living with his spouse or remarry or enter into another arrangement a reevaluation of the order as to rent and utilities might be necessary.

Defendants are being asked to provide a number of maintenance items. Claimant is reminded that he has a responsibility not to abuse those special items provided for him.

Defendants have requested specific dollar amounts on such expenses as rent and utilities. Assigning specific values is just too difficult in the changing economy. However, the parties in this case appear to be cooperating and to be conducting themselves in a reasonable manner. The rent and utility payments currently made by defendants seem slightly high, but within the range of reasonable. The parties are encouraged to keep working together as they have in the past.

In like manner no specific time frame is being set for replacement of the van or wheelchair. Dr. Jackson's testimony indicates the life expectancy of these items can vary. Again, the parties are urged to be reasonable and to cooperate.

Should a specific dispute develop in regard to any item ordered, that contest will have to be brought to the agency.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is twenty-eight (28) years of age.

That claimant has a GED.

That claimant was injured as he worked for defendant employer on February 9, 1976.

That claimant has been confined primarily to a wheelchair since his injury.

That claimant is a C7 quadriplegic.

That when claimant lived in Des Moines while he was attending school he had a homemaker helper and a nurse.

That claimant has not been able to find work.

That claimant presently is living alone in a trailer home.

That there are certain household chores which claimant is unable to do by himself.

That claimant has help with his household tasks from his mother and older brother.

That claimant has thirty-five dollars ($35.00) each week for groceries, cigarettes and gas.

That claimant has a conservator.

That claimant's conservator retains funds for maintenance and insurance on claimant's van.

That claimant has no source of funds other than his workers' compensation.

That claimant's mother provides him with groceries and clothes.

That claimant has a van which was purchased by the defendants in 1977 and has in excess of 300,000 miles.

That claimant's rent, utilities and phone bill have been paid by defendants.

That the defendants have provided claimant with braces and both a push and a power wheelchair.

That claimant has been supplied by the defendants with a waterbed and air conditioning unit.

That claimant needs a ramp or a lift for access to his mobile home.

That claimant needs modification of his bathroom to enable him to bathe alone.

That claimant needs a phone to summon assistance and to make arrangements for his treatment.

That claimant needs a van with hand controls, a lifting device, a lockdown system, an extended roof, a lowered floor, an extended steering wheel, special seat belts, a removable driver's seat, air conditioning, power steering and brakes and a CB.

That claimant needs a wheelchair and a backup.

That claimant needs some medication.

That claimant needs an annual examination.

That claimant may need devices for assistance from time to time.

That claimant needs air conditioning.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has shown entitlement to various items under Iowa Code section 85.27.

ORDER

THEREFORE, IT IS ORDERED

That the following items are necessary for the handling of claimant's compensable injury:

An annual medical review with particular attention to the urinary tract.

Prescription drugs and vitamins as ordered by claimant's physicians.

Assistive devices as suggested by claimant's physicians.

A van with hand controls, a lifting device, a tie down system, an extended roof, lowered floor, an extended steering wheel, special seat belts, removable driver's seat, air conditioning, power steering and brakes and a CB.

Maintenance on the special van modifications.

Either a wheelchair shower or other device to enable claimant to bathe independently.

Housekeeping assistance for a maximum of five (5) hours each week.

A telephone with a panic button and with long distance charges for calls to his doctors and to his immediate family with a monthly maximum of $50.00.

A portable air conditioning unit.

A wheelchair and backup.

Annual maintenance of wheelchairs.

Monthly rent and utilities.

A lift or ramp for access to his home.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 18 day of May, 1984.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ERNEST FLORES, Claimant, vs. H. J. HEINZ CO., Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File No. 722203 A P P E A L D E C I S I O N

Defendants appeal from an arbitration decision in which claimant was awarded temporary total disability benefits as a result of an injury received July 10, 1981. The record on appeal consists of the transcript of the arbitration proceedings together with claimant's exhibits 1 through 7 and defendants' exhibits A through F; and the written briefs and arguments of the parties.

ISSUE

Whether or not there is a causal relationship between claimant's injury of July 10, 1981 and the present disability to his neck.

REVIEW OF THE EVIDENCE

The recitation of the stipulations in the Introduction and evidence in the Statement of the Case in the Arbitration Decision are sufficient and adopted with the following modifications:

Typographical errors on page one, paragraph three, line five should be changed from "November 1, 1983" to November 2, 1982" and page four, fifth full paragraph, line one from "November 2, 1981" to "November 2, 1982".

APPLICABLE LAW AND ANALYSIS

The applicable law and analysis of the arbitration decision is adopted herein. Although defendant appellants present many hypotheses as to why the deputy could have concluded the claimant had failed to prove a causal relationship between his July 10, 1981 injury and his disability evidenced after November 1, 1982 the deputy accepted the version of the claimant and concluded the disability was causally related to the injury. The evidence is sufficiently convincing to support the findings and conclusions of the deputy and the proposed arbitration decision should be affirmed.

WHEREFORE, the deputy's decision filed September 28, 1983 is affirmed.

FINDINGS OF FACT

IT IS FOUND:

That claimant is a fifty (50) year old married father of four (4) children.

That claimant has a GED and some college.

That claimant has served in the military.

That claimant has training as a pipefitter and as an electrician

That claimant received an injury when he hit his hard hat on a beam as he was installing water and steam lines at defendant employer's plant on July 10, 1981.

That claimant saw Dr. Catalona who x-rayed him.

That claimant was scheduled for surgery in 1983, but none was performed because claimant had a heart attack.

That claimant had a heart attack prior to this most recent one.

That claimant continues to take medication for his heart and high blood pressure.

That claimant has been manipulated by a chiropractor since March of 1977.

That x-rays taken by the chiropractor in April 1977 showed misalignment at the fourth lumbar, fourth and fifth dorsals (thoracic) and at the first and second cervicals.

That claimant had complaints relating to all areas of his spine beginning at least in 1977.

That claimant had neck and upper dorsal pain relating to lifting an air compressor in May of 1977.

That claimant slipped on oil and injured his low back in March of 1982.

That claimant's last work for defendant employer was November 1, 1982.

That claimant is a credible witness.

That claimant became disabled as a result of his July 10, 1981 injury commencing November 2, 1982.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

That claimant has established entitlement to temporary total disability from November 2, 1982 until the date of his heart attack.

That claimant will again be entitled to temporary total disability when his heart problems resolve and he is able to have surgery.

That claimant will not be awarded additional benefits pursuant to Iowa Code section 86.13.

That claimant's rate of compensation is two hundred twenty-one and 77/100 dollars ($221.77) per week.

ORDER

THEREFORE, it is ordered:

That defendants pay unto claimant weekly compensation benefits from November 2, 1982 until the date of his heart attack at the rate of two hundred twenty-one and 77/100 dollars ($221.77).

That defendants pay unto claimant the following charges:

Muscatine General Hospital	$168
Medical Services	$ 25

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants pay costs according to Industrial Commissioner Rule 500-4.33 including one hundred fifty dollars ($150) for the charge for the deposition of Dr. Clark.

That defendants file a first report of injury.

Signed and filed this 26th day of January, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN W. FONTENOT, Claimant, vs. INSULATION SERVICES, INC., Employer, and EMPLOYER'S CASUALTY COMPANY, Insurance Carrier, Defendants.	File No. 636107 A P P E A L D E C I S I O N

By order of the industrial commissioner filed November 15, 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 and claimant cross-appeals from a review-reopening decision of September 16, 1983.

The record consists of the transcript; claimant's exhibits 1 through 10; and defendants' exhibits A through G, all of which evidence was considered in reaching this final agency decision.

The result will be the same as that reached by the review-reopening decision.

ISSUES

The review-reopening decision awarded claimant 50 percent permanent partial disability for industrial purposes, of which 20 percent had already been paid voluntarily by defendants.

Defendants state the issues thus:

I. Whether the proposed review-reopening decision of the Deputy Industrial Commissioner is supported by substantial evidence in the record made before the agency when viewed as a whole so as to allow an award of 50 percent industrial disability as the result of the work related injury at issue.

II. Claimant failed to carry his burden of proof by a preponderance of the evidence that the injury of March 26, 1980, is causally related to the disability upon which he now bases his claim. A possiblity is insufficient; a probability is necessary.

III. The question of causal connection and the nature and extent of physical impairment is essentially within the domain of expert testimony.

IV. The claimant is not entitled to recover for the results of a preexisting injury or disease. If any injury is sustained in the course of claimant's employment which lights up or aggravates such condition, he may recover only to the extent of the aggravation.

Claimant states the issues on cross-appeal thus: "1. The Industrial Commissioner, on defendants' appeal, could increase the award in favor of the non-appealing claimant. 2. Did the Deputy Industrial Commissioner err in limiting claimant's industrial disability to fifty per cent or the body as a whole?"

STATEMENT OF THE CASE

The recitation of the evidence in the review-reopening decision is sufficient and under the circumstances adopted and will not again be set out herein. Some additional facts which were brought up in the cross-appeal will be discussed in the analysis.

APPLICABLE LAW

Claimant must show that his 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 v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 (1934).

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). "The incident or activity need not be the sole proximate cause, if the injury is directly traceable to it." Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296 297 (1974); Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971). "A cause is proximate if it is a substantial factor in bringing about the result." Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

With respect to a prior condition which was aggravated by a job injury, the Iowa Supreme Court discussed the matter in Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 374-375, 112 N.W.2d 299 (1961):

> The fact plaintiff had some blackouts in 1956 and 1957 or had been injured or diseased before he was re-employed in October 1957 is not a defense. If his condition was aggravated, accelerated, worsened or "lighted up" by the injury of July 2, 1958, so it resulted in the disability found to exist, plaintiff was entitled to recover therefor. Of course he was not entitled to compensation for the results of a pre-existing injury or disease. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 760, 761, and citations; Ziegler v. U. S. Gypsum Co., supra, 252 Iowa 613, 620, 106 N.W.2d 591, 595, 596, and citations.
>
> See also 100 C. J. S., Workmen's Compensation, section 555(17)a, which states: "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."

Industrial disability includes considerations of functional impairment, 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). See also Blacksmith, 290 N.W.2d 348 and McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

ANALYSIS

The second, third and fourth issues recited by defendants are taken to raise one general issue, that of causal relationship. The case can be stated thus: Claimant had prior back injuries and probably had a herniated disc before the work injury; nevertheless, he was able to continue working. The question then becomes the extent to which the work injury caused his disability. That question must be looked at in terms of the medical evidence. The most convincing medical evidence is that by the treating surgeon, which should be repeated here. Robert E. Hanchey, M.D., a qualified neurosurgeon testified:

> I think that John did have a ruptured disc. He probably had it going way back before this injury, the injury five weeks before May, 1980. But it is certainly possible that the injury -- that his last accident aggravated a pre-existing condition.
>
> ....
>
> that the last accident certainly did cause the thing to come, shall we say, permanently symptomatic, and led him, after therapies and whatnot, to surgery.
>
> ....
>
> I think that his accident did aggravate his ruptured disc. It caused the symptoms. I'm just saying very simply that the man had this problem long before, which is a fairly normal occurrence. (Hanchey dep., pp. 12-14 11. 8-12, 21-23, 16-19)

That testimony clearly establishes that the work incident aggravated or lighted up the preexisting disc condition and that the aggravation or lighting up was significant and permanent. It thus "resulted in the disability found to exist." Yeager, p. 374. Further, claimant had no preexisting disability from his herniated disc because he was able to continue working until the incident on the job. To say that claimant would in the course of time have had permanent impairment as a result of the herniated disc is to speculate upon a matter not in the record and will not be done.

Therefore, it is concluded that the requisite causal relationship between the injury and the disability exists.

Both sides raised the issue of the extent of industrial disability, claimant was age 50 at the time of the hearing, had

a ninth grade education and a minimal ability to read and write the English language. Dr. Hanchey thought claimant was poorly motivated. Claimant is obviously a person of limited abilities and is at an age where his retraining potential is not as high as that in a younger person. On the whole, it is clear that the award recognizes claimant's difficulties but that claimant is capable of work. He has a lifting limit of 50 pounds (Hanchey dep., 19) which shows the ability to do at least moderate work as does the fact that, at the time of the hearing, he was working in a security position. The finding of a 50 percent loss of earning capacity is correct.

PINDINGS OP FACT

1. Claimant was employed by Insulation Services on March 26, 1980.

2. Claimant was hurt while working on March 26, 1980, aggravating a preexisting back condition.

3. Defendants filed a memorandum of agreement concerning a March 26, 1980 injury.

4. Prior to the work incident of March 26, 1980, claimant already had a protruding or herniated disc.

5. The work incident made the herniated disc permanently symptomatic.

6. As a result of claimant's work injury, he has a permanently partial impairment to the body as a whole of 15 to 20 percent.

7. Claimant's work background is limited as are his learning ability and education.

8. He was age 50 at the time of the hearing.

9. Claimant is able to do light to moderately heavy work.

10. The parties stipulated that the rate of compensation is $311.58 per week.

CONCLUSIONS OF LAW

Claimant was employed by Insulation Services on March 26, 1980 and sustained an injury which arose out of and in the course of his employment, said injury being in the nature of an aggravation of a preexisting condition.

As a result of the injury, claimant is entitled to two hundred fifty (250) weeks of permanent partial disability at the rate of three hundred eleven and 58/100 dollars ($311.58).

ORDER

WHEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant for a period of two hundred fifty (250) weeks at the rate of three hundred eleven and 58/100 dollars ($311.58) per week for the permanent disability, accrued payments to be made in a lump sum together with statutory interest of ten (10) percent per year from the date due, less a credit for payments heretofore made.

Costs are taxed to defendants.

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

Signed and filed at Des Moines, Iowa this 2nd day of March, 1984.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GREG FORT,	:	
Claimant,	:	
vs.	:	
PAUL PARK COMPANY,	:	File No. 689360
Employer,	:	A P P E A L
and	:	D E C I S I O N
MARYLAND CASUALTY COMPANY,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Defendants appeal from a proposed review-reopening decision wherein claimant was awarded permanent partial disability benefits based upon a finding of 20 percent functional impairment. Additional healing period benefits were also awarded.

The record on appeal consists of the transcript of the review-reopening proceedings which contains the testimony of claimant, Greg Fort, and defendants' witnesses Kenneth Rohlk and Chris Christensen; claimant's exhibits 1 through 14; defendants' exhibits A through D; and the briefs and filings of all parties on appeal.

ISSUE

Whether or not claimant sustained a permanent partial disability as a result of the injury and, if so, the extent of that disability.

REVIEW OF THE EVIDENCE

Counsel for the claimant and for the defendants stipulate that the applicable rate of compensation benefits is $123.55. (Transcript, p. 3)

Claimant, who was twenty-four years old at the time of the hearing, is a high school graduate and has completed a six month course in bricklaying. His previous work experience has included general construction and driving a truck. (Tr., pp. 28-29)

Claimant testified that he has worked as a bricklayer apprentice for defendant employer since January of 1981. On December 2, 1981 claimant was told by his supervisor to clear snow from a scaffold. When claimant finished clearing he jumped down, twisting his left ankle as he landed. Claimant testified that he continued working that day but by evening was experiencing pain and swelling in his ankle. (Tr., pp. 12-13) On the following day claimant visited his family physician, David C. Carver, M.D., who referred him to Robert J. Weatherwax, M.D. (Defendants' Exhibit C)

Curettage and bone grafting surgery was performed on January 12, 1982 and claimant was placed in a short leg walking cast. Claimant was instructed to continue limited activity with walking only on level surfaces. On September 3, 1982 claimant was released to light duty with no prolonged standing, no jumping or running and no heavy carrying of greater than 20 pounds. (Claimant's Ex. 10) In his report of December 1, 1982 Dr. Weatherwax added:

> At that time, I felt that his symptoms were not apt to significantly improve to any degree and that activity could be resumed as fully as possible letting the ankle symptoms dictate the level of activity. The likelihood of arthritis is significant and at that time, I felt that he had 20 percent of lower limb permanent partial disability based on the AMA and American Academy of Orthopedic Surgeons guidlines [sic]. (Cl. Ex. 12)

Dr. Weatherwax's progress notes of September 20, 1982 state: "I feel this problem represents approximately 20% of limb disability and should be considered permanent at this point." (Cl. Ex. 12)

Claimant testified that he continued to have problems with his ankle, and in January 1983, on the advice of R. H. Miller, M.D. went to Mark P. Brodersen, M.D., for a second opinion. (Tr., pp. 20-21) Dr. Brodersen recommended an ankle brace for stability and strength and suggested claimant find a different field of work. (Tr., p. 21) Dr. Brodersen's February 8, 1983 report states:

> [I]t's my belief that his injury and subsequent problems are directly related to the injury that he sustained on December 2, 1981, when he jumped from the scaffold and twisted his ankle when hitting the ground....I believe that he, at the present time, is totally unable to perform the vigorous type of lifting and climbing work that he had been doing in the past because of continued problems with his ankle. I would consider him completely disabled for this type of vigorous physical work. Finally, in regards to his degree of permanent partial impairment because of this injury. At the present time I would estimate this to be 11 percent of the lower extremity. (Cl. Ex. 13)

Claimant now wears the orthopedic brace. He has fallen when the ankle fails to support him and he can stand or walk for only limited periods without swelling and pain in the injured region. (Tr., p. 22)

In response to a question regarding his health before the December 1981 injury, claimant testified:

> A. I was able and willing to do anything anybody had for me to do, especially for Paul Park. I wheeled their cement and I hauled their brick. I hauled their block. I fed their lumber; I fed their rafters. I shingled their houses. Anything they asked me to do I did. (Tr., pp. 27-28)

Claimant's superintendent has testified that in October and November claimant was working full time and did not appear to be having any problems with his leg. (Tr., p. 48)

Defendants contend that claimant injured his ankle in a softball game in June 1981. Witnesses for defendants, Kenneth Rohlk and Chris Christensen, testified that claimant told them he had sprained his ankle playing ball and missed work for two or three months because of the injury. (Tr., pp. 36-46) The record indicates that on June 1, 1981, claimant saw R. H. Miller, M.D., for a sprain of his left knee. (Cl. Ex. 14)

In a letter dated May 26, 1982, and marked defendants' exhibit C, Dr. Weatherwax states: "There is no question that he had a pre-existing condition with cystic formation in the bone of the ankle joint." -- any continuing problems would certainly relate to the preexisting condition in his ankle.

Kenneth Rohlk, defendant employer, has testified that there is no work that claimant could do for them given his activity limitations. "But the way he's saying, in his condition, I don't see there's any possible way that he could be in construction work." (Tr., p. 42)

APPLICABLE LAW

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is aggravated, accelerated, worsened or lighted up so that

it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962).

Our supreme court has stated many times that a claimant may recover for a work connected aggravation of a preexisting condition. Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934). See also Auxier v. Woodward State Hosp. Sch., 266 N.W.2d 139 (Iowa 1978); Gosek v. Garmer and Stiles Co., 158 N.W.2d 731 (Iowa 1968); Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Ziegler v. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960).

Compensation for injury resulting in impairment of scheduled member is confined to the specific schedule. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

ANALYSIS

Claimant has testified that before the December 2, 1981 injury, he was able to perform whatever work chores were assigned to him. He wheeled cement and hauled block. He fed lumber and shingled houses. He routinely engaged in a number of vigorous physical tasks in the course of his employment with defendants. The injury, itself, is the result of jumping down from a scaffold.

Absent evidence to the contrary, it would appear that prior to the injury in question, claimant had no disability that prevented him from performing the walking, climbing, and jumping activities necessary to his job. There is no indication in the record that claimant's work tasks were in any way restricted by a preexisting condition that impaired mobility. Defendants have stated that in October and November claimant was working full time, and there didn't appear to be any problem with his leg.

Following the injury, claimant suffered swelling and soreness in his ankle. He underwent surgery. He was placed in a walking cast. His activities were restricted to light carrying and walking on even ground. He currently wears an orthopedic brace for support to his ankle. Claimant has worked sporadically on light duty jobs, but cannot walk or stand for too long without suffering pain and swelling to the ankle. Defendant employer has no job for claimant because of his restrictions of movement.

Clearly, claimant has suffered a compensable injury. Before December 2, 1981 claimant was able to carry out the physical work tasks necessary to do his work; since the December injury and continuing up to the present time, he is not able to perform these activities.

The preexisting condition of the ankle found by Dr. Weatherwax caused neither disability nor restricted mobility to claimant previous to the December injury. As such, the condition may not now be claimed as the cause of claimant's present disability. Until he jumped down and twisted his ankle upon landing, claimant was fully able to function in his job.

FINDINGS OF FACT

1. On December 2, 1981, claimant suffered an injury to his left ankle while he was working.

2. On January 12, 1982 claimant underwent curettage and bone grafting to repair the ankle.

3. Claimant wore a walking cast for several weeks and was put on restricted activity.

4. Claimant was in a state of healing and was not able to return to substantially similar work until September 3, 1982.

5. He has worked only light jobs since the injury.

6. Claimant wears an ankle brace for support.

7. He is unable to stand or walk for periods longer than 2-3 hours without suffering pain and swelling to his ankle.

8. Before the injury claimant was working full time and performing the physical tasks necessary to do his work as a bricklayer apprentice.

9. Since the injury claimant's restrictions of movement prevent him from returning to a job in the construction trade.

10. Claimant has a 20 percent permanent partial impairment of his left leg.

11. Claimant's rate of compensation is $123.55 per week.

CONCLUSIONS OF LAW

Claimant has sustained the burden of proving a 20 percent permanent partial disablity to his left leg which is causally related to his injury of December 2, 1981.

WHEREFORE, the deputy's proposed review-reopening decision is affirmed.

THEREFORE, it is ordered:

That the defendants shall pay claimant an additional eleven (11) weeks of healing period benefits at the rate of one hundred twenty-three and 55/100 dollars ($123.55) per week.

That defendants shall pay claimant forty-four (44) weeks of permanent partial disability benefits under the terms of section 85.34(2)(o) at the rate of one hundred twenty-three and 55/100 dollars ($123.55) per week.

That the defendants shall pay claimant the following medical charges:

Fort Dodge Medical Center, P.C. $29.00
Fort Dodge Medical Center, P.C. $58.00

That the defendants shall reimburse claimant for mileage expenses for one thousand twenty (1,020) miles at twenty-four cents ($.24) per mile for a total of two hundred twenty-four and 80/100 dollars ($224.80).

That interest shall accrue pursuant to section 85.30.

That costs of this action are taxed to 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 30th day of January, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TERRY HOWARD FORTNEY,	:	
Claimant,	:	
vs.	:	
MEAD CONTAINERS,	:	File No. 677314
Employer,	:	A P P E A L
and	:	D E C I S I O N
LIBERTY MUTUAL INSURANCE CO.,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision wherein the deputy found that claimant had failed to prove a causal relationship between an industrial accident which occurred on May 6, 1980, and his later surgery and disability. Claimant's notice of appeal was filed on April 1, 1983. On June 20, 1983 claimant filed a motion for an application for taking additional evidence regarding causation. Defendants' resistance thereto was filed on June 24, 1983. Claimant's motion was deemed untimely and denied in a ruling issued on June 29, 1983.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Daniel Meier, Beverly Fortney, Stan Hawkins, Roger Harris and Larry St. John; claimant's exhibits 1 through 22; defendants' exhibits A through Q; and the briefs and filings of all parties on appeal.

ISSUE

Whether or not the records of Robert A. Hayne, M.D., are sufficient to establish a causal relationship between claimant's injury of May 6, 1980 and his present disability.

REVIEW OF THE EVIDENCE

At the time of the arbitration hearing the parties stipulated the applicable rate, in the event of an award, to be $149.66 per week. The parties also stipulated to the time off work, and to the fairness and reasonableness of the medical bills. (Transcript, pp. 3-5)

Claimant began working for Mead Containers, a manufacturer of cardboard boxes, on April 24, 1978. Claimant worked as a general laborer in various areas of the plant. He testified that most of the work he performed required continuous bending and heavy lifting. (Tr., pp. 22-23)

On the date of injury, May 6, 1980, claimant had been operating a stitching machine. The work required that claimant stitch and stack pieces of material which were eight to ten feet in length and four feet wide. The stacks, which weighed up to 150 pounds, were then loaded onto a moving track and the process began over. (Tr., pp. 23-25) Claimant testified that he had worked eight hours during the previous day and had experienced lower back discomfort while operating the stitching machine. The low back pain resumed on May 6, 1980 and worsened throughout the day. Claimant visited the emergency room at Trinity Regional Hospital in Fort Dodge that evening, where he was attended to by Gary LeValley, M.D. Emergency room records recorded on May 6, 1980 indicate that claimant had experienced lower back and leg pain over the previous one and one-half years. (Defendants' Exhibit E) Claimant verified during testimony at the arbitration hearing that heavy lifting had resulted in backaches and hip pain previous to the May 6, 1980 incident. (Tr., p. 70) He was put on light duty work restrictions and was eventually hospitalized from June 6, 1980 through June 17, 1980 for rest and therapy. Claimant testified that he returned to light duty work upon release from the hospital on June 17, 1980. He recalled that the lower back pain radiated into his hips and further extended into the left leg. (Tr., pp. 26-40)

Claimant was referred by Dr. LeValley to Robert A. Hayne, M.D., who first examined claimant on August 17, 1980 at Iowa Methodist Medical Center in Des Moines. Defendants' exhibit K contains the results of a myelogram and the notes of Dr. Hayne during claimant's hospital stay from August 17, 1980 through August 19, 1980. In relating the history obtained from claimant at that time, Dr. Hayne wrote: "This 29-year-old, referred by Dr. Gary LeValley, has had constant low back and left extremity pain dating back for approximately four months. He states that he thinks that the pain was precipitated incident to lifting at work." (emphasis added) (Def. Ex. K)

Claimant's exhibit 20 contains the Iowa Methodist Medical Center records concerning claimant's hospitalization from October 13, 1980 through October 22, 1980 and surgery of October 16, 1980. In a history and examination report prepared on October 15, 1980, Dr. Hayne wrote:

> This patient was previously hospitalized here under my care from 8-17-80 to 8-19-80. At that time he was 29, with a history dating back some three months of low back pain and pain in the back of the left lower extremity. He attributed this to straining his back incident to doing lifting at work. (emphasis added) (Claimant's Ex. 20)

In the discharge summary prepared on October 23, 1980, Dr. Hayne wrote:

> This 30-year-old was admitted on 10-13-80 and discharged on 10-22-80. He was hospitalized here in August of 1980 with a history dating back 3 months of low back pain and pain in the back of the left lower extremity. He attributed this to straining his back incident doing lifting at work
>
> ....
>
> In view of his persistent pain and the venogram findings, he was subjected to total lumbar laminectomy on October 16, 1980. The 5th lumbar interspace on the left side was explored and found to be the site of a firm protrusion in the intervertebral disks. (Cl. Ex. 20)

Claimant recuperated through the remainder of the year and returned to light duty work with Mead Container on January 12, 1981. He was laid off from work on January 26, 1981 and has not returned. (Tr., pp. 43-44, 46-47) Claimant testified that the surgery which he underwent in October 1980 had alleviated the pain in his hips, but that the low back and left leg pain persisted. (Tr., pp. 44-45) He was readmitted at Iowa Methodist Medical Center from January 31, 1982 through February 3, 1982. In a discharge summary dated February 3, 1982, Dr. Hayne wrote:

> He was seen for check up examination on December 3 at which time he was complaining of a burning and tingling in the left lower extremity. The neurological examination was essentially within normal limits. He was given a release to return to work on January 15, 1981. When seen for examination on March 20, 1981, he stated he had worked for only ten days and then was laid off at the plant. He was still complaining of burning in the left lower and right lower extremity. He was then seen for examination on August 24, 1981, at which time he was complaining of pain in the low back and into both buttocks on each side. He was wearing a low back corsette support.
>
> Mr. Fortney has continued to have pain in the back of the left leg. He states that he cannot do much activity without aggrivation [sic] in the symptomatology. It was deemed advisable to readmit him to the hospital for a lumbar myelogram.
>
> A lumbar myelogram on 2/1/82 was performed and there was no abnormal findings on this examination. Lumbar spine showed slight narrowing of the lumbo-sacral interspace. Lumbar spine was otherwise within normal limits and appearance. Chest x-rays were normal. An EMG of the lower extremities showed no evidence of lumbar ridiculopathy [sic].
>
> His laboratory work showed CBC, UA, and SMA/12 profile to be within normal limits.
>
> In view of the negative myelogram and EMG, I feel that there is no alternative but to continue on conservative measures. I feel that in view of his two-year history of pain that Mr. Fortney may be a candidate for evaluation at a local pain clinic.
>
> FINAL DIAGNOSIS: Chronic low back and left lower extremity pain of questionable cause. (Claimant's exhibits 2, 5 and 6)

Claimant's exhibits 1, 15, 18, and 22; and defendants' exhibits H, I, J, L, N, and O all contain notations or forms bearing the signature of Dr. Hayne. In none of these, however, does Dr. Hayne address the issue of causation of claimant's disability.

Claimant testified that he has been unable to find a job due to his physical limitation. He stated that he is unable to stand for much more than one hour without resting and unable to bend due to sharp radiating left leg pain. (Tr., pp. 49-50)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 6, 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 Bradshaw, 251 Iowa 375, 101 N.W.2d 167, the court addressed the issues relating to proving a causal connection in the absence of unequivocal expert medical evidence/testimony. The court stated at 380, 381:

> I. Plaintiff contends his fall in defendant-hospital on March 30 was a proximate cause of the condition the Mayo doctors found the following December 18. Defendant's first assignment of error is that the evidence is insufficient to warrant a finding for plaintiff on this issue. In considering this and the second assigned error of course we must view the testimony in the light most favorable to plaintiff. Priebe v. Kossuth County Agricultural Assn., Inc., 251 Iowa 93, 95, 99 N.W.2d 292, 293, and citations.
>
> Dr. Einer W. Johnson, the Mayo surgeon, asked by a long hypothetical question to express his opinion whether there would be causal connection between the fall on March 30 and the condition he found in December, testified "I think there could be." Standing alone this is insufficient proof of the claimed causal connection. Such an answer is usually held to indicate only a possibility, rather than probability, of the alleged causal relation and hence insufficient. See Chenoweth v. Flynn, 251 Iowa 11, 16, 99 N.W.2d 310, 313; Rose v. John Deere Ottumwa Works, 247 Iowa 900, 910, 76 N.W.2d 756, 761; Boswell v. Kearns Garden Chapel Funeral Home, 227 Iowa 344, 351, 288 N.W. 402, and citations; Annotation, 135 A. L. R. 516, 517.
>
> However, we have held such expert evidence as that given here is sufficient to warrant submitting to the jury the issue of proximate cause when coupled with other testimony, nonexpert in nature, that plaintiff was not afflicted with any such condition prior to the accident in question. Rose v. John Deere Ottumwa Works, supra, and citations; Chenoweth v. Flynn, supra. See also annotation, 135 A. L. R. 516, 532 et seq. Plaintiff contends there is such other evidence here.
>
> In the Rose case the doctor who attended plaintiff part of the time he was disabled testified his condition was the result of trauma and "could have been caused" by such an injury as plaintiff said he suffered. Plaintiff stated the injury was the only one he ever received, his back never troubled him before and, in effect, never ceased to trouble him thereafter although his work was much lighter than before. We held that under the combined testimony of the doctor and plaintiff his disability was caused by the injury.
>
> In Chenoweth v. Flynn, supra, one of the doctors who treated plaintiff testified an ulcer on a foot is usually the result of trauma and the accident could cause the ulcerated condition for which he treated her. Plaintiff said she never had foot trouble prior to her accident, was then bruised, within a few days a seepage developed and she constantly suffered pain. We held a jury question was created on the issue of causation, citing Rose v. John Deere Ottumwa Works, supra.

ANALYSIS

The sole issue on appeal is whether the records and reports of Robert Hayne, M.D., are sufficient to establish a causal relationship between claimant's work related injury of May 6, 1980 and his present disability. Dr. Hayne was not called upon to testify during the arbitration hearing, nor was he deposed during the pendency of this case. The evidence relating to causation offered by either party at the hearing consists of hospital records and medical reports authored by Dr. Hayne. In none of these documents, however, does Dr. Hayne express an opinion that claimant's laminectomy and present disability are related to his work at Mead Containers. While several recorded histories and discharge summaries mentioned that claimant attributed his health problems to a work incident, there is no indication that Dr. Hayne adopted claimant's theory of causation. To the contrary, in the final discharge summary prepared by Dr. Hayne (dated February 3, 1982), he states that claimant's chronic low back and left lower extremity pain are of questionable cause. In addition, claimant admitted that he had experienced intermittent back and hip pain for up to one and one-half years prior to May 6, 1980. Questions of causal relationship are to be established through expert medical testimony. To conclude under the evidence presented in this case that a causal relationship exists between claimant's work and his present disability would be a resort to conjecture and speculation based merely upon the testimony of claimant.

Claimant relied upon a number of cases which stand for the proposition that a causal relationship may be inferred in situations where expert medical opinions are equivocal, but where the claimant is shown not to have been afflicted by a condition previous to an injury. The instant case is readily distinguishable, however, in that Dr. Hayne was never asked to express any opinion at all as to the cause of claimant's disability. In addition, claimant himself testified that he had experienced back and hip pain for some time prior to May 6, 1980. The deputy's finding that claimant did not prove a causal relationship between his injury and his disability shall be affirmed.

FINDINGS OF FACT

1. Claimant was an employee of Mead Containers on May 6, 1980.

2. Claimant sustained a work related lower back and hip injury on May 6, 1980.

3. Claimant had experienced low back and lower left extremity pain upon heavy lifting for one and one-half years prior to the May 6, 1980 injury.

4. Claimant underwent a laminectomy in October 1980.

5. Claimant returned to light duty work in January 1981.

6. Claimant was laid off work on January 26, 1981 and has not worked since that time.

7. Claimant continues to experience low back pain extending into the left lower extremity.

8. The medical evidence offered during the arbitration does not establish a causal relationship between claimant's work related injury of May 6, 1980 and his present disability.

CONCLUSION OF LAW

Claimant has failed to sustain his burden of proving by a preponderance of the evidence that there exists a causal relationship between his work related injury of May 6, 1980 and his present disability.

WHEREFORE, the deputy's decision filed March 29, 1983 is affirmed.

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That the costs of the arbitration proceedings are taxed to defendants and the costs of the appeal are taxed to claimant.

Signed and filed this 30th day of December, 1983.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

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

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FAY FOWLER,

Claimant,

vs.

SEARS, ROEBUCK & COMPANY,

Employer,
Self-Insured,
Defendant.

File No. 387623

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision wherein claimant was awarded 500 weeks of permanent total disability benefits, medical expenses, and mileage expenses. Claimant's application for rehearing was denied.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Sophia Marzec, Margaret Boe and Donna Green; claimant's exhibits 1 through 5 (claimant's exhibit 3 being the deposition of Albert D. Blenderman, M.D.); defendant's exhibits A through F; and the briefs and filings of all parties on appeal.

ISSUE

Whether it was error for the deputy to conclude that claimant's disability relates back to June 6, 1972, rather than finding that her continuing employment activities subsequent to that date and until October 14, 1974 were the cause of her disability.

REVIEW OF THE EVIDENCE

Claimant who was 66 years old at the time of the hearing, completed the 10th grade in school. Claimant first began working for Sears in 1959, and in 1972 was classified as a direct salesperson in the carpet and furniture department. She testified that her work required that she carry books of carpet samples to customer's homes. Claimant estimated that each sample book weighed 25 pounds, and that she sometimes took as many as 15 books to a customer's home. She denied experiencing any difficulty in carrying the sample books prior to July 6, 1972. (Transcript, pp. 10-28)

Claimant testified that on July 6, 1972 she fell while descending a flight of steps at Sears. She recalled that she was on her way to a customer's home when she slipped on debris on the steps, landing with her right leg extended and her left foot underneath the left buttock. Claimant complained of severe back pain, pain all the way down her right leg, and numbness in her left foot. Claimant was taken to a hospital by ambulance and seen the following day by Milton B. Grossman, M.D., a company physician. (Tr., pp. 31-35) Claimant testified that she was treated with hot pads and was released from the hospital on July 15, 1972. She recalled resting at home for several days before being released by Dr. Grossman to return to work on July 31, 1972. Claimant did not recall that any restrictions were put on her physical activities. (Tr., pp. 36-38)

Claimant testified that she returned to her regular work routine despite being "totally bruised" and "black and blue." She stated that she continued to carry carpet sample books, but experienced pain in her back and legs. Claimant noted that she tended to favor her right side while carrying sample books. She testified that she would start each morning feeling able to perform her work, but the pain would increase throughout the day as she lifted objects and twisted her body. Claimant recalled that she was completely released from Dr. Grossman's care in August of 1972, and did not seek further medical care until June of 1973 despite continuing back and leg pain. (Tr., pp. 38-41)

Claimant was examined by D. M. Youngblade, M.D., in June of 1973 after asking permission from Sears to seek treatment from her own doctor. Dr. Youngblade took x-rays of claimant's back and recommended that she see Albert D. Blenderman, M.D., for an orthopedic evaluation. (Tr., pp. 41-43)

Claimant testified that in July of 1973, while measuring a hallway for carpet, she experienced a severe back spasm which resulted in her lower body locking up. She recalled that she had to pull herself up with a doorknob and quit for the day. (Tr., pp. 43-44)

Claimant testified that she returned to see Dr. Youngblade on August 9, 1973 and again on October 9, 1973. Dr. Youngblade arranged for claimant to visit Dr. Blenderman on October 9, 1973. Claimant was fitted for a back brace which she began wearing on October 12, 1973. She revealed that the brace provided relief for awhile, but that she soon began to experience the same type of back pain as she continued to carry carpet sample books at work. (Tr., pp. 45-47)

Claimant continued to visit Dr. Blenderman on a monthly basis through June of 1974. She was hospitalized on September 3, 1974 and underwent a myelogram which was performed by Drs. Blenderman and Brown on September 4, 1974. Back surgery was scheduled for October 14, 1974. (Tr., pp. 49-50) Claimant testified that she returned to work for several days before her scheduled surgery. She recalled being asked to move some mattresses in the bedding department during one of the days just previous to her surgery, resulting in a "horrible" sensation in her back. (Tr., pp. 50-51)

Claimant testified that Drs. Blenderman and Brown performed a spinal fusion on October 14, 1974. She was released on November 5, 1974, but continued to have intense pain in her spine, feet, and heels. A second myelogram was performed by Dr. Brown on July 30, 1975, followed by decompression laminectomy on August 1, 1975. Claimant testified that following the 1975 surgery she was unable to cook or do housework. She last saw Dr. Brown in June of 1976, but was sent by Dr. Youngblade to Iowa City for further evaluation in November of 1976. Claimant testified that she received a complete physical examination by the doctors in Iowa City, and was advised to continue using her back brace and a cane. (Tr., pp.51-61)

Claimant underwent decompressive surgery for spinal stenosis in Iowa City during June of 1980. In a June 9, 1980 letter to claimant's attorney prepared shortly prior to the surgery, Thomas R. Lehmann, M.D., wrote:

> It is my impression that the patient has an ongoing radiculopathy which may be due to ruptured disc or spinal stenosis. It is my best impression that the problem is one of spinal stenosis or narrowing of the spinal canal and intervertebral canals causing pressure on the nerve roots. This condition may have been pre-existing prior to the time of her injury in 1972 or it maybe as a result of degeneration subsequent to that injury. It also maybe partially related to the back surgeries which were required because of the initial injury. In any case, it is quite clear that the patient was asymptomatic and functioning well prior to the time of the alleged injury and subsequent to that time has suffered from a chronic low back pain syndrome. In this sense, I must assume that the condition, that the patient now finds herself in, is compensable.
>
> Up to this point, I have never prescribed home nursing care for the patient and did not request that her husband provide this type of care. It may have been more appropriate for me to have done so but, in fact, I did not. The patient may require some home nursing care following her proposed lumbar surgery, but at this time I am unable to determine the necessity of the same. For the above stated reasons, I feel that the surgery is indicated and the surgery has become necessary because of the alleged injury.
>
> Following this surgery, it is anticipated that the patient will require some period of rehabilitation. Despite the surgery and this rehabilitation it is apparent to me that some permanent, partial impairment will result in this case, which I would estimate to be in the neighborhood of 15 to 20% of the whole body. Industrial disability related to this impairment maybe more or less when the patient's age, education, and previous work experience is considered. (Claimant's Exhibit 2; Defendant's Exhibit A)

On October 24, 1980, Dr. Lehmann reported:

> Mrs. Fowler is 4 months status post decompressive surgery for spinal stenosis. She feels as though she is very much improved and pleased that she doesn't have that burning pain that she used to have in her back. However, she still has pain in her lower back across her hips, like a vice. She still has problems not knowing exactly where her feet are, that is she finds herself watching her feet all of the time to make sure that they are doing what she expects them to do. She also continues to note the area of numbness over the right buttock region. (Cl. Ex. 2; Def. Ex. A)

In a November 7, 1974 letter addressed to defendant, Dr. Blenderman discussed his findings and treatment with regard to claimant.

> I am enclosing a copy of my initial history and physical examination which I think adequately outlines the fact that the patient sustained her back injury while at work for Sears, Roebuck and Company on July 15, 1972.
>
> Following her examination, she was fitted with a chair back brace, which she wore for an extended period of time, although this never completely relieved the discomfort, either in her back or leg.
>
> On several occasions, a point tender region in the low back was injected with cortisone and a local anesthetic in an effort to relieve any possible trigger zones of pain.
>
> Ultimately, however, the patient's discomfort reached a point where a decision was made that she should be admitted to a local hospital for neuro-surgical evaluation.
>
> Dr. C. A. Brown of Sioux City, Iowa, a neuro-surgeon, was called in consultation and a myelogram performed showing a herniated disc at the level of L-4 bilateral and at the level of L-5 on the left, with possible herniation of the disc at the level of L-3 on the right.
>
> At that time, the patient did not know whether or not she wanted to accept surgery on her back, and she decided ultimately, that she would pursue some further conservative management.
>
> However, she finally decided that because of the degree of discomfort she was having, that she was wanted to go ahead with the surgery. A copy of last office evaluation before hospitalization, dated 10-10-74, is enclosed.
>
> The patient was readmitted to St. Joseph Hospital in Sioux City, Iowa and operated on 10-14-74. At this time, Dr. Brown removed the disc at the level of L-4 bilaterally and at the level of L-5 on the left. After he had completed his portion of the surgery I performed a fusion, extending from L-4 to S-1 inclusive.
>
> The patient is still hospitalized, but getting along satisfactorily to date, and will be dismissed from the hospital shortly.
>
> In summation, it is my opinion and my judgement [sic] that the patient's back discomfort and leg pain originated as a result of her fall while employed by Sears, Roebuck and Company and that the resulting surgery was necessitated as a direct result of the trauma the patient received in this accident. (Cl. Ex. 2; Def. Ex. A)

In a November 11, 1974 letter addressed to defendant, Dr. Brown wrote:

> With reference to your letter of November 4, 1974 regarding Mrs. Fay Fowler, this patient was first seen in consultation with Dr. A.D. Blenderman at St. Joseph Mercy Hospital on September 3, 1974. My history was that she had left hip pain persistent since injury two years previously with associated recent numbness of the right lower extremity.
>
> Mrs. Fowler told me she fell at work on July 6, 1972. She was not unconscious but did knock out one tooth and hit the back of her head and bruised her right lower extremity. She had intense pain and was hospitalized for nine days and treated by Dr. Milton Grossman and disagnosed to have strain of the lumbo-sacral spine. X-rays then showed slight narrowing of the lumbo-sacral spine and minimal arthritis. She continued to have pain in the left sacroiliac area with some numbness of the left lower extremity particularly in the flank and sacroiliac area of the posterior hip. The pain was not quite as bad as it was at one time but it had not gone entirely, associated with more or less frequent aching. She states she had returned to work at Sears where she was employed and where she had fallen down the stairs. If she was active, by the end of the week, in her work she would have more pain. On the other hand, at rest the pain was not quite so severe.
>
> The pain did not leave by one year after accident so then she saw Dr. Daniel Youngblade, Sioux City. X-rays showed no further change. She was not improved and she was then referred to Dr. Blenderman who saw her in his office about Steptember [sic] 1973. She was fitted with a chairback brace which again helped to maintain the pain some. In the last few months she had begun to have some numbness in the lower extremity. She thinks maybe it began as early as a year ago, in the right anterior thigh which was increased by lifting or twisting and she would have a feeling that her legs were weak and she might fall. It was because of the particular symptoms of numbness, and not so much pain, that she entered the hospital for my neurosurgical evaluation.
>
> My examination showed she could possibly have disc at L-4 and even at L-3. Myelogram was advised. Myelogram was done September 4, 1974, which showed bilateral defects at L-4 more on the right and some at L-5 on the left. It was a minimal defect at L-3, probably considered more of a needle defect by the x-ray specialists from the puncuture [sic] site at this level, although I question if it could be a disc. I was hesitant to determine this patient should be operated at the multiple levels and advised we try treatment with Butazoline as a strong anti-rhuematic medicine to see if this would give relief. This was done but did not relieve her symptoms. She was seen in my office September 26 and again on October 10, 1974 without improvement.
>
> Subsequently she re-entered St. Joseph Mercy Hospital, Sioux City, Iowa on October 13, 1974 and was operated by Dr. Blenderman and myself on October 14. On that date in surgery disc at L-4 bilateral and L-5 right were exposed and removed with negative exploration for disc at L-5 left or for L-3 right. Disc formation showed degenerate herniated disc, transverse bar type, of chronic nature.
>
> For purposes of decision, it is my medical opinion that if the disc did not come directly from the injury but was of pre-existing condition, it is evident from all information I have available and from every indication that there was a major aggravation by the fall of July 6, 1972, that her symptoms continuing and disabling her since then had not existed before that time and finally the injury did directly relate to her continued disorder and eventual need for surgery. (Cl. Ex. 2; Def. Ex. A)

At the request of her attorney, claimant returned to see Dr. Blenderman on March 5, 1982 to discuss and explore her complaints relative to her back injury. In a September 7, 1982 letter addressed to defendant's attorney, Dr. Blenderman wrote:

> I have received your letter of August 26, 1982, posing some questions regarding Fay M. Fowler.
>
> The questions you have posed and the answers I feel are indicated, are as follows:
>
> (1) Was a physical examination done at the time the patient was seen by you on 3-5-82?
>
> Answer: No.
>
> (2) Not applicable.
>
> (3) Did you first obtain the further history of the instances in July, 1973 and August, 1973, when the patient was seen by you on 3-5-82?
>
> Answer: In my first history at the time the patient was initially seen on 10-9-73, the patient made no reference to any injuries in the general vicinity of July, 1973, except that in paragraph 5 of this 10-9-73 examination, the patient stated that some time after July of 1972, she was told she could go back to work, so she tried going back to work as a decorator; but she went out to measure for a carpet one day and as she was doing so, developed marked muscle spasm in the right calf muscle, which she tried to knead and work for a while to release the muscle spasm.
>
> However, the patient gave no specific date that this occurred, as given to me at the time of her 3-5-82 visit.
>
> (4) Not applicable.
>
> (5) It is my opinion that the patient's back discomfort and leg pain originated as a result of her fall while at work for Sears and Roebuck in July of 1972, and that her subsequent surgery was as a direct result of the trauma that the patient received in the fall.
>
> Her subsequent episodes of pain, for example, carrying her sample books, measuring in a closet and pushing on the bedding that set up for display of the store, were in my opinion, simply aggravating conditions; but I still feel the initial fall at the store was the precipitating reason for her subsequent surgery and the other conditions were simply aggravations. (Cl. Ex. 2; Def. Ex. A)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 6, 1972 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).

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. * * * *

Iowa Code section 85.34(3), 1971 states, in part:

> Compensation for an injury causing permanent total disability shall be upon the basis of sixty-six and two-thirds percent per week of the employee's average weekly earnings, but not more than a weekly benefit amount, rounded to the nearest dollar, equal to forty-six percent of the state average weekly wage paid employees as determined by the Iowa employment security commission under the provisions of section 96.3 and in effect at the time of the injury provided that no employee shall receive as compensation less than eighteen dollars per week, except if at the time of his injury his earnings are less than eighteen dollars per week, then the weekly compensation shall be a sum equal to the full amount of his weekly earnings; said weekly compensation shall be payable during the period of his disability for a period of time not to exceed five hundred weeks.

ANALYSIS

The sole issue on appeal is whether claimant's disability, for purposes of determining the proper duration of benefits, relates back to July 6, 1972 when her injury occurred on October 14, 1974 when she first underwent back surgery. While the record does indicate that claimant continued her employment subsequent to her fall on July 6, 1972, the medical evidence does not indicate her continued employment to have materially contributed to her present disability. Claimant suffered a significant degree of back pain from the time of her fall on July 6, 1972 through the time that she quit work and her eventual surgery. The reports of Drs. Brown and Blenderman were to the effect that claimant had a preexisting defect at the L3, L4 region, which was materially aggravated by the incident on July 6, 1972. The only indication by a treating physician that claimant suffered physical trauma of any nature following the July 6, 1972 incident is found in the September 7, 1982 letter of Dr. Blenderman. Even then Dr. Blenderman continued to maintain that the primary cause of claimant's disability was the fall in July of 1972, describing any trauma of carrying sample books, measuring closet space, and pushing bedding as mere aggravations which did not precipitate surgery or further disability. As such, it is an inescapable conclusion that the injury causing claimant's disability resulted from her July 6, 1972 fall, and not from additional physical trauma or aggravation. The deputy's conclusion that claimant is permanently disabled as a result of her July 6, 1972 injury is affirmed.

FINDINGS OF FACT

1. Claimant was an employee of Sears, Roebucks & Co.

2. Claimant was injured when she fell down a flight of steps on July 6, 1972.

3. Claimant had a preexisting back condition prior to July of 1972.

4. Claimant continued to work at Sears until October of 1974.

5. Claimant suffered an aggravation to her back injury in July of 1973.

6. Claimant's aggravation of her back injury of July 1973 was not material.

7. Claimant underwent surgery on October 14, 1974 as a result of her back injury.

8. Claimant's October 14, 1974 back surgery was precipitated by the July 6, 1972 incident.

9. Claimant is presently permanently totally disabled as a result of her July 6, 1972 back injury.

CONCLUSIONS OF LAW

Claimant has sustained the burden of proving that her disability is causally related to her July 6, 1972 accident.

Claimant is permanently totally disabled as a result of her July 6, 1972 accident.

WHEREFORE, the deputy's decision filed November 30, 1982 is affirmed.

THEREFORE, it is ordered:

That defendant pay unto claimant five hundred (500) weeks of permanent total disability at the rate of sixty-three dollars ($63.00) per week.

Defendant is to reimburse claimant for pharmacy bills in the amount of one hundred forty-four and 20/100 dollars ($144.20).

Defendant is to reimburse claimant nine hundred eighty-seven and 30/100 dollars ($987.30) for mileage.

Costs are charged to defendant pursuant to Industrial Commissioner Rule 500-4.33.

Defendant is ordered to file a final report upon payment of this award.

Signed and filed this 31st day of October, 1983.

Appealed to District Court;
Pending

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DAVID A. FRANCIS,	:	
Claimant,	:	
vs.	:	
RYDER TRUCK RENTAL,	:	File No. 686450
Employer,	:	A P P E A L
and	:	D E C I S I O N
CRAWFORD AND COMPANY, OLD REPUBLIC INSURANCE CO.,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from a decision on attorney's fees wherein claimant was ordered to pay a one-third attorney fee on past and future compensation, including permanency.

The record on appeal consists of exhibits 1 through 6, as well as the briefs and filings of all parties on appeal.

ISSUE

Whether the deputy's order that claimant pay attorney's fees of one-third of past and future workers' compensation benefits to Patrick Payton is unreasonable.

REVIEW OF THE EVIDENCE

On September 22, 1981 claimant sustained an injury arising out of and in the course of his employment with Ryder Truck Rental. The area of the body affected was claimant's right shoulder. Healing period benefits were paid for approximately one year, after which claimant was awarded permanent disability based upon a five percent loss of function of the arm. Claimant was unable to return to work at that time.

Claimant originally was represented by William B. Garten. In August of 1982 claimant discharged Mr. Garten and retained Roy M. Irish for the purposes of seeking further rehabilitation benefits. Mr. Irish secured another medical examination, but claimant's application for rehabilitation benefits was withdrawn once it became apparent that the examination merely confirmed earlier findings. Claimant later visited Patrick H. Payton and Ronald G. Cable in regard to a separate legal matter. Discussion concerning claimant's disability ensued, and claimant retained Mr. Payton and Mr. Cable to represent him in further efforts to gain additional rehabilitation benefits. The newly retained attorneys arranged for yet another examination of claimant which resulted in claimant's hospitalization and rotator cuff surgery (the doctor's fees were paid by the insurer). Weekly workers' compensation benefits were reinstated retroactive to January 5, 1982.

On March 7, 1983 claimant signed an agreement which read as follows:

> I, David A. Francis, hereby authorize Crawford and Company to draft my weekly workers [sic] compensation benefit payments solely to Patrick H. Payton.
>
> I understand that Mr. Payton will deposit said payments into his Trust Account and after deducting 33-1/3 contingent fee owed to Patrick H. Payton, Mr. Payton will pay the balance of each weekly payment to me.
>
> I further understand that I will receive a photo copy of the actual check for informational purposes.
>
> I further release Crawford & Company and Ryder Systems, Inc., for liability for making the payments in this manner. (Exhibit 2)

Payment of claimant's benefits continued as stated in the agreement. On May 13, 1983 claimant wrote a note discharging Mr. Payton and Mr. Cable (Ex. 1). Claimant subsequently retained Gene R. La Seur to represent him in the matter of payment of further attorney's fees to Mr. Payton and Mr. Cable.

APPLICABLE LAW

Iowa Code section 86.39 provides:

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

ANALYSIS

It is apparent that but for the labors of Patrick Payton and Ronald Cable, claimant's workers' compensation benefits would not have been reinstated, nor would claimant have received needed medical care. Claimant knowingly signed a contingency fee contract to pay one-third of his recovery to Mr. Payton. Although the percentage set forth in the contract may or may not be as recommended by this agency, it is within the range of charge for attorney's services in workers' compensation cases in this locale. The claimant signed the agreement and accepted the successful services of his attorneys. The deputy's order that claimant pay one-third of his recovery to Patrick Payton is not unreasonable and will be affirmed.

FINDINGS OF FACT

1. Claimant employed Patrick Payton and Ronald Cable to represent him in his workers' compensation case.

2. Through the efforts of Payton and Cable claimant received needed medical attention.

3. Through the efforts of Payton and Cable claimant's workers' compensation benefits were reinstated.

4. Claimant signed a contingency fee contract to pay one-third of his recovery to Patrick Payton.

5. One-third of claimant's recovery does not represent an unreasonable fee under the circumstances of this case.

CONCLUSION

A contingency fee of one-third of claimant's recovery will be allowed.

WHEREFORE, the deputy's decision filed May 31, 1983 is affirmed.

THEREFORE an attorney's fee of one-third (1/3) of claimant's recovery is approved in favor of Patrick H. Payton.

Signed and filed this 30th day of September, 1983.

Appealed to District Court;
Affirmed

Robert C. Landess
Industrial Commissioner

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SAMMIE LEE FREEMAN,	:	
	:	
Claimant,	:	
	:	
vs.	:	
	:	File No. 643633
IOWA DEPARTMENT OF TRANSPORTATION,	:	A P P E A L
	:	
Employer,	:	D E C I S I O N
	:	
and	:	
	:	
STATE OF IOWA,	:	
	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant suffered an injury to his back in an incident arising out of and in the course of his employment on March 21, 1980. A first report of injury was filed August 7, 1980. While a memorandum of agreement has not been filed, permanent disability benefits to the extent of 25 percent of the body as a whole appear to have been paid. (Transcript, page 4) Claimant now appeals from an October 14, 1983 review-reopening decision wherein he was determined to have sustained an industrial disability of 25 percent of the body as a whole as a result of the March 21, 1980 injury, and was ordered to take nothing further as a result of the proceedings.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Anna Marge Redling, Richard Burdette Smith, Donald Eugene Rhodes, Jr., and George Orrie Longnecker, Jr.; claimant's exhibits 1 (A-G), 2 and 3; defendants' exhibits 1, 2, and 3; and the briefs and filings of all parties on appeal.

ISSUE

Whether the deputy erred in failing to find claimant to be permanently totally disabled as a result of his injury of March 21, 1980.

REVIEW OF THE EVIDENCE

At the time of the hearing the parties stipulated claimant's applicable workers' compensation rate to be $166.47 per week. All medical bills submitted appear to have been paid. (Tr., p. 3)

Claimant, who is currently a resident of Texas, was 42 years old at the time of the hearing. He lived in Ames, Iowa prior to moving to Texas approximately two years prior to the August 19, 1983 hearing. Claimant testified that he has been unemployed for approximately three years. Claimant reached only the third grade in school and possesses very limited reading, writing, and math skills. He testified that he has been able to obtain drivers' licenses only by taking oral tests. (Tr., pp. 9-10, 35-36)

Claimant assisted his father with farm work from age 8 to age 16. Between 1956 and 1969 claimant held several jobs in Texas as a custodial worker, truck driver, and garbage collector. Claimant moved to Iowa in 1969 and worked on an assembly line at Fawn Engineering for approximately two years. He later found work with Metro Solid Waste as a garbage collector until he injured his back in 1972. Claimant appears to have been off work for approximately two years before taking a job as a truck driver with the Iowa Department of Transportation in 1973. (Tr., pp. 10-28)

Claimant testified that his work as a driver for the DOT required him to load and unload his truck. Claimant asserted that he had fully recovered from his earlier back injury by the time he began working with the DOT. Despite his limited reading skills, claimant was able to associate the names of towns with the names on shipping labels in order to make deliveries to the proper destinations. He indicated that many of the items which he delivered were quite heavy, but that he had no further difficulties with his back prior to March 1980. (Tr., pp. 28-38)

On March 21, 1980 claimant was loading 55 gallon chemical drums onto a truck. Claimant's method was to tip and roll the drums, which weighed about 600 pounds, supporting them by his arms and back. On the date of the incident claimant felt a pull in his back when he attempted to catch a drum which had gotten out of control. Claimant testified that he continued to work for three or four days before seeking medical treatment because he did not at first believe the back injury to be severe and no heavy lifting was being done. He recalled that he was eventually treated at the McFarland Clinic by Doctors Gohman and Grant who advised him to avoid heavy lifting. Claimant testified that he attempted to perform light duty work such as sweeping for about one week, but quit because the condition of his back worsened. (Tr., pp. 39-45)

John A. Grant, M.D., an orthopedic surgeon, testified that he first saw claimant on May 12, 1980. Dr. Grant's records indicate that claimant was initially seen for his current back complaints by James Gohman, M.D., on March 28, 1980. Dr. Grant testified that he initially believed claimant to have suffered a simple low back strain and prescribed light duty work. Claimant was hospitalized for one week in June 1980 without achieving significant improvement. On July 3, 1980 Dr. Grant notified claimant's supervisor that claimant could return to work as long as he performed lifting of no more than 30 pounds and avoided bending and prolonged standing. Dr. Grant last saw claimant on January 13, 1981 at which time he was experiencing greater difficulty walking, bending, and lifting. The doctor indicated that he had very little to suggest in terms of medical treatment and estimated that claimant had sustained a permanent functional impairment of 10 percent of the body as a whole. [Claimant's Exhibits 1 (A-G) and 2]

Claimant testified that he can currently stand for only ten to fifteen minutes before his legs begin to bother him. He can walk for about one hour and sit for three to four hours, but is restricted in his ability to bend, twist, and lift. Claimant indicated that he has moved back to Texas and has spent the last two years trying to improve the condition of his back. Claimant has not sought alternative employment of any nature since his injury because he doesn't know what types of work he can do. (Tr., pp. 46-53)

Marge Redling, an employee assistance counselor with the Department of Transportation, testified that she spoke with claimant regarding vocational rehabilitation and job alternatives. (Tr., pp. 117-122)

George Longnecker, former supervisor of the shipping and receiving department at the Department of Transportation, testified that he originally hired claimant. Longnecker testified to the effect that claimant had been able to keep all of the necessary log books required of truck drivers. Longnecker also testified that claimant was offered light duty work such as sweeping after his injury, but that he turned the work down. (Tr., pp. 190-205)

Donald Rhodes, Jr., a district manager of International Rehabilitation Associates, testified that he was approached by the insurance carrier to assist claimant in pursuing suitable employment. Rhodes reviewed claimant's pertinent medical records and interviewed claimant before concluding that claimant was capable of functioning in 5,000 to 10,000 of the 20,000 occupations listed in the Dictionary of Occupational Titles. On cross-examination it was revealed that the witness spends only about five percent of his time working with clientele, and that during the majority of his time he is concerned with the selling and expansion of the business' services. Rhodes conceded that the only physical limitation he had considered in assessing claimant's future employment prospects was claimant's lifting restriction. He was unable to estimate the number or types of occupations available to claimant after taking into consideration claimant's limited ability to bend or twist. (Tr., pp. 127-189)

Clifford Smith, a professor in the Industrial Engineering Department at Iowa State University, testified to having experience with evaluating injured employee's employment opportunities. Smith testified that he interviewed claimant in February 1981 and later concluded that claimant had a 0 percent to 10 percent chance of finding employment with his expressed physical and mental limitations. The witness also stated that he had seen reports prepared by Dr. Grant, but indicated that his conclusions were based primarily upon the information provided by claimant verbally during the interview. (Cl. Ex. 3)

APPLICABLE LAW

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

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).

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).

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, 902 (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 sole issue on appeal is whether the deputy erred in failing to find claimant to be permanently totally disabled as a result of his injury of March 21, 1980. The medical evidence provided by Dr. Grant indicates that claimant has sustained a functional disability of 10 percent as a result of his back injury. The testimony of Donald Rhodes suggests that claimant, even with his physical limitations and limited education, is capable of performing in a substantial number and variety of occupations. While Clifford Smith was less optomistic about claimant's prospects for future employment, it must be noted that he based his opinion entirely upon information obtained during a single interview with claimant and chose to ignore the medical records prepared by Dr. Grant.

Claimant is 42 years old and possesses very limited reading, writing, and math skills. While it is apparent that persons with limited education and physical limitations will be faced with a variety of patent obstacles in their search for employment, their abilities to find employment have not necessarily been obliterated. In the instant case claimant has made no attempt whatsoever to find employment which would be tolerant of his limitations, nor has he been receptive to offers of rehabilitative help or employment counseling. In light of the foregoing, as well as the deputy's first hand impression that claimant is capable of performing alternative work in an acceptable fashion, the deputy's determination that claimant has sustained an industrial disability of 25 percent of the body as a whole is affirmed.

FINDINGS OF FACT

1. Claimant is 42 years old.

2. Claimant has a third grade education and posseses limited reading, writing, and math skills.

3. Claimant has sustained a functional disability of 10 percent of the body as a whole as a result of his March 21, 1980 back injury.

4. Claimant has previously worked as a truck driver and heavy laborer.

5. Claimant is capable of working in alternative occupations.

6. Claimant has not sought alternative employment since his injury in March 1980.

7. Claimant has been unemployed for three years.

8. Claimant has sustained an industrial disability of 25 percent of the body as a whole.

9. Claimant has been paid 125 weeks of benefits.

10. Claimant's applicable benefits rate is $166.47 per week.

CONCLUSION OF LAW

Claimant has sustained the burden of proving an industrial disability to the extent of 25 percent of the body as a whole as a result of his injury of March 21, 1980.

WHEREFORE, the deputy's decision filed October 14, 1983 is affirmed.

THEREFORE, it is ordered:

That claimant shall take nothing further as a result of these proceedings.

Costs of the review-reopening proceeding are taxed to defendants. Each party shall bear their respective costs on appeal.

Signed and filed this 29th day of March, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JERRY L. FREY,	:	
Claimant,	:	
vs.	:	
BREMCO CONSTRUCTION COMPANY,	:	File No. 656118
Employer,	:	A P P E A L
and	:	D E C I S I O N
IOWA MUTUAL INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

Defendants appeal from a ruling denying a motion to reconsider opening the record to the employer and insurance carrier. The record on appeal consists of the pleadings and filings.

ISSUE

Whether defendants' motion to reconsider opening the record was properly denied as untimely.

REVIEW OF THE EVIDENCE

On October 13, 1983, a deputy industrial commissioner filed an order closing the record to the offering of further evidence by the defendants. This order resulted from defendants' failure to comply with a September 30, 1983 order for production of documents. On November 22, 1983 defendants filed a motion to reconsider the October 13 order. Such motion was denied for lack of timeliness.

APPLICABLE LAW

Industrial Commissioner Rule 500-4.24(86) states:

> Any party may file an application for rehearing of a decision in any contested case by a deputy commissioner within twenty days after the issuance of the decision. A copy of such application shall be timely mailed by the applicant to all parties of record not joining therein. Such an application for rehearing shall be deemed denied unless the deputy commissioner rendering the decision grants the application within twenty days after its filing.

Rule 4.25(17A, 86) provides that:

> An appeal to or review on motion of the industrial commissioner must be filed within twenty days after the application for rehearing under 4.24(86) has been denied or deemed denied. If the application for rehearing is granted, the appeal shall be filed within twenty days of the decision on rehearing. If no application for rehearing under 4.24(86) is filed, appeal shall be as provided in 4.27(86,17A).
>
> This rule is intended to implement section 17A.15 and section 86.24, Iowa Code.

Under rule 4.27(86, 17A), it is stated:

> 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, Iowa Code.

FINDINGS OF FACT

1. An order was filed on October 13, 1983 closing the record to defendants for failure to comply with a prior order.

2. Industrial Commissioner Rule 4.24(86) provides 20 days in which to request an application for rehearing.

3. The motion to reconsider which is the same as an application for rehearing was filed on November 22, 1983, 20 days past the alotted period of time.

4. A ruling, denying the motion to reconsider as not timely, was filed on December 2, 1983.

5. An appeal was filed on December 22, 1983 asking review of the October 13, 1983 order.

6. A timely filed application for rehearing extends the time for appeal from the original decision.

7. An untimely filed application for rehearing does not extend the time for appeal from the original decision.

8. This appeal is from the ruling on a motion to reconsider only.

9. As the application for rehearing was untimely filed, it was properly denied.

CONCLUSION OF LAW

Defendants' motion to reconsider was properly denied for lack of timeliness.

WHEREFORE, the ruling of the deputy industrial commissioner is affirmed.

THEREFORE, defendants' appeal is dismissed.

Signed and filed this 16th day of January, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ANNABELLE I. FULLER,	:	
Claimant,	:	File No. 697124
vs.	:	A R B I T R A T I O N
WEBSTER CITY PRODUCTS COMPANY,	:	D E C I S I O N
Employer,	:	
and	:	
TRAVELERS INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Annabelle Fuller, the claimant, against her employer, Webster City Products, and their insurance carrier, Travelers Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury she sustained on May 30, 1980.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Webster County Courthouse in Fort Dodge, Iowa on March 15, 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 January 17, 1983. There are no other official filings. The record in this case consists of the testimony of claimant, Judy Eastwood, Dave Fisher, Ardith Gillespie; claimant's exhibits 1 through 6 and 8 and 9. An objection was lodged to exhibit 7 on the basis that it was not exchanged. That exhibit will be stricken and not considered; and defendants' exhibits A, B and C. An objection lodged to exhibit C that it was not exchanged is without merit in the opinion of the undersigned. Exhibit C is a return-to-work slip and not a medical report as contemplated by the rule.

ISSUES

The issues to be resolved in this proceeding are whether the claimant sustained a personal injury which both arose out of and in the course of her employment, the existence of a causal relationship between the injury and the resulting disability, as well as the nature and extent of that disability. There is also a question of notice under section 85.23 of the Code.

REVIEW OF THE EVIDENCE

By stipulation filed by the parties April 22, 1983, it was agreed that the applicable weekly rate in the event of an award is $145.98; that the employee worked for the defendant on all of the dates outlined on exhibit A, attached to the stipulation; and that the claimant worked from October 27, 1981 through January 28, 1982 at a local truck stop. It was further stipulated that all medical bills contained in this record are fair and reasonable.

Claimant, Annabelle Fuller, testified that she was born on May 5, 1942. She is a high school graduate and has no other schooling or training in any specialized field of endeavor.

The claimant's work history indicates that for the period 1960 through 1969 claimant worked for a manufacturing company for approximately a year and a half. Beginning in 1969 she began her employment relationship with the defendant employer's predecessor and has continued in their employ for a period of twelve years.

This witness confirmed that defendant is a manufacturer of washers and dryers. The claimant worked on a general production line, particularly in the dryer assembly area. She indicated that lifting, bending, carrying, and operating various forms of hand-held machinery was required in her position. One of the tools that she had to operate was an air gun. It might also be described as a pistol-grip power screwdriver. This witness indicated that for the first five months of 1980 she was involved in assembling "lower back sheets" onto dryers. She would use the aforedescribed power screwdriver to attach these backsheets. The claimant described at length the operation of the power screwdriver, and specifically the torque generated by the device. She confirmed that occasionally screws would become stuck and she would be required to place additional force or the air gun in order to dislodge the screw. She complained of continuous problems in the use of this device.

Ms. Fuller indicated that in May 1980 she was having problems with her hands and difficulties with her grip, evidenced by a continuing problem of dropping things. Claimant indicated that she requested of Ardith Gillespie an opportunity to see the company physician, E. Reveiz, M.D. This was accomplished in May 1980, and according to the claimant Dr. Reveiz permitted her to return to work with medication. According to the claimant, Dr. Reveiz provided her with a slip indicating to avoid use of the air guns. Claimant states that the wrist discomfort continued.

On June 2, 1980, due to continuing discomfort the claimant was directed to her family physician, Hoyt H. Allen, M.D. This appears to to have been accomplished with the permission of Ms. Gillespie. Allegedly, Dr. Allen advised the claimant to remain off work a few weeks and gave her a notation to return to the employer to that effect. Ms. Fuller indicated that prior to that date she didn't realize her condition was work related. Ms. Fuller indicated that she turned the slip in and remained off work a period of two weeks. She indicated that the group insurance carrier paid for the time off work.

The record reveals that on June 2, 1980 the claimant's hands were swollen, numb and painful. She indicated that prior to June 2, 1980 she never received any information that the condition might be work related or work aggravated. On June 2 Dr. Allen apparently indicated to her that the situation was a bilateral carpal tunnel syndrome.

The record indicates that on June 16, 1980 surgery was performed by Dr. Allen to rectify the bilateral carpal tunnel syndrome problem. After a period of recuperation the claimant returned to work in October 1980. The claimant indicated that post surgery no improvement in her status was noted. Upon return to work in October 1980 the claimant was assigned to what might be described as light duty work. She indicated an inability to do this work. She noted swelling and tenderness of the hands and fingers. She was able to work one day, at which time she advised Ms. Gillespie of the difficulties and returned to Dr. Allen on October 6.

Ms. Fuller indicated that the employer set up an appointment with C. O. Adams, M.D., who in turn examined the claimant's hands and made various tests of her condition.

The day after Dr. Adams' examination, the claimant returned to work on the dryer line, installing motors which weighed five to eight pounds each. The witness indicated that again she was required to use the screwdriver to work on between fifty and eighty machines per hour. She was also required to fasten wire harnesses to motors which required hand and wrist action, as well as pushing and pulling. The claimant also was required to use hand screwdrivers at times. The record reveals that she had continuing difficulties with the screwdriver use and could not, in fact, tighten the screws. Claimant's hands continued to swell, and she noted flashes of hot and cold in these appendages. She indicated that she did the aforedescribed job for three or four days and then had to discontinue that activity because her hands could not take the work.

Allegedly, Ms. Fuller advised the company nurse that she could not do this work and was in turn advised that there was no other job available. Claimant stated that she spoke with Daniel Parr, who appears to be in a supervisory capacity at the defendant, and was in substance advised that she should go elsewhere for work. The balance of 1980 and into 1981 the claimant continued to have difficulties with her hands. Eventually this problem precipitated an examination by Horst G. Blume, M.D., of Sioux City, Iowa. The record indicates that by the stipulation of the parties, claimant returned to work on October 27, 1981 at the I-35 Truck Stop and continued in their employ until January 28, 1982. Claimant indicated that she has not worked since January 28, 1982.

The claimant's present problems include inability to lift over twenty pounds, and an inability to perform any activity for a length of time. She has a loss of strength in her hands and a loss of dexterity in her fingers. Some of the swelling has dissipated and some of the pain has gone. According to the claimant, the swelling and pain dissipated due to the involvement of Dr. Blume.

On cross-examination, claimant acknowledged that her last visit to Dr. Blume was in August 1982. The claimant acknowledged that she received exhibit C from Dr. Reveiz, and then indicated that she is "almost positive" that she received another form or return-to-work slip from him.

The claimant indicated that prior to June 1980 her hands and wrists did not bother her. She indicated that the discomfort prior to that date was nothing compared to the discomfort she felt when she initially went to Dr. Reveiz.

Judy Eastwood testified on behalf of the claimant. She confirmed that she has known the claimant for a period of time and confirmed that she was off work for a period of time in June 1980. The balance of this witness' direct and cross-examination has been considered in the final disposition of this case.

Dave Fisher was called to testify on behalf of the claimant. Mr. Fisher is the director of industrial relations and specifically in charge of safety and personnel for the employer. He confirmed that exhibit B is the paperwork related to the group insurance claim processed for the claimant. He confirmed that any information that the group health insurance carrier would receive would come through the defendant. The balance of this witness' direct and cross-examination has been considered in the final disposition of this case.

Ardith Gillespie, the insurance coordinator at Webster City Products, testified on the their behalf. She confirmed that the group insurance carrier, Provident Insurance Company, paid in excess of $2,000 on claimant's disability claim. This witness testified that the first knowledge the employer had of any claim for work-related carpal tunnel syndrome was the document attached to defendants' exhibit A, which is dated June 2, 1980. This document, signed by Dr. Allen, indicated the probable work related nature of the carpal tunnel syndrome. According to this witness, as confirmed by the stamp on the back of the document, it was not received by the employer until September 8, 1980. This witness confirmed that she was aware that the claimant was off work for two weeks to see if her hand condition would settle down. She also knew that the claimant was under the care of a physician. She confirmed that disability benefits through Provident Insurance Company were commenced at this time. This witness indicated that Dr. Allen only indicated that the claimant had carpal tunnel syndrome and never indicated that it was work related. This witness confirmed that from the period June 1, 1980 through and including September 7, 1980, the employer did not receive any report from any physician regarding the fact that claimant's condition might be causally related to her work. This witness did not believe that the claimant ever reported that her condition was work related prior to September 7, 1980. Prior to the notation from Dr. Allen, again the employer indicates that they were without notice of the possible work related nature of the condition.

This witness indicated that after the claimant was examined by Dr. Adams, a position was tailored to meet her limitations.

On cross-examination, this witness remained firm in her testimony that no one had ever advised the employer that the condition was work related until Dr. Allen's note was received on or about September 8, 1980.

Claimant was recalled for rebuttal purposes and indicated that on June 2, 1980 she received the notation attached to defendants' exhibit A, made three Xerox copies and gave one to Ms. Gillespie. This witness indicated that Ms. Gillespie was aware that the problem was work related; hence, her direction that claimant see Dr. Allen.

John A. Grant, M.D., an orthopedic specialist, noted in a report dated November 17, 1982 and contained as part of claimant's exhibit 1:

> It is my feeling that this lady's carpal tunnel symptoms and ultimate surgery were almost certainly associated with the type of work she was doing previously. I do not see evidence for a clear-cut diagnosis of rheumatoid arthritis. I am not overly impressed with the x-ray findings and certainly Doctor Adams' laboratory studies and ours are within the limits of normal. Her current problems with primarily weakness in the upper extremities appears to this examiner to be much more subjective than objective in nature. I would appreciate that she probably cannot resume employment with the repetitious use of vibrating equipment and I think she would be limited in some type of repetitious hand motion even if it is not very extreme in its requirements. Nevertheless, with some type of attention paid to avoiding jobs requiring heavy grip strength, very repetitious hand motions or the use of vibrating equipment, I would think she is employable.
>
> I would anticipate that the diagnosis here is residual problems post carpal tunnel release, the treatment of which should be strictly symptomatic. I would estimate her percent of partial permanent physical impairment at 10 percent of each upper extremity. Using the combined tables this gives a combined rating of 19 percent which when you convert that to the whole man gives a percentage impairment of 11 percent. Establishing a percent of impairment in this type of problem is difficult and much of the impairment rating is based on the patient's loss of strength.

Dr. Horst G. Blume, M.D., a neurosurgeon notes in a report dated August 13, 1982, contained as part of claimant's exhibit 1:

> The patient has been working for twelve years and she first noticed symptoms of injury between March and early May of 1980. Prior to this, the patient had been treated for tendonitis for three to five years. She developed this kind of weakness, especially since March of 1980 so she had to quit working and it is my opinion that the weakness and numbness that the patient has been complaining of is directly related to her work activity that she has done over the last twelve years, in particular when she was working with a pneumatic high torque air gun that turned screws.

Hoyt H. Allen, M.D., in a letter dated May 5, 1982, contained as part of claimant's exhibit 1, notes:

> In reviewing my records, I am unable to find one specific injury which would result in a condition requiring the surgery that she underwent. However, her work does apparently entail activities that are continually traumatic to the hands, and this could very well lead to the carpal tunnel condition or at least certainly materially contribute to them.

In a report dated October 28, 1980 by C. O. Adams, M.D., an orthopedic specialist, he notes that a diagnosis in the claimant's case can be made of "rheumatoid disease, early and mild." He attributes this rheumatoid disease situation as being a major factor in the development of carpal tunnel syndrome bilaterally in claimant's work. He suggests that the claimant may return to work if she avoids situations that will aggravate the underlying problem. He recommends that she avoid lifting over twenty pounds and avoid using air guns or other vibrating tools. He is of the opinion that claimant has a permanent disability but attributes this to the natural progress of rheumatoid disease. He indicates that she is recovered, in his opinion, from the carpal tunnel syndrome and the resulting surgical releases other than tenderness in the scar area, has no residuals as a result of the problem in the surgery. He is of the opinion that she can return to work as of October 30, 1980.

It is noted in Dr. Allen's letter of May 5, 1982 previously alluded to, that he indicates his last examination of claimant was on October 8, 1980, and at that point she was continuing to improve and had a good response from her surgery.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on May 30, 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 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).

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

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

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).

The Iowa Supreme Court in the recent case captioned Simbro v. Delong's Sportswear., 332 N.W. 2d 886 (Iowa 1983), shed particular light on a case of this nature when they in substance held:

> In this appeal we hold that workers' compensation benefits for permanent partial disability of two members caused by a single accident is a scheduled benefit. We also hold that the degree of impairment must be computed on the basis of a functional, rather than an industrial, disability.

ANALYSIS

Initially, it is undisputed that on the alleged date of injury, May 30, 1980, the claimant was an employee of the defendant.

With respect to the notice issue under section 85.23, The Code, it appears clear from the record, in the opinion of the undersigned, that Dr. Allen was a physician selected by the employer for purposes of examining claimant. Testimony to this effect is uncontroverted. The record also indicates that group benefits were paid to the claimant based on Dr. Allen's involvement. For purposes of notice, it is therefore the opinion of the undersigned that Dr. Allen acted, in substance, as the agent of the employer. It is clear from his notation attached to defendants' exhibit A that from the date indicated on that form he was aware of the potential or probable connection between the bilateral carpal tunnel syndrome situation and the type of work that the claimant was performing. It is the opinion of the undersigned that due to Dr. Allen's position in this case, the knowledge he had is attributable to the employer and, therefore, they had knowledge of the nature, seriousness and probable compensable nature of the injury on or about June 2, 1980.

With respect to the issue of medical causation, after examining the records and taking them into consideration as a whole, and specifically relying upon the opinions expressed by Dr. Grant and Dr. Allen, it is the opinion of the undersigned that claimant has sustained her burden and proof and has established a causal relationship between the work incident which occurred on or about May 30, 1980, and the bilateral carpal tunnel syndrome for which surgery was performed by Dr. Allen in 1980.

Dr. Grant is the only individual that addresses the issue of the extent of claimant's functional impairment. His opinion along these lines will be relied upon.

Note that the aforecited Simbro case deals with a factual situation similar to this one, that is, an injury to two members which arises out of a single incident. Under that case an injury of this nature is, in substance, considered to be two scheduled members and the concepts of industrial disability or the loss of earning capacity do not apply. As a consequence, Clifford Smith's opinions in this case are of little assistance.

Dr. Grant indicates the claimant has sustained a permanent physical impairment of ten percent of each upper extremity and, according to combined values table, equals a rating of nineteen percent. According to the undersigned's calculations, Dr. Grant has made a slight miscalculation. In order to correctly use the combined values tables the ten percent impairment to each extremity should be converted to the body as a whole figure. According to the AMA guides, ten percent of an extremity equals six percent of the body as a whole figure. The six percent figures (one for each ten percent impairment) are then run through the combined values table. According to the table, the combined value of those figures is twelve percent. The twelve percent is then multiplied by 500 weeks and the resulting 60 weeks is the length of time compensation is paid.

With respect to the issue of healing period, Dr. Allen indicates that the claimant should remain off work beginning June 2, 1980. In a later letter he notes that the last occasion he examined the claimant was October 8, 1980, at which time she was improving. According to the stipulation of the parties, the claimant returned to work on November 16, 1980. There is nothing in the record to establish a healing period beyond November 16, 1980. Therefore, the healing period will be found to exist and extend from June 2, 1980 through and including November 15, 1980.

FINDINGS OF FACT

That on May 30, 1980 the claimant was an employee of the defendant.

That on June 2, 1980 the employer received notice of the nature, seriousness and probable compensable nature of the injury via their agent, Dr. Hoyt Allen.

That on May 30, 1980 the claimant sustained a personal injury which both arose out of and in the course of her employment in the form of a bilateral carpal tunnel syndrome. Surgery was performed in June 1980 by Dr. Allen. The functional impairment does not extend beyond the scheduled members.

That the healing period in this case extends from June 2, 1980 through November 15, 1980. Claimant returned to work on November 16, 1980.

That there exists a causal relationship between the injury and the resulting disability. The claimant has sustained a functional impairment of ten percent (10%) of each upper extremity.

That the medical bills submitted in conjunction with this case are fair and reasonable and found to be causally related to treatment of the injury.

CONCLUSIONS OF LAW

The claimant has sustained her burden of proof and has established that on May 30, 1980 she was an employee of this defendant, and that on that date she sustained a personal injury which both arose out of and in the course of her employment.

The claimant has sustained her burden of proof and has established a causal relationship between the injury and the resulting disability.

ORDER

THEREFORE, IT IS ORDERED that the defendants shall pay unto claimant sixty (60) weeks of permanent partial disability benefits at the stipulated rate of one hundred forty-five and 98/100 dollars ($145.98) per week.

Defendants shall pay unto claimant healing period benefits for the period June 2, 1980 through November 15, 1980 at the rate of one hundred forty-five and 98/100 dollars ($145.98) per week.

Defendants shall pay unto claimant the following medical expenses:

Neurological Institute & Pain Center, P.C.	$786.00
Associated Physicians	399.00
Medications	62.22
Trinity Regional Hospital	590.50

Defendants shall pay unto claimant the following mileage expenses:

1980 - 500 miles x .20 =	$100.00
1982 - 720 miles x .20 =	172.80

Interest shall accrue pursuant to section 85.30, The Code, from the date of injury, May 30, 1980.

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

Defendants shall file a final report upon payment of this award.

Signed and filed this 6th day of September, 1983.

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES C. FULLERTON, Claimant, vs. CATERPILLAR TRACTOR CO., Employer, Self-Insured, Defendant.	File No. 655819 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendant appeals from a proposed review-reopening decision wherein claimant was awarded additional permanent partial disability benefits based upon a finding of 37 1/2 percent industrial disability of the body as a whole. Claimant had previously received 7 5/7 weeks of healing period benefits and 87 1/2 weeks of permanent partial disability based on a physical impairment of 35 percent of an arm. Claimant was also paid medical and travel expenses.

The record on appeal consists of the transcript of the review-reopening proceedings which contains the testimony of claimant and claimant's witness, Michael Hengl; claimant's exhibits 1 and 2; and the filings and briefs of all parties on appeal.

ISSUES

Defendant-appellant states the issues as:

1. Was there an agreement for settlement within the meaning of section 86.13 such that claimant must show a change in condition precedent to receiving an increase of compensation under section 86.14(2) of The Code?

2. Was the deputy's disability determination supported by the substantial weight of the evidence?

REVIEW OF THE EVIDENCE

The parties stipulate to $239.40 as the rate of compensation benefits.

Claimant was 50 years old at the time of the hearing. He is a high school graduate and served two years in the Navy as a gunner's mate. (Transcript, pages 6-7) His previous job experience includes line assembly and supervisory tasks in assembly. (Tr., pp. 7-8) He began working for defendant in 1977 as a chemical unit process tender in a "C" classification. Claimant testified that defendant rates employees in alphabetical order, "A" being a lesser job. (Tr., p. 10) On January 23, 1979 claimant was earning $8.57 an hour in an "P" classification, working in disassembly of engines. (Tr., p. 11) He was injured when an overhead engine fell on his right arm. (Claimant's Exhibit 1, p. 1) Claimant was taken to Mercy Hospital in Davenport and treated by John Sinning, M.D. (Cl. Ex. 1, pp. 3, 16) Dr. Sinning diagnosed the injury as a compound fracture of the right ulna with extensive muscle damage. (Cl. Ex. 1, p. 2) Surgery was performed for "debridement of compound fracture right ulna with excision of devitalized muscle and reduction of volar dislocation of the ulnar carpal joint." (Cl. Ex. 1, p. 2) On March 12, 1979 Dr. Sinning noted the fracture was unhealed. (Cl. Ex. 1, p. 5) Claimant's right arm was placed in a new long arm cast. Claimant was released by Dr. Sinning to return to "one-handed work" on March 19, 1979. (Cl. Ex. 1, pp. 5-6) On April 30, 1979 Dr. Sinning noted that the fracture was healed and claimant was to receive physical therapy for his hand, wrist, elbow and shoulder. Dr. Sinning stated that claimant's most serious limitation of motion was in the shoulder. (Cl. Ex. 1, p. 7) In September of 1979 claimant was experiencing pain at night in his shoulder and weakness in the right hand. (Cl. Ex. 1, p. 11) Dr. Sinning noted in his progress report of September 6, 1979:

> On examination the wrist moves from 45 extension to 30 flexion but pronation is limited to 20 of pronation and no supination.
>
> ....
>
> ...I have told him [claimant] that I am not very optimistic about trying to restore rotation to the damaged forearm and that it probably is a result of the severity of the crush injury.

On November 29, 1979 claimant was referred to orthopaedics at University Hospitals for evaluation of his lack of supination. (Cl. Ex. 1, p. 12) Dr. Sinning notes the outcome of that assessment.

> Mr. Fullerton was seen by Dr. Buckwalter at University Hospitals several weeks ago. Dr. Buckwalter made the very reasonable suggestion that Mr. Fullerton work toward greater use of his left hand. He indicated that resection of the area of tightness could not be expected with any degree of certainty to improve his function. (Cl. Ex. 1, p. 13)

On March 6, 1980, Dr. Sinning reported that nothing more could be done to improve claimant's arm rotation.

> Mr. Fullerton has a problem of shoulder rotation going in 30 degrees compared to 80 or 90 on the other side. External rotation 20 degrees compared to 60 degrees. Overhead elevation limited by 10 degrees.
>
> The elbow lacks 5 degrees of extension and there is a little snap in the elbow. Wrist extension 60 degrees, flexion 30 degrees. Extends his fingers and wrist well. Rotation no more than 20 degrees to pronation and no supination. (Cl. Ex. 1, p. 14)

On September 23, 1980 Dr. Sinning assigned a 35 percent impairment rating to claimant.

> The degree of loss of rotation contributes 22% loss of the upper extremity. Loss of flexion-extension is another 5%. This adds up to 27% of the arm because of the elbow. The limitations in the shoulder add up to 6% impairment. Ordinarily these two values are combined rather than added so that 27 combined with a 6 is 31 percent. I would increase this arbitrarily to 35% based on the muscle loss in the forearm with the associated weakness. (Cl. Ex. 1, p. 16)

On May 24, 1983 claimant consulted Jerome G. Bashara, M.D., who determined a total permanency rating of 35 percent of the right upper extremity involving impairment to the elbow, forearm and shoulder which converts to a 21 percent permanent partial physical impairment of the body as a whole. (Cl. Ex. 1, pp. 17-18)

When claimant returned to work on March 19, 1979, he did one-arm sorting and other light duty tasks. (Cl. Ex. 1, p. 5; Tr., p. 13) He remained on light duty for one and a half years. During this period claimant attempted a job in the pump and governor room but was physically unable to compress the springs in the plunger assembly. (Tr., p. 14) He returned to sorting duties and at the suggestion of claimant's foreman, claimant then moved to a piston blaster job in the "F" classification. (Tr., p. 14) Claimant was laid off by defendant on June 6, 1982 and has not been recalled. (Tr., p. 16) Claimant testified that men with less seniority were called to work by defendant on June 6, 1983, but claimant was not recalled because of the disability to his arm. (Tr., p. 16) Claimant filed a union grievance and was told a senior man was on his piston blasting job. (Tr., pp. 33-34) Claimant made a claim through the National Labor Relations Board and was told claimant had not been recalled because of his disability. (Tr., p. 17) Claimant stated defendant has not lifted the one-arm restriction from his record. (Tr., p. 18) Claimant testified he believes he would not have been laid off if he had remained in the pump and governor room. (Tr., p. 38) Claimant stated the combination of seniority and qualifications would have kept him on the job as there are not many people qualified for the job. (Tr., p. 38)

The men who were recalled on June 6, 1983 worked two months before again being laid off. (Tr., pp. 46-47) Claimant testified that if he had been called back on June 6, 1983, his rate of pay would have been $12.50 - $12.60 an hour and he would have received insurance benefits for another year. (Tr., p. 47) Claimant stated he did not understand the previous settlement based on the impairment to his arm to be the final settlement. (Tr., p. 48) "(I)t was my understanding that, you know, Caterpillar would be responsible for my arm for the rest of my life." (Tr., p. 48) He has attempted to get other employment through Job Service and on his own but has not been successful. (Tr., pp. 36-37) He cannot lift weight above waist high. (Tr., p. 36) He cannot use his arm for hammering or sweeping at home. (Tr., p. 44) Personal hygiene and shaving is difficult for him. (Tr., p. 44)

Michael Hengl, benefit representative for UAW, testified that he advised claimant in the settlement with defendant. (Tr., p. 53) Mr. Hengl stated it was not his understanding that the amount of compensation paid was a final settlement. (Tr., p. 53) He reported that claimant continued to work for defendant both before and after the settlement. (Tr., p. 54) Mr. Hengl stated that defendant had light duty jobs within the "A" through "D" classification of duties that claimant would be able to do, subject to seniority restrictions. (Tr., pp. 54-58) Mr. Hengl testified that under the labor agreement with defendant, the factors controlling placement in a job were qualifications for the job and whether the person being considered had done that work before. A third factor was seniority. (Tr., p. 62) Mr. Hengl stated that since claimant's injury, he has had no opportunity to advance his qualifications. (Tr., p. 64) He stated claimant was not recalled on June 6, 1983 because of claimant's arm restrictions. (Tr., p. 66) Mr. Hengl testified that people like claimant, off for seniority or medical reasons, would possibly be recalled if business picked up. (Tr., p. 68) Mr. Hengl stated that he believed claimant was a highly motivated worker who would still be working if he had not had the industrial injury. (Tr., p. 69)

APPLICABLE LAW AND ANALYSIS

As the deputy correctly points out, the filing of the memorandum of agreement by defendant was a unilateral action on the part of the employer. The memorandum of agreement establishes an employer-employee relationship and an injury arising out of and in the course of employment. Freeman v. Luppes Transport Co., 227 N.W.2d 143, 150 (Iowa 1975). In accordance with section 86.14, claimant may now seek an increase in compensation benefits previously awarded. "[A]n increase in industrial disability may occur without a change in physical condition." Blacksmith v. All-American, Inc., 290 N.W.2d 348, 350 (Iowa 1980).

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).

With regard to defendant's second issue, the record indicates that claimant's injury was determined by both Dr. Sinning and Dr. Bashara to involve functional impairment of the right shoulder. Claimant was paid compensation benefits for the injury including his shoulder based on a 35 percent functional impairment of his right extremity as a scheduled member. A disability to the shoulder is a disability to the body as a whole. Alm v. Morris Marick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949).

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, 902 (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, 257 (1963).

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, II Iowa Industrial Commissioner Report 39 (1981); Enstrom v. Iowa Public Services Company, II Iowa Industrial Commissioner Report 142 (1981); Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981).

Claimant has no physical restrictions in successfully performing his work tasks prior to his injury. During the period of his employment with defendant, claimant was motivated to increase his job skills and progress into higher paying work classifications. But for his injury and resulting disability, claimant's seniority and job qualifications might have allowed him to continue working during a plant slow down. Instead, claimant is on lay off and unable to find work within his functioning capacity. His ability to compete in the job market has been impeded and his earning potential is diminished. The evidence is sufficiently convincing to support the findings and conclusions of the deputy that claimant has sustained an industrial disability of 37 1/2 percent as a result of the injury of January 23, 1979.

FINDINGS OF FACT

1. Claimant is 50 years old and a high school graduate.

2. Claimant was working for defendant on January 23, 1979 when he was injured on the job.

3. Claimant suffered a compound fracture of the right ulna and extensive muscle damage.

4. Claimant returned to "one-arm" sorting work on March 19, 1979.

5. Claimant was unable to perform the physical tasks of his previous job.

6. Claimant was laid off by defendant on June 6, 1982.

7. Claimant has not been recalled to work and is physically unable to do the work for which he would have the seniority and qualifications.

8. Claimant has been unable to find other work within his one-arm functioning restrictions.

9. Claimant has been paid compensation benefits based on impairment of his right arm.

10. Claimant's disability includes functional impairment of the right shoulder.

11. Claimant has a 21 percent permanent partial impairment of the body as a whole.

12. Claimant has an industrial disability of 37 1/2 percent as a result of his injury.

13. Claimant's rate of compensation benefits is $239.40 per week.

CONCLUSION OF LAW

Claimant is entitled to permanent partial disability benefits based on a finding of an industrial disability of 37 1/2 percent as a result of the work-related injury of January 23, 1979.

WHEREFORE, the deputy's proposed review-reopening decision is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay unto claimant an additional one hundred (100) weeks of permanent partial disability at a rate of two hundred thirty-nine and 40/100 dollars ($239.40).

That defendant pay the amount due and owing in a lump sum.

That defendant pay interest pursuant to Iowa Code section 85.30.

That defendant pay costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

That defendant file a final report within sixty (60) days.

Signed and filed this 21st day of March, 1984.

Appealed to District Court;
Affirmed

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CAROL M. GARRETT, Claimant, vs. MAHASKA COUNTY HOSPITAL, Employer, and BITUMINOUS CASUALTY COMPANY, Insurance Carrier, Defendants.	File No. 697109 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision wherein claimant was denied permanent partial, healing period or temporary total disability benefits.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Elizabeth Holliday, and Barbara Howar; claimant's exhibits 1 through 9; defendants' exhibit 1 (the deposition of Arnis B. Grundberg, M.D.); the deposition of Carol Garrett; and the briefs and filings of all parties on appeal.

ISSUE

Whether the deputy erred in finding that neither claimant's right nor left carpal tunnel syndrome and accompanying nerve problems arose out of and in the course of her employment with defendant employer.

REVIEW OF THE EVIDENCE

Claimant, who was 50 years old at the time of the hearing, is a high school graduate and has had previous work experience as a waitress and seed corn sorter. Claimant began working for defendant employer in approximately 1970 as a housekeeping aid. She testified that her duties included cleaning rooms, mopping, and making beds. (Transcript, pp. 7-13)

Claimant testified that her right arm and hand were injured in May of 1981 when she collided with a nurse coming around a corner. She recalled being off work for one week following that incident, but that her arm and hand did not bother her upon returning to work. (Tr., p. 13-15)

Claimant testified that she was injured again in June or July of 1981 when she began to experience pain in her left arm, wrist, and hand. She was examined by Dr. Phelps at the Mahaska County Hospital in July of 1981, and was fitted with an arm brace which kept her wrist from bending. Claimant went back to work, but returned to Dr. Phelps when the pain failed to subside after a week. She was referred to Donald D. Berg, M.D. She testified that Dr. Berg performed surgery on her left hand on July 21, 1981, and again in November of 1981. Claimant testified that she continued to have problems with her left hand and was referred to William F. Blair, M.D., by a friend in August of 1982. Dr. Blair performed surgery on claimant's left hand on September 23, 1982. (Tr., pp. 15-29)

Claimant was seen by Arnis B. Grundberg, M.D., on a referral from Dr. Berg in May of 1982. (Tr., p. 26)

Claimant also testified to experiencing pain in her right arm beginning in September or October of 1982. She recalled that the right arm pain was similar to that which had been present in her left arm and that Dr. Blair performed surgery on her right arm also. (Tr., pp. 28-30)

Claimant testified that her right arm and hand are fully functional, while she cannot grip heavy objects with her left hand because two fingers no longer bend. She has remained unemployed since July of 1981 and resigned from work in order to collect her IPERS. Claimant has not looked for work of any sort because she believes two good hands are required for any job. (Tr., pp. 32-34, 39-40)

Elizabeth Holliday, head housekeeper supervisor for defendant employer for the past 11 years, testified that claimant's job entailed lifting mattresses in order to wash underneath and make the beds, dusting, mopping, and garbage pickup. The witness did not classify the work as heavy and believed a person with one disabled hand could perform the duties of a housekeeper. (Tr., pp. 58-62)

In a letter addressed to claimant's counsel dated April 15, 1982, Dr. Berg reported:

> In answer to your letter dated April 2, 1982 regarding Carol M. Garrett. In answer to your question regarding her status at the present time, Carol Garrett is 48 years of age and is post operative a second carpal tunnel release. She had previously had a carpal tunnel release in July of 1981. Post operative to this procedure the patient continued to have pain and numbness and tingling over the medial nerve distribution of her hand and never obtained good relief. She was treated with ice packs, anti-inflammatory medication and rest for her hand. She persisted in having symptoms. Following this, she was re-evaluated and felt she had extensive scar tissue over the medial nerve and she underwent an exploration of the left carpal tunnel area on November 18, 1981. It was found that she had extensive scar tissue about the median nerve and this was freed and a fat graft was placed along the medial nerve in hopes this would prevent extensive scar tissue formation.
>
> Following her surgery, she has again progressed rather slowly. She continues to have some pain and swelling in her hand although this is improving and the use of a high intensity TENS unit is helping her as far as motion is concerned and she is improving with physical therapy which she is doing to retain motion. She also had been placed on medication, Vitamin B-6, Elevil and Dilantin to aid in the nerve recovery and to relieve her pain. She was last seen by me on March 20, 1982 and she was told to return to the office in approximately one month for follow up exam. She is slowly improving and noted to have less swelling on that date of March 20, 1982 than previous visits and had better motion of her hand.
>
> As to prognosis, I feel she will probably continue to have some intermittent pain in the near future. As far as long term, hopefully this will resolve and she will again be able to return to functional use of her hand. A lot of this is determined by the amount of scar tissue she forms. (Claimant's Exhibit 1)

A clinical note recorded on November 6, 1982 by Dr. Blair states:

> Mrs. Garrett underwent a right carpal tunnel release and an external neurolysis of her left median nerve and was released from the hospital 23 September 82. In the interval she states significant improvement in her right hand but persistant problems with the left hand. In the left hand she feels as though her index finger is improved but that she has persistant problems with her right long finger. She is at present improved to the point where she is able to sleep throughout the night time, which she was previously unable to do. She is also moderately active with the hand at present.
>
> PE: Incision well healed. The APB is grade 5 bilaterally, two point discrimination right hand 5 mm, on the left hand it is as follows: small 5, ring 6, long greater than 15, index 6, thumb 5.
>
> Impression: 1) Satisfactory post-op status right hand, 2) Persistant pain over portions of the median nerve, post-neurolysis.
>
> I explained to the patient that I was not optimistic about the eventual outcome in her left hand, as we had discussed pre-operatively. I restated my somewhat pessimistic point of view, and we can hope that she does eventually gain some decrease in her pain experience in the left long finger. She was understanding and accepting. (Cl. Ex. 4)

A clinical note recorded on May 4, 1982 Dr. Grundberg stated:

> Mrs. Garrett, age 48 is sent here by Dr. Berg from Ottumwa. She is a housekeeper's aid at the Mahaska County Hospital in Ottumwa. On July 15, 1981 she developed carpal tunnel symptoms and this was a work connected problem. She had numbness and tingling in the left hand and pain that went all the way up to her shoulder from her wrist. Dr. Berg decompressed her carpal tunnel, relieving the pain radiating from the wrist to her shoulder and the numbness and tingling. She had persistent discomfort in the hand and because of this had another operation to decompress the median nerve, at the wrist in November of 1981. At that time a fat graft was used to decrease the swelling in the wrist. This has not helped her significantly, apparently. She has local symptoms in her hand. Her index and long fingers have become stiff. The hand hurts her constantly. She has not been able to go to work. She has been treated with TENS, Vitamin B 6, Dilantin and physical therapy, which have helped her some but not significantly.
>
> On examination the grip on the right is 70, left 17. Pinch right 6, left 3. She has swelling in the index and long finger. She misses the distal palmer crease by 6cm in flexion. Her fingers IP joints have the appearence of early degenerative arthritis. The joints of the index and long finger are tender. There is some decreased sensation in

the tips of the index and long fingers but not in the ring and little fingers.

Impression: Left carpal tunnel syndrome, post-operative state with residual symptoms and some sympathetic dystrophy

Discussion: I told the patient that she has had the treatment that I would consider appropriate for a carpal tunnel problem, including for the residual symptoms that she has. I think that further improvement will come with just time. I reassure her that she would improve. (Cl. Ex. 3)

During his deposition taken September 7, 1982, Dr. Grundberg indicated that the history he recorded during his May 4, 1982 examination of claimant reflects a combination of what claimant told him and what a prior history recorded by Dr. Berg stated. At one point the following ensued:

Q. Did she tell you that the problem or the symptoms that she had were related to her employment?

A. Well, I don't have that information down. I just have the information down that it hadn't been previously decided that she did have a work-connected problem that it was a carpal tunnel syndrome.

Q. That is not your opinion, or you don't have an opinion?

A. I don't have an opinion. I'm just relating what somebody told me.

Q. That statement that it is a work-connected problem is reflected in your report of May 4th or --

A. Yes.

Q. -- in the history portion?

A. Yes.

Q. And in order to clarify that for my purposes I want to make sure that that statement is a reflection of the history that either some -- or Doctor Berg provided you and not a reflection of your own opinion.

A. That's correct.

Q. Now, can you tell me by looking at your records whether or not that was something that Doctor Berg advised you about?

A. I can't say whether it was the patient or Doctor Berg.

Q. Did Mrs. Garrett when she was here give you any history of carpal tunnel symptoms in her right wrist?

A. I don't have any notes that would indicate that I asked her anything about the right hand. (Grundberg Deposition, pp. 7-8)

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on July 19, 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).

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).

In the course of relates to time, place and circumstances of the injury. An injury occurs in the course of employment when it is within the period of employment at a place where the employee may reasonably be, and while doing the employer's work or something incidental thereto. McClure v. Union et al., Counties, 188 N.W.2d 283 (Iowa 1971); Cedar Rapids Community Sch. v. Cody, 278 N.W.2d 298 (Iowa 1979).

Arising out of refers to the cause or origin of the injury. The injury must be a rational incident of the work. This means that it must be a rational consequence of a hazard connected with the employment. Musselman, 261 Iowa 352, 154 N.W.2d 128; Cedar Rapids Community Sch., 278 N.W.2d 298.

The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). It cannot be predicated upon conjecture, speculation or mere surmise. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1956). An award will not be permitted to stand if the evidence goes no further than to show a possibility of causal connection. Nellis v. Quealy, 237 Iowa 507, 21 N.W.2d 584 (1946).

ANALYSIS

The sole issue on appeal is whether claimant's carpal tunnel syndrome arose out of and in the course of her employment with defendant employer. For an injury to arise out of employment there must be a causal connection between the conditions under which the work is performed and the resulting injury. As stated in the preceeding section herein, questions of causal connection are essentially within the domain of expert testimony. Although the May 4, 1982 clinical note of Dr. Grundberg states that claimant's carpal tunnel symptoms were work related, his deposition testimony clearly indicates that such conclusion was not a reflection of his own opinion, rather was simply a restatement of what he had been told by claimant. At no point in his testimony did Dr. Grundberg express the opinion that claimant's carpal tunnel syndrome was work related. The medical records of Dr. Berg and Dr. Blair do an adequate job of relating claimant's symptoms and the treatment rendered but in no way indicate that claimant's problems were work related. To conclude that claimant's condition was causally connected to her employment, without a greater showing, would be mere speculation. Claimant has failed to prove that her condition arose out of her employment.

FINDINGS OF FACT

1. Claimant worked for Mahaska County Hospital as a housekeeper aid for 11 years.

2. Claimant began having pain in her left arm, wrist, and hand in June or July of 1981.

3. Claimant underwent carpal tunnel release surgery on her left hand in July and September of 1981.

4. Claimant began having pain in her right arm in September or October of 1982.

5. Claimant underwent carpal tunnel release surgery on her right hand in September of 1982.

6. Claimant underwent an external neurolysis of her left median nerve in September of 1982.

7. Claimant currently has full use of her right hand.

8. Claimant's use of her left hand is limited due to two fingers which have restricted movement.

9. Claimant's carpal tunnel problems are not causally related to her employment.

CONCLUSION OF LAW

Claimant has failed to sustain the burden of proving that her injury arose out of and in the course of her employment.

WHEREFORE, the deputy's decision filed March 11, 1983 is affirmed.

THEREFORE, it is ordered that claimant take nothing as a result of these proceedings.

Costs of the arbitration decision are charged to defendants. Costs of the appeal are charged to claimant.

Signed and filed this 31st day of October, 1983.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEITH J. GARRETT,	:	
Claimant,	:	
vs.	:	File No. 539960
DUBUQUE PACKING COMPANY,	:	A P P E A L
Employer, Self-Insured, Defendant.	:	D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision in which he was denied further benefits beyond those already received as a result of an occupational disease he incurred on May 7, 1979. The record on appeal consists of the transcript of the review-reopening proceeding together with claimant's exhibits 1 through 3. Defendant's exhibit A was withdrawn. Employer's answer to interrogatory number 9 was offered and accepted as a part of the record. The other pleadings and briefs and exceptions of the parties on appeal are also considered as a part of the record.

ISSUE

Appellant states the issue thus: Whether the claimant should be denied healing period benefits from a condition which was caused at work which restricts the type of work that the claimant can do, and where the company refuses to allow the claimant to work in another capacity or in any capacity because of the restrictions.

REVIEW OF THE EVIDENCE

Claimant was 40 years old at the time of the hearing and is a high school graduate. (Transcript, pp. 9-10) After leaving school, he worked in general labor jobs and was a supply clerk in the Army. (Tr., p. 10) He worked part-time for defendant employer for 3 - 4 years and began full-time employment in 1969. (Tr., p. 12) During the years of 1969, 1971, 1972, 1973, 1974, 1976, 1978 and 1979 claimant visited the medical department of defendant employer's plant with complaints of a skin rash. (Tr., pp. 14, 33-40; Claimant's Exhibit 2) Claimant testified that he broke out in a rash on his hands when he handled products with acid content. (Tr., pp. 13-14) He was treated by the company physician, L. C. Faber, M.D. (Cl. Ex. 2; Tr., p. 14) On July

15, 1981, Dr. Faber noted in the claimant's medical record: "Given slip for absolutly [sic] dry work - If none available take off job." (Cl. Ex. 2)

Claimant testified his rash problems only became serious in 1979 when he began a new job putting tripe into a scalder. (Tr., pp. 13-14) Claimant was seen by Dr. Faber on May 10, 1979 and was released from work. (Cl. Ex. 2 Work Injury Report) Claimant received healing period benefits for a total of six weeks and four days. (Employer's Report of Benefits Paid) Dr. Faber released claimant to return to work on July 3, 1979 with restrictions that claimant should not handle meat products and should do only dry work. (Cl. Ex. 2)

The record is not clear as to when claimant returned to work in 1979. Claimant testified that he worked for defendant employer through the entire year of 1980. (Tr., p. 15) None of his work duties involved handling tripe. (Tr., p. 15)

On January 3, 1981, claimant was involved in a general lay-off. (Tr., p. 16) Claimant testified he was called in June of that year by the personnel director and was told there was no work available. (Tr., p. 17) Gerald Hoftender, union steward and employee of defendant employer, testified that claimant had enough seniority to be recalled in June of 1981. (Tr., p. 46-49) Mr. Hoftender stated he was told that claimant was not recalled because claimant could not do wet work. (Tr., p. 52)

Claimant was recalled to work on September 23, 1981 and worked until October 3, 1981 at which time he was again laid off. (Tr., p. 42) Claimant testified he has not worked since October 3, 1981. (Tr., pp. 25-26) Defendant employer closed its plant on October 16, 1982. (Tr., p. 42)

Claimant testified that he has had no skin rash problems since he became unemployed. (Tr., p. 25) On September 17, 1982 he consulted Allen D. Harves, M.D., a dermatologist, for an examination. (Tr., pp. 23-24) Dr. Harves found no evidence of dermatitis present on claimant's hands. (Cl. Ex. 1) In his report, Dr. Harves stated that, based on the history and description provided by claimant, the rash problem was probably a contact irritant dermatitis. (Cl. Ex. 1)

> In other words, an eczema which develops on the hands after continual wetting and drying of the skin which produces excessive dryness with cracking of the epidermis. In other words, fissuring, which then leads to the erythema or redness and the subsequent burning and itching sensation. This would be a type of dermatitis not uncommonly found in people with "sensitive skin", who are dishwashers, new mothers who have their hands in and out of water a lot, nurses, surgeons who wash extensively, etc.
>
> ....
>
> You again asked about permanent disability in this patient. From the patient's history, alone, the only disability would be in not being able to work with tripe and the scalder. There is no way I know of to determine the exact problem or cause of the patient's dermatitis at the time he was doing that job and, since I know of no way of determining that, I would not have any idea whether there are other jobs with which the patient would definitely have trouble. (Cl. Ex. 1)

APPLICABLE LAW

Claimant must show that his dermatitis is connected to the employment within the terms of the occupational disease law which is found in Chapter 85A, The Code. Section 85A.8 states as follows:

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

Section 85A.16 provides that workers' compensation law shall apply in cases of compensable occupational diseases, and section 85.33 addresses temporary total and temporary partial disability. It states in part:

> [T]he 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.

ANALYSIS

Claimant appears to contend the employer is liable to him for workers' compensation benefits because the only work the company had available would have exposed him to elements to which he is allergic. While this may be so if the condition which prevents the claimant from being unable to perform the duties were caused by the employment, it is not so when the condition preventing the claimant from performing the duties is preexisting or brought in from the outside. This would not bar claimant from temporary disability for flare-ups of the condition caused by exposure in the work environment but it does not establish that the employer is liable for temporary disability benefits when the condition is dormant or in remission or for permanent disability benefits because it is now found that the claimant has a preexisting condition which prevents him from engaging in certain employment activities.

Nothing in the record indicates the propensity to contact dermatitis from the "acid" contained in products of the employer was caused by the employment. The medical records of Dr. Faber merely note the periodic presence of a rash and the recommendation of duties involving dry work only. Claimant's dermatologist, Dr. Harves, declines to speculate as to the cause underlying claimant's 1979 flare-up and compares the condition to one not uncommonly found in people with sensitive skin. There is no showing that claimant acquired skin sensitivity for the first time in and because of the work environment of defendant employer.

Equally, there is an absence of evidence that claimant has suffered any permanent disability due to his 1979 industrial injury. Claimant returned to work for defendant employer when his hands healed and remained on the job without incident until the January 1981 general lay-off. Claimant has testified that he has experienced no subsequent skin problems and Dr. Harves' report confirms that claimant's hands were free of dermatitis in October 1982. Clearly the remission of claimant's dermatitis has been total, and the 1979 injury, for which claimant received temporary compensation benefits, has not resulted in permanent impairment. Were claimant to experience a flare-up in the course of his employment and causally related to his work duties, claimant would be eligible for temporary benefits, but such benefits can not be awarded for a dermatitis problem which no longer exists.

FINDINGS OF FACT

1. On May 10, 1979 claimant suffered a severe rash to his hands while working for defendant employer.

2. Claimant was released from work due to the dermatitis condition and was paid temporary total disability benefits for six weeks and four days.

3. Claimant returned to work for defendant employer and experienced no further skin problems.

4. On January 3, 1981 claimant was laid off from employment as a part of a general cut-back.

5. Claimant was recalled, worked and was again laid off in October of 1981.

6. At a September 17, 1982 examination, claimant's physician found no evidence of dermatitis on either hand.

7. Claimant has not suffered a permanent impairment due to the work related injury of May 10, 1979.

8. The deputy was correct in denying claimant additional benefits.

CONCLUSION OF LAW

Claimant sustained a temporary total disability for which compensation benefits have been paid. Claimant has failed to demonstrate that additional benefits are payable to claimant as a result of the industrial injury.

WHEREFORE, the deputy's proposed review-reopening decision is affirmed.

ORDER

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

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

Signed and filed this 29th day of February, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

Copies To:

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD G. GILL,

Claimant,

vs.

GILL ELECTRIC COMPANY, INC.,

Employer,

and

UNITED STATES FIDELITY and GUARANTY COMPANY,

Insurance Carrier, Defendants.

File No. 463078

A P P E A L

D E C I S I O N

By order of the industrial commissioner filed March 2, 1984 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; exhibits 1 through 5; and the depositions of Carl Peter DeRosa, Marlene DeRosa, and Frank Xavier Maher, M.D.

The outcome of this final agency decision will modify the review-reopening decision.

ISSUES

The hearing deputy found that claimant was permanently and totally disabled under the provisions of §85.34(3), The Code, and ordered payments commenced December 30, 1983 but provided a credit to defendants for a prior partial commutation. The order also directed defendants to pay $1,988.08 in reimbursement for benefits under §85.27, The Code, and found that defendants should be penalized under §86.13 in the amount of $500 for failure to pay certain benefits under §85.27.

The issues are stated in defendants' brief:

I. Claimant's condition has not substantially changed since the date of the settlement.

II. Claimant failed to prove that his present medical problems were caused by his injury of October 26, 1976.

III. It was error to order defendants to begin making payments to claimant immediately when in fact defendants have prepaid claimant's weekly benefits because of a prior commutation.

IV. It was error to assess a penalty under §86.13 of the Iowa Code against defendants for contesting the reasonableness of mileage and athletic club expenses.

EVIDENCE PRESENTED

There has been much litigation in this matter since claimant's injury of October 26, 1976; however, a prior agreement for settlement and partial commutation took care of many of the issues. The basic question for review-reopening was whether claimant had undergone a change of condition since the agreement for settlement. Claimant had had three surgeries prior to that agreement for settlement, all involving the low back area of L4-5 and L5-S1.

In the second of those surgeries, a physician in California attempted to fuse a cadaver bone into claimant's spine. That procedure appears to have utterly failed. Claimant then had a third surgery in an attempt to correct the failure. After the agreement for settlement, claimant had yet another surgery (number four) in an attempt to fuse the low back area of L5-S1. Later yet, he had a chymopapain injection at L3-4.

It should be pointed out at this time that defendants vigorously deny any causal relationship between the treatment of the L3-4 interspace and the 1976 injury.

An orthopedic evaluation of claimant of August 3, 1983 by Howard H. Ginsburg, M.D., of Phoenix, Arizona contains about the best summary of claimant's back problem.

> This is a 43 year old male seen at the present time because of pain present in his back. The patient's back pain dates back to October of 1976. He was working as an electrical contractor at that time, moving a pipe bender from a pick-up with four other men. This object weighed approximately 450 pounds. He sustained a twisting injury to his back and developed the onset of lower back pain with radiation down both legs to the levels of the knees. He was seen by Dr. Murphy in Ventura, California. Dr. Murphy is a neurosurgeon. He underwent an L5-S1 laminectomy after myelogram and CT scan had been carried out. His back pain was initially improved but he still had some persistent leg pain. With persistence of symptoms, in 1978, he underwent lumbosacral fusion carried out by Dr. Murphy, carried out with cadaver bone, posteriorly. Pre-operatively, he had been placed into a thoracolumbar support and was continued in this post-operatively for a short period of time. The patient states that he did not do well post-operatively with persistent back and leg symptoms developing.
>
> In 1979, he underwent a second fusion carried out from L4-L5 level, using iliac bone taken from the anterior iliac crest on the right side. The patient was again placed into a thoracolumbar scaral [sic] orthosis post-operatively. He states no improvement of symptoms developed. The patient does live in Arizona but returned to California for the operation. In April of 1982, he was seen by Dr. Maher in Flagstaff Community Hospital, an orthopaedic surgeon. The patient had a fourth operation with the third attempt at repair of lumbosacral fusion. He states that he was placed into a thoracolumbar scaral [sic] orthosis, six to eight hours a day for eight months, post-operatively. He felt good from April of 1982 until December of 1982, when pain began to resume.
>
> He was then seen at the Pain Center at St. Luke's Hospital. He has had several epidural blocks carried out. In May of 1983, chymopapain injections at the L3-L4 interspace were carried out by Dr. Kelley after myelogram and CT scan had been carried out. The patient is still wearing a thoracolumbar sacral orthosis approximately six hours per day, stating it does help. He is swimming.

John J. Kelley, M.D., a neurologist, from Phoenix, Arizona, who treated claimant for the condition at L3-4 gave the following summary dated September 26, 1983:

> On 5/23/83 he had chemonucleolysis at the L-3-4 level for protruded disc. His condition with regard to that procedure is stationary. He continues to have symptoms referable to a pseudarthrosis of fused segments at L-4-5 and L-5-S-1 and is under the care of Dr. Howard Ginsburg, orthopedic surgeon, relative to this.

That same doctor on April 25, 1983 gave the following impression: "Status post multiple low back surgeries, persistent low back and extremity pain, and this patient has the classic failed back syndrome, having had 4 prior low back operations without significant benefit."

Francis X. Maher, M.D., an orthopedic surgeon from Flagstaff, Arizona, who treated claimant during his fourth surgery testified by deposition as to the diagnosis: "My diagnosis was that he had a chronic postoperative back pain syndrome which means to say that there is an entity in which people have multiple back surgeries and the pain is not completely resolved and it is difficult, if not impossible, to completely resolve." (Maher dep., p. 5 ll. 16-10) With respect to claimant's change of condition, Dr. Maher testified:

> Q. (BY MR. SAR) Doctor, I will let you answer that any way you are comfortable with. The condition for which he originally sought treatment, how is he today as compared to when you first saw him?
>
> A. He still has back pain and right lower extremity pain and I certainly can state that I do not feel it is significantly improved.
>
> Q. Is he any worse now that he was before?
>
> A. Possibly he is worse from a pain standpoint. Pain is difficult to measure, you know, and to make objective, but at this moment in time, I feel that he is having more pain subjectively.
>
> Q. Has there been any significant change in his physical condition that you can detect?
>
> A. Well, at times his back or lower lumbar paraspinal muscles recently will show more palpable spasm than that which was noted on 14 September, 1981.
>
> Q. Anything else?
>
> A. No, nothing that I have appreciated.
>
> Q. Doctor, are you familiar with impairment ratings for back problems, have you been called upon to give them in times past?
>
> A. Yes.
>
> Q. Would Mr. Gill's impairment be significantly different today than it was prior to his surgery?
>
> MR. PATTERSON: Talking about his orthopedic impairment?
>
> MR. SAR: Yes.
>
> A. When you talk about impairment, you need to, I think, always refer to whether the condition is stable or stationary and at this moment in time, I am not entirely convinced that his condition is stationary. At times his condition is equal to that of 14 September, 1981 from an orthopedic standpoint objectively and subjectively and at other times subjectively and objectively his condition is worse than what I noted on 14 September, 1981.
>
> Q. Is it possible, Doctor, for you to quantify the difference in any way, for example can you state whether it is appreciably or significantly worse or simply noticeable. Can you put any sort of adjective or qualifier on it?
>
> A. Yes. When Mr. Gill is having his worst bouts of pain, then his back motion is less than that noted on 14 September, 1981 and you can quantify that. However, it depends upon the level of the patient's pain in terms of the motion obtained.
>
> Q. Are there times when he perhaps is slightly better?

A. Than 14 September, 1981?

Q. Yes.

A. No, I do not feel that I could honestly say that he is better at present.

Q. Are there times, however, when he is comparable?

A. Comparable, yes. (Maher dep., pp. 7-9 ll. 7-25, 1-25 and 1-8)

Finally, Dr. Maher states:

> Yes, I feel that it is reasonable to give Mr. Gill an impairment rating similar to that which he had before surgery. As I mentioned before, I do not think his surgery has been of significant benefit and in spite of saying at times he may be worse from a symptomatic standpoint, after surgery in terms of giving impairment ratings, those are supposed to be based on objective criteria and objective criterion are not significantly changed. (Maher dep., p. 25 ll. 6-13)

Robert H. Barnes, M.D., the medical director at the St. Luke's Pain and Stress Reduction Center in Phoenix, Arizona stated in a letter of September 26, 1983:

> Considering the severity of the physical pathology involved, including the failed fusion in his back, and the severity of his pain difficulties, this man is in no way a candidate for any type of work - or at this point, for a rehabilitation progrom, in the usual sense. After treatment in the Intensive Out-Patient Program if there is some improvement, whether this involves further surgery or not, we will be in a better position to ascertain the general directions of a rehabilitation program.

Claimant assumed after the fourth surgery that his problems would lessen; however, he had the episode at L3-4 which he describes as follows: "I though I was home Free. I sat down on the edge of the bed, bent over to put my shoes on, and it's like someone took a hand grenade and stuck it in your back and it blew up." (Tr., p. 84 ll. 15-18) That pain apparently improved because Dr. Kelley described the condition after the chymopapain injection as "stationary" in his letter of September 26, 1983, and a report of April 25, 1983 from Dr. Barnes states that the pain was decreased 85 percent with reference to the L3-4 distress.

Claimant also had some psychiatric consultations in a letter of March 1, 1983, Dean L. Gerstenberger, M.D., a psychiatrist from Flagstaff, Arizona, stated:

> The purpose for this letter is to see if it would be possible to expedite approval of Dick Gill attending the Pain Management Center in Phoenix. I am currently extremely concerned about Dick. He has become much more depressed in the last two weeks and has been getting things in order in a manner which makes me feel he is an extremely high suicidal risk in the next month if immediate steps are not taken to have him hospitalized and treated. I feel that if something definite is set up on the Pain Management Center for the very near future, Dick will be able to look forward to that and hold on. If nothing is done, I am extremely concerned of suicidal potential.

In a letter of August 29, 1983, Dr. Gerstenberg describes claimant as "depressed to a moderately severe degree." Then in a report of September 26, 1983, Dr. Gerstenberger states:

> At the present time Dick continues to be somewhat depressed but his mental state is much improved over what it was prior to going to the Pain Center. I feel that if his mental state continued where it is now it would have little interference with his being able to hold a job.
>
> I must add to this a more negative note, however. When Dick's pain becomes very severe his mood also goes down and it is my sincere belief that Dick will sometime in the future again be a high suicidal risk if the pain's severity increases with no possibility of improvement.

Dr. Maher rates claimant's permanent partial impairment at 35 percent impairment of the body as a whole (Chart note 11-582) and did not change that rating in his deposition. Also, Dr. Maher felt that claimant's use of an atheltic club membership, which had been disputed by the parties, was a "supportive, ancillary adjunct to his physical theory treatments." (Chart note August 17, 1982)

In an appeal decision of May 12, 1983, the undersigned deputy industrial commissioner had made a presumption that certain compensation payments had continued during the pendency of the action. That assumption turned out to be wrong and the parties cured the mistake by a filing of August 12, 1983. That filing best explains the situation with respect to the credit for the compensation:

> That under the Appeal Decision filed May 12, 1983, the first full paragraph of page 2 of the decision should be corrected to reflect that claimant's total settlement is 543 weeks (242 TTD as stated by Deputy Moranville plus the 26 weeks of TTD from 4/28/82 through 10/26/82 plus the 275 weeks of PPD) and that 432 weeks have been paid through 5/10/83 leaving a balance of 111 weeks; further that claimant has requested a partial commutation which as of May 9, 1983, would be computed as follows:
>
> | | |
> |---|---|
> | Remainder | 111 weeks |
> | Commutation of | 110weeks |
> | New remainder | 1 week |

APPLICABLE LAW

Claimant must show that his health impairment was probably caused by the work injury; possible cause is not sufficient. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955); Ford v. Goode, 1219, 38 N.W.2d 158 (Iowa 1949);

Almquist v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 (1934). Claimant also 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 the 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. Id. at 1112; Martin v. Skelly Oil Company, 252 Iowa 128, 106 N.W.2d 95 (1960).

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).

Although claimant must show a change of condition in order to reopen his case, he does not have to show an increased functional disability. Blacksmith v. All American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

The first and fourth unnumbered paragraphs of §86.13 applied to this case:

> If an employer or insurance carrier pays weekly compensation benefits to an employee, the employer or insurance carrier shall file with the industrial commissioner on forms prescribed by the industrial commissioner a notice of the commencement of the payments. The payments establish conclusively that the employer and insurance carrier have notice of the injury for which benefits are claimed but the payments do not constitute an admission of liability under this chapter or chapter 85, 85A, or 85B.
>
> ....
>
> 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.

ANALYSIS

The second issue, that of the question of the causal relationship between the original injury and claimant's L3-4 problem, will be considered first. Defendants argue with some force that none of the evidence establishes such a causal relationship. Claimant counters by arguing:

> Although the symptomatology most recent in advance of the April 1983 hospitalization reflected that in December of 1982 patient was bending over and had increased back symptoms, the report, captioned "St. Luke's Behavorial Health Center", reflecting a discharge of May 13, 1983 under Dr. Barnes' section of reports, reflects that both Drs. Kelly [sic] and Barnes thought that Mr. Gill had a classic failed back syndrome, having had four prior low back operations without significant benefit. Prior to surgery to repair the herniated disk, authorization was secured from the insurance carrier and the insurance carrier was advised by telephone of the diagnosis. All charges have been paid.
>
> It is not surprising that the disk herniation at the level of L3-L4 most recently diagnosed is not directly and causally related to the October 1976 injury. Rather, it is clear it reflects a natural consequence of deterioration and injury flowing directly from the multiple surgeries undertaken to repair back injuries resulting from the initial trauma and the complications that arose therefrom.

Such an argument does not refute that of defendants, and no reason is given for claimant's failure to try to connect up the injury and the L3-4 incident. Also, just because defendants authorized the procedure does not mean that they admitted the causal relationship. Claimant's argument that the condition at L3-4 "reflects a natural consequence" of the injury is totally without proof. Therefore, one concludes claimant has failed to carry the burden of showing a causal relationship between the injury and the herniated disc at L3-4.

Claimant's condition at L4-5 and L5-S1, however, is clearly connected to the injury and is of such a serious nature that it is extremely doubtful he will ever work again.

Further, he has satisfied the requirement that he show a change of condition following his fourth surgery. See Maher deposition, for example, p. 7 wherein that physician says that claimant's pain was possibly worse and that his lower lumbar paraspinal muscles showed a more palpable spasm after the surgery. Of course, one recognizes that Dr. Maher did not raise the disability rating from 35 percent of the whole man.

Claimant has shown a change of condition in another respect. When the parties signed the agreement for settlement after the third surgery, it seems clear that they had in mind only a partial disability and contemplated that claimant might again be able to work. However, that eventuality did not take place and probably never will. It is clear, then, that the parties attempted to make a reasonable prediction of claimant's disability but that prediction should not foreclose claimant from reopening. See Myers v. Holiday Inn, 272 N.W.2d 24 (Iowa ap. 1973). See also Plain v. Franklin Manufacturing Co., 2 Iowa Industrial Commissioner Report 306 (1982).

With respect to the extent of claimant's industrial disability, the evidence shows he has a high school education and one and one-half years of college. More importantly, perhaps, he operated a successful electrical business. Even so, the constant pain in claimant's low back, which apparently emanates from the failure to fuse, incapacitates him to such an extent that he probably will never work again. Therefore, one concludes claimant is permanently and totally disabled.

Defendants are correct, of course, that they should receive a credit to the extent of the commutation granted from the stipulation filed, it appears compensation was paid to May 9, 1983. The credit of 110 weeks would mean that claimant's compensation payments would be interrupted to June 17, 1985, at which time they would recommence.

The review-reopening decision assessed a penalty for late payment of benefits under §85.27. As the penalty provision applies only to late weekly payments, that part of the review-reopening decision must be changed. Klein v. Furnas Electric Co., Appeal decision by the industrial commissioner, February 27, 1984.

The findings of fact, conclusions of law, and order of the review-reopening decision are not adopted, and those below are by the undersigned.

FINDINGS OF FACT

Claimant hurt his back at work on October 26, 1976 and has had four low back surgeries since then plus chemonucleolysis at L3-4.

Between the time of the third and fourth surgery, he entered into an agreement for settlement under which the parties agreed that he had a permanent partial disability of 55 percent of the body as a whole.

Defendants have paid compensation benefits to May 9, 1983 and from that date to June 17, 1985 equals 110 weeks.

Claimant had a back pain episode in December 1982 which involved the L3-L4 disc interspace and which required treatment by chymopapain injection; the condition which resulted from that back episode has not been shown to be connected to the injury.

Claimant's condition at L3-4 is stationary and does not significantly contribute to his disability.

Claimant's main physical problem is a pseudarthrosis, a failed back, at L4-5 and L5-S1.

The failed back syndrome is connected to the injury of October 26, 1976.

Claimant was age 43 at the time of the hearing, a high school graduate with one and one-half years of college who operated his own successful business.

Defendants failed to pay certain benefits owed under §85.27.

CONCLUSIONS OF LAW

On October 26, 1976, claimant sustained an injury which arose out of and in the course of his employment.

As a result of that injury, claimant is permanently and totally disabled.

Defendants are entitled to a credit of one hundred ten (110) weeks for a prior partial commutation.

Defendants are not obliged to pay a penalty for a failure to pay benefits under §85.27.

ORDER

WHEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant at the rate of one hundred sixty dollars ($160) per week under the provisions of §85.34(3), Code of Iowa, so long as claimant's disability shown shall last, provided however that such payments do not begin until June 18, 1985.

Defendants shall pay unto claimant the sum of one thousand nine hundred eighty-eight and 08/100 dollars ($1,988.08) in reimbursement for benefits under §85.27.

The defendants shall pay the costs of the athletic club membership and expenses and the transportation expenses incidental thereto for all periods of time in the future until such time as the claimant's treating physician, appointed by the defendants, determines and reports that such expenses are not of reasonable medical benefit to the claimant's condition.

Costs are taxed against defendants.

Defendants are ordered to file an up to date claim activity report.

Signed and filed at Des Moines, Iowa this 21st day of June, 1984.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL L. GRAHAM,	:	
Claimant,	:	File No. 693596
vs.	:	
RESEARCH COTTRELL, INC.,	:	
Employer,	:	REVIEW-
and	:	REOPENING
THE HARTFORD,	:	DECISION
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Michael L. Graham, claimant, against Research Cottrell, Inc., employer, and The Hartford Insurance Company, insurance carrier, for the recovery of further benefits as the result of an injury on January 27, 1982. A hearing was held before the undersigned on July 26, 1983. The case was considered fully submitted upon completion of the hearing.

The record consists of the testimony of claimant and Diana Graham as well as the transcript of the testimony of Barbara Chaldy; claimant's exhibits 1 through 10 and 12 through 16; and defendants' exhibits A through D. Claimant filed a letter brief.

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 permanent partial disability benefits he is entitled to; and his rate of compensation. The parties also agreed that the undersigned shall determine if claimant's healing period ended in September or October of 1982.

FACTS PRESENTED

Claimant received an injury arising out of and in the course of his employment with defendant on January 27, 1982 when, while up on a cooling tower he slipped on some ice and fell five or six feet. At the time of his injury claimant was working out of a union hall as an electrician and had been hired by defendant who was building a powerhouse. As a result of his injuries claimant was referred to different physicians. Claimant's main complaints were with his back and left leg. Claimant presently wears a back brace seven days a week. Claimant has been told that surgery might be beneficial but claimant has not wanted to undergo surgery. Claimant testified that at the time of his injury he had a common-law marriage.

Claimant indicated that prior to this injury he had no physical limitations and that he could perform all of his job requirements. Claimant disclosed that his physical complaint at the time of hearing is that he can't do anything. Claimant stated that when he gets on his knees he hurts, when he is under a car he hurts, when he mows the yard he hurts, but can do some activities for short periods of time. Claimant indicated that he gets up at 6:00 a.m. and goes to sleep at 10:00 p.m. but takes two or three rest periods a day. Claimant has not worked since last working for defendant with a light duty slip in March or April of 1982.

On cross-examination, it was brought out that claimant is concerned that if he does electrical type work outside of the union hall he could lose his seniority rights and retirement benefits.

Diana Graham testified that she is married to claimant although they have not had a formal marriage. Diana stated that they have held themselves out as being married since June of 1981.

Barbara Chaldy testified that she is a rehabilitation supervisor for International Rehabilitation Association, and provided rehabilitation services to claimant at the request of the defendant insurance carrier. Ms. Chaldy indicated she first contacted claimant on November 2, 1982. Ms. Chaldy disclosed that she was unable to place claimant in any position, but was not really at that point yet with claimant's file. Ms. Chaldy opined that claimant was not capable of returning to his former position.

On cross-examination, Ms. Chaldy indicated that because of claimant's erratic physical behavior an active job search was not initiated.

In a report dated September 22, 1982 Mark Odell, M.D., indicated he first saw claimant on February 9, 1982 after claimant had slipped and fallen at work on January 27, 1982. Although claimant originally complained of stiffness in his neck, right arm, middle finger, posterior thigh and foot, after a few weeks his only complaint was radiating pain down the posterior aspect of his left leg. X-rays showed mild narrowing of L5-S, and some spur formation. Dr. Odell disclosed that claimant had a prolonged course of intermittent improvement followed by periods of back and leg pain. Dr. Odell revealed that orthopedic consultants feel claimant's problem is due to a herniated disc and that he would benefit from surgery. Dr. Odell indicated that claimant rejected surgery but followed conservative treatment.

In a report dated October 25, 1983 Jerry L. Jochims, M.D., opined that claimant had a herniated intervertebral disc at L5-S1 and had fifteen percent permanent partial impairment. Dr. Jochims later opined claimant was 100% permanently impaired on

an industrial basis. In his report of April 27, 1982 Dr. Jochims advised claimant to return to work on March 22, 1982 and if he was unable to, to follow up in the office on a PRN basis.

In his report William Catalona, M.D., opined that claimant had a herniated intervertebral disc.

APPLICABLE LAW

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

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).

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. See Birmingham v. Firestone Tire & Rubber Company, II Iowa Industrial Commissioner Report 39 (1981); Enstrom v. Iowa Public Services Company, II Iowa Industrial Commissioner Report 142 (1981; Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981).

ANALYSIS

Claimant has met his burden of proving that he had a common-law marriage on the date of his injury. Claimant, as well as his common-law wife, testified as to their relationship and no evidence was received that would contradict their testimony. The parties stipulated that if a common-law marriage was found to exist claimant's rate would be $348.21 per week.

Claimant has also met his burden in proving he has some permanent impairment as a result of his injury on January 27, 1982. All the medical evidence received would indicate that claimant has a herniated disc as a result of his injury. The only physician to give an impairment rating was Dr. Jochims, who opined that claimant was fifteen percent permanently partially impaired.

Dr. Jochims also opined as to claimant's industrial disability. Contrary to claimant's argument, Dr. Jochims has not been shown to have any expertise in the area of industrial disability. The fact that a physician has rated many patients as far as permanent impairment is concerned does not have any bearing on his or her qualifications of rating industrial disability. Furthermore, Dr. Jochims did not indicate what factors he considered when giving such an opinion.

Claimant was born on August 6, 1938 and has an eleventh grade education. Other than loading trucks as a laborer for one and one-half years claimant has spent the majority of his working life as an electrician. Claimant also was an apartment manager for approximately six months.

Claimant has met his burden in proving that he can not return to his former position as a construction electrician. However, the undersigned is greatly hampered by the fact that claimant failed to have any physician indicate what claimant's working restrictions would be. The undersigned can not base a decision on mere speculation. The fact that no restrictions were stated does not shift the burden of proof to defendants to prove what claimant can do. It is apparent from reading the reports that claimant should not do heavy lifting, but even in this regard the upper limit of what claimant can lift was not presented. This lack of evidence obviously affects the undersigned's ability to determine claimant's loss of earning capacity. This lack of information greatly restricts the undersigned's ability to determine what claimant's future job opportunities might be. Based on the evidence presented, it is determined that claimant has an industrial disability of 35%.

The September 23, 1982 letter of Dr. Jochims indicates that he last saw claimant on September 9, 1982 and at that time was able to rate claimant's permanent impairment. Claimant has failed to show his condition has improved since that date.

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 27, 1982 claimant received an injury arising out of and in the course of his employment.

FINDING 2. At the time of his injury claimant and Diana Graham were holding themselves out as husband and wife.

CONCLUSION A. At the time of his injury claimant had a common-law marriage.

FINDING 3. As a result of his injury claimant has a permanent impairment of fifteen percent (15%).

FINDING 4. The medical evidence failed to disclose any physical restrictions on claimant other than heavy lifting.

FINDING 5. Claimant was born August 6, 1938 and has an eleventh grade education.

FINDING 6. Claimant has loaded trucks as a laborer but for the majority of his working life has been a construction electrician.

FINDING 7. Claimant has also worked as an apartment manager.

FINDING 8. Claimant can not presently return to his job as a construction manager.

CONCLUSION B. Claimant has an industrial disability of thirty-five percent (35%).

FINDING 9. As the result of a September 9, 1982 examination claimant was rated on his permanent impairment.

FINDING 10. Claimant's condition has not improved since September 9, 1982.

CONCLUSION C. Claimant's healing period ended on September 9, 1982.

ORDER

THEREFORE, IT IS ORDERED:

Defendants are to pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at a rate of three hundred forty-eight and 21/100 dollars ($348.21) per week to be computed from September 9, 1982. Defendants are also ordered to reimburse claimant the difference between his rate as found and the rate paid with regard to healing period benefits.

Claimant failed to present any evidence to causally connect claimant's exhibit 1 and the injury involved so that bill will not be allowed.

Defendants are to be given credit for healing period benefits and permanent partial disability benefits previously paid.

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.

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 ____ day of January, 1984.

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EDWARD GRAPEVINE,	:	
Claimant,	:	File No. 650724
vs.	:	R E V I E W
HUMBOLDT FEED & GRAIN,	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
IOWA KEMPER INSURANCE CO.,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Edward Grapevine, the claimant, against his employer, Humboldt Feed & Grain, and their insurance carrier, Iowa Kemper Insurance Co., to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on September 4, 1980.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Webster County Courthouse in Fort Dodge, Iowa on March 16, 1983. The record was considered fully submitted on that date.

An examination of the industrial commissioner's file indicates that a first report of injury was filed October 17, 1980. A memorandum of agreement was filed December 17, 1980. A Form 2A was filed June 21, 1982 indicating the claimant has been paid 62 weeks of healing period benefits and a permanent partial disability of six percent of the body as a whole.

The record in this case consists of the testimony of the claimant, Don Faltinson, D. W. Hoyt, D.C., Gary L. Gonnerman, D.C., Connie Jorgensen, Allen Test; claimant's exhibits 1 through 5 inclusive; and defendants' exhibits A and B.

ISSUES

The issues to be resolved are whether there exists a causal relationship between the injury and the resulting disability, as well as the extent of that disability. There is also an issue of the appropriateness of certain medical charges under section 85.27 of the Code.

REVIEW OF THE EVIDENCE

At the time of hearing the parties stipulated that the applicable rate in the event of an award is $171.26. The parties agreed that the claimant has been off work since the date of injury, September 4, 1980. The parties further stipulated that the healing period extends from September 4, 1980 through February 16, 1982. The parties agreed that all medical bills in issue are fair and reasonable for the services rendered.

The claimant, Edward Grapevine, testified that he is 62 years of age, married, with three grown children.

His educational background reveals that he completed the ninth grade and later secured a G.E.D. certificate.

His employment background includes farm work prior to World War II. The claimant served in the Coast Guard from 1940 through 1945. Claimant's answer to interrogatory 5 indicates that post World War II he was self-employed in the radio repair business, later worked for Cottonwood Country Farms service ranch, performing the tasks of an assistant manager. Later, he was employed by Clay County Farm Bureau Service Cooperative in a management position. Betwen 1962 and 1964 he worked for Bernard Lease, Inc. as a traveling salesman. He worked for Doughboy Feeds of Humboldt, Iowa from 1965 through 1974 as a sales representative. He began his employment relationship with the defendant, Humboldt Feed & Grain Company, in 1975. The answer to the interrogatory and testimony indicates that he worked in a management position for the defendant overseeing inventory, bookkeeping, sales and supervised personnel. Claimant indicates in his testimony that while many of his positions were management-related, some physical exertion was also required by him in conjunction with operating the business.

On the date of injury, September 4, 1980, the claimant confirmed that he was working for the defendant. On that date he was grinding feed when an overhead conveying pipe became clogged. Claimant stated that he was attempting to hold the pipe over his head in an attempt to clear it when it came loose and dropped jolting his arms, neck and shoulder. Claimant continued to work on the date of the injury, lifting 50-100 pound bags of feed and pouring the contents into the mixer. On September 4 claimant acknowledges that he felt pain in the upper back area and the painful sensation continued to worsen on September 5 and 6. On September 6 he was examined by Dr. Hoyt, a chiropractor, and confirms that he has not worked since that date.

Mr. Grapevine indicates that prior to the date of injury, he had never experienced neck and shoulder pain which he experienced on September 4, 1980.

Claimant indicates that he has continued under the care of Dr. Hoyt since September 6, 1980 on a regular basis. Therapy, traction and chiropractic manipulation have been applied.

Mr. Grapevine indicates that, post injury, the pain has come and gone on a sporadic basis. However, when the pain builds up to a point where he cannot tolerate it, he returns to Dr. Hoyt for chiropractic adjustment. The intensity of the pain varies with the amount of activity which claimant performs. The claimant acknowledges that after the injury he has done some driving of an automobile but not to any great extent. He has also tried to drive a bus but indicates that he "pays for it later."

Claimant indicates that pain is located in his neck which radiates into his shoulder and arms. He also notes pain in his low back. The pain appears to be aggravated upon walking.

Claimant confirms that in 1981 he was evaluated at the Mercy Hospital Medical Evaluation Unit. The claimant has filled out several job applications and had one interview, but no other responses to his applications for work. Mr. Grapevine indicates that he has never declined to make an application. He indicates that he would not decline retraining overtures, but none have been made. Claimant is not happy in his present status.

On cross-examination, the claimant confirms that he was the manager of Humboldt Feed & Grain Company. He indicates that this facility has been dissolved and now is closed.

Since the date of injury, the claimant confirms that he has remained at home. He walks, does the exercises that have been prescribed, and paints.

He confirms that surgery has been discussed with N.W. Hoover, M.D., and rated at a 50-50 chance of success. No surgery has been carried out today. With respect to claimant's low back complaints, he indicates that he vocalized these to Dr. Hoover, but Dr. Hoover did not treat the low back.

The claimant confirms that prior to the date of injury he planned to retire at the age of 62. He confirms that he has sold some oil paintings on a professional basis and would like to continue that activity, although this painting activity does appear to be a hobby. The balance of this witness' examination and testimony has been considered in the final dispostion of the case.

Don Faltinson testified on behalf of the claimant. During the summer and fall of 1980, this witness had occasion to work for the defendant on a part-time basis. His work primarily involved delivering feed and loading and unloading trucks. He is acquainted with the claimant via their work for the defendant. He confirms that prior to the date of injury he has had occasion to work with claimant and indicates the claimant never complained of any discomfort or pain prior to the incident in quesiton. He appeared able to do his work without difficulty. This witness confirms the facts of the incident which occurred on September 4, 1980, producing the injury of which complaint is now made. He confirms that the claimant complained of stiffness and limitation of motion on September 5. This witness has had the opportunity to see the claimant post injury and indicates that the claimant is very cautious in his movements and limited in his actions. He considers claimant an honest and industrious individual and not a malingerer. The cross-examination of this witness has been considered in the final disposition of this case.

Dr. David Hoyt, a chiropractor, testified at length on behalf of the claimant. This witness has been in the practice of chiropractic for 32 years and is licensed to practice in the state of Iowa. He is acquainted with the claimant and confirms that the claimant has been his patient for a considerable period of time. His first examination of the claimant occurred on September 6, 1980. The claimant on that date complained of severe pain in the cervical area, which radiated into the left shoulder and arm. The facts recited to this witness are similar to the testimony given by the claimant with regard to the incident in question. After diagnostic studies were undertaken, a preliminary diagnosis of peexisting degeneration of the discs C5, C6 and C7 was made. Conservative treatment was undertaken, including chiropractic manipulation three times per weeks.

This witness diagnosed a low back difficulty which he attributes partly to the cervical injury and partly to a compression of L5, S1. He describes this as a compression of the entire spine.

This witness expressed the opinion that the cervical injury is probably the result of trauma occasioned by the work incident described by claimant. He confirms that degeneration of the levels of C5, C6 is a common problem with people in the claimant's age bracket. This witness confirms that absent trauma the degeneration noted would not cause any significant problem with the claimant. This is borne out by the fact that the claimant was not limited prior to the date of injury. This witness indicates that the consequential results of the trauma were more severe to the C5, C6 area due to the preexisting degeneration. He is of the opinion that a healthy joint could sustain more trauma than one with the degeneraive conditions noted.

In June 1981 low back x-rays were taken and diagnosis of scoliosis and degeneration of L5, S1 was made. This witness is of the opinion that the low back problem was aggravated by the cervical injury previously noted. This witness is of the opinion that therapy suggested by the medical doctors in this case caused an aggravation of the claimant's condition and resulted in a downhill progression. The therapy in question lasted one week as this was all claimant could stand. The chiropractor indicates too much traction was applied at an incorrect angle causing additional difficulties. This witness confirms that the claimant continues to be treated by him and the course of treatment remains the same and includes traction and manipulative therapy, walking and exercise. This witness confirms that there is presently owing a balance of $870.00 for services rendered in this case. He confirms that the carrier paid the chiropractic bill up to July 1982. He also confirms that in July 1982 he was advised that no more chiropractic bills would be paid after that date.

This witness confirms that in October 1980 a second opinion was jointly secured and recommended by the chiropractor and by representatives of Kemper Insurance. Dr. Hoover was the examining independent physician. This witness is aware of Dr. Hoover's opinion on the cervical problem and agrees with his findings of an impairment of six percent. He also confirms that the claimant cannot engage in any occupation requiring lifting. He also

cannot engage in a position which requires him to be on his feet or walk for an extended period of time. This witness also believes there is some impairment due to the low back problems but no rating appears to have been given.

Gary Gonnerman, D.C., a business partner of Dr. Hoyt, and also a chiropractor, testified at length on behalf of the claimant. This witness has been involved in claimant's treatment generally and specifically in evaluation. Providing lengthy testimony concerning the variety of tests that he performed on the claimant, he indicates in his opinion the claimant has sustained an impairment of 45 percent of the body as a whole. This witness interestingly indicated that the figures can be higher or lower depending upon "what side of the fence you are on." No testimony was offered from this witness as to the potential causal relationship between the injury and the resulting substantial disability that he noted.

On cross-examination, this witness confirms that he did not become involved in the claimant's case until January 1983. This witness admitted that he does not know the cause of the back injury, that is, whether it is degeneration or caused from the accident.

Bonnie Jorgensen, the office manager for Job Service of Iowa, testified on behalf of the defense. She is charged with the general management of the Job Service office, and also is directly involved placing people in various positions. She is acquainted with the claimant and has known him since the summer of 1982. She indicates that when the claimant first came to the Job Service office, he indicated he wanted part-time or full-time work in bookkeeping, sales and management, but with limited physical activity. After the summer 1982 this witness had several conversations with the claimant with respect to his potential placement. This witness confirms that she referred the claimant to potential employers and as far as she knows he made contact with them. She indicates that the W & H Cooperative was interested in the claimant, and other employers were also interested. They had positions which fit his restrictions. The balance of this witness' testimony has been considered in the final disposition of this case.

Allan D. Test, an employee of Test & Company, testified on behalf of the defense. He has experience in handling workers' compensation claims and working with vocational rehabilitation specialists. This witness confirms that he was first contacted with respect to the claimant's situation in March 1981 by the insurance carrier. He was requested to assist claimant in returning to work. He also confirms that in conjunction with this overall job placment, the Mercy Hospital evaluation was completed.

In August 1981 an interview between this witness and claimant was conducted to seek out claimant's potential interest with respect to employment. Claimant indicated he was interested in a mail order business and it was suggested that possibly the insurance carrier could provide some money to assist in beginning this business. However, the claimant never provided any figures. This witness confirms that he conducted a general job survey in the Humboldt area, again, at the expense of the employer-insurance carrier and determined that there were few jobs available in Humboldt, generally speaking. The balance of this witness' testimony has been considered in the final disposition of the case.

Norman W. Hoover, M.D., an orthopedic specialist, notes in his letter of May 14, 1981, contained as part of claimant's exhibit 2, that it was his impression that the claimant's present impairment to the cervical spine was related to the injury which he sustained in September 1980. He also notes that via radiographic studies, there is a suggestion that there is an unrelated degeneration of the C5, C6 disc. He is of the opinion that apparently the work-related trauma is pathologically located at the C6, C7 area.

Dr. Hoover testified by deposition in these proceedings. Dr. Hoover is a board certified orthopedic specialist, and a member of numerous professional organizations. This witness confirms that he first examined the claimant on December 26, 1980 at the request of Dr. Hoyt, the chiropractor. The history reported to this physician by the claimant is basically consistent with the claimant's testimony. Claimant, upon examination, complained of residual pain in his neck and less pain radiating into his arms. Diagnostic studies were undertaken and x-rays displayed a narrowing of C5, C6 intervertebral spaces with some hypertrophic ridging of that space. Dr. Hoover indicates that narrowing is not unusual for a man the claimant's age.

The physician then testified at length concerning the numerous periodic visits and examinations that he conducted of the claimant. Eventually therapy was recommended at Trinity Regional Hospital in Fort Dodge. It appears from the record that there may have been some aggravation of the symptoms due to this therapy. It wasn't until February 16, 1982 that the claimant complained of low back pain. Dr. Hoover undertook an evaluation of claimant's permanent impairment and notes in his testimony as follows with regard to that impairment:

> Therefore, I would agree with six percent as a measure of permanent impairment, but my note says that this does not measure physical disability, since it gives no weight to the major problem which is pain and increasing pain with activity. Therefore, I evaluated Mr. Grapevine's physical disability from any type -- for any type of activity, to be twenty-five percent of the whole person, and concluded that since his usual occupation was a strenuous one, that he could not return to that, that is to say that he was at least at that time totally disabled from his usual occupation or any other of a similar type.

Dr. Hoover notes that he is of the opinion claimant has a six percent functional impairment and has gratuitously opinioned that the disability attributable to the injury is 25 percent of the body as a whole. He notes that claimant's "physical disability" is significantly greater because of pain than his rateable physical impairment. He disagrees with the report of the Medical Occupational Evaluation Center, and noted "disability" as six percent. He notes that "six percent physical disability is virtually none." This physician confirms that degenerative changes preexisted the injury in question. The physician is of the opinion that the trauma described by the claimant could have caused a protrusion of the disc in question. This physician confirms that surgery was discussed, but based on the risks due to claimant's age, and based upon the fact that claimant was at least bearing up to the pain, the physician recommended that the surgery not be carried out. In substance, the physician is of the opinion there is a causal relationship between the incident and the resulting injury. He is of the opinion that claimant cannot perform heavy lifting of 50-100 pounds. He is also of the opinion that claimant cannot operate an automobile for extended periods of time.

This physician, after examining the report of the Medical Occupational Evaluation Center, indicates that he is in agreement with all of their findings. He only disputes the way they stated the disability rating.

On cross-examination, the physician confirmed that surgery has not been performed. The physician is also of the opinion that the chances of success of a proposed surgical procedure would be quite good. The balance of this witness' testimony has been reviewed and considered in the final disposition of this case.

The contents of the Medical Occupational Evaluation Center report, marked defendants' exhibit A have been reviewed in conjunction with disposition of this case. In summation, that report indicates:

> As a result of this accident of September 4, 1980, he did sustain permanent partial disability. This amounts to 6% or more of the body as a whole at this time, but the figure is somewhat indefinite depending upon the need for any possible surgical intervention in the future.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 4, 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 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).

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 & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); 100 C.J.S. 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. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1960), and cases cited.

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

It is undisputed that on the date of injury, September 4, 1980, the claimant was an employee of the defendant. The record reveals that the defense has filed a memorandum of agreement in this case, and by that document admits in addition to the employee-employer relationship, that on the aforementioned date the claimant sustained a personal injury which both arose out of and in the course of his employment. The claimant has been examined and/or treated by a variety of practitioners running the gamut from chiropractors to the Medical Occupational Evaluation Center to Dr. Hoover, a well qualified orthopedic specialist. In analyzing the medical data, it is interesting to note that Dr. Hoover, Dr. Hoyt and the Medical Occupational Evaluation Center all rate claimant at approximately the same functional impairment of six percent. While Dr. Hoover had some disagreement with the final results of the Mercy Hospital Medical Occupational Evaluation Center, a close examination of their opinion evidences the fact that there might be some confusion as to whether they are talking about impairment or disability. If they are talking in terms of impairment, the three opinions are very close. Certainly Dr. Hoover, who has been the claimant's treating physician, and Dr. Hoyt, the chiropractor, can be said to be in agreement as to

the extent of functional impairment. In the opinion of the undersigned, this closeness of opinion among various practitioners is very persuasive in the final disposition of this case. It is only Dr. Gonnerman who provides an opinion of a functional impairment which is substantially different from the aforementioned individuals or institutions. The great disparity in the rating, in the opinion of the undersigned, detracts from the weight and credibility of Dr. Gonnerman's position.

It is clear that the claimant has some preexisting degenerative condition in the cervical area. The record is clear, however, that the claimant was productive and able to work on a regular basis prior to the date of injury in question. This would leave the undersigned to believe that any preexisting cervical problem was dormant and non-disabling prior to the incident in question. The record is clear that the claimant has had significant difficulties post injury and a significant period of healing period has been paid.

The claimant is approximately 62 years old and admitted to an intent to retire at age 62 prior to the date of injury. The record is clear that he posseses some talents over and above the normal laborer. He has experience in management of various facilities, all of which are to his credit.

Based upon the record as a whole, and taking into consideration the aforementioned industrial disability considerations, it is the opinion of the undersigned the claimant has sustained an industrial disability to the extent of twenty-five percent of the body as a whole. It is noted that the opinion of the undersigned coincides with that of Dr. Hoover. It should be noted, however, that Dr. Hoover's opinion as to disability was not controlling on the undersigned.

With respect to the issue of section 85.27 benefits, it is the opinion of the undersigned that based upon the record, notice was conveyed to Dr. Hoyt that his bill would no longer be paid but it does not appear that this information was ever conveyed to the claimant. In light of the defendants' failure to advise the claimant of the discontinuance of his involvement with Dr. Hoyt, it is the opinion of the undersigned that the charges of Dr. Hoyt for the period in question should be the responsibility of the employer and insurance carrier.

FINDINGS OF FACT

That on September 4, 1980 the claimant was an employee of the defendant.

That on that date he sustained a personal injury in the form of an aggravation of an underlying cervical degenerative condition.

That claimant was in a state of healing from September 4, 1980 through February 16, 1982.

That claimant has sustained a permanent functional impairment of six percent (6%) of the body as whole.

That certain restrictions have been placed on the claimant in terms of lifting and other physical activities.

That the claimant is 62 years of age.

That the claimant has a GED certificate.

That the claimant has some managerial experience based upon his prior work history.

That claimant has not returned to work since the date of injury.

That claimant has sustained an industrial disability to the extent of twenty-five percent (25%) to the body as a whole.

CONCLUSIONS OF LAW

The claimant has sustained his burden of proof and has established a causal relationship between the incident of September 1980 and the resulting cervical impairment.

That claimant has failed to sustain his burden of proof and has not established a causal relationship between the incident of September 1980 and the low back difficulties of which he complaints.

ORDER

THEREFORE, IT IS ORDERED that the defendants shall pay unto claimant healing period benefits for the period September 4, 1980 through February 16, 1982 at the stipulated rate of one hundred seventy-one and 26/100 dollars ($171.26) per week.

That the defendants shall pay unto claimant permanent partial disability benefits of one hundred twenty-five (125) weeks at the stipulated rate of one hundred seventy-one and 26/100 dollars ($171.26) per week.

Defendants are to be given credit for all benefits previously paid.

Defendants shall pay unto claimant the following medical expenses:

Humboldt Chiropractic Center	$853.00

Interest shall accrue from the date of this decision pursuant to the terms of section 85.33.

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

Defendants shall file a final report upon payment of this award.

Signed and filed this ____ day of September, 1983.

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EDWARD GRAPEVINE,	:	
Claimant,	:	File No. 650724
vs.	:	N U N C
HUMBOLDT FEED & GRAIN,	:	P R O
Employer,	:	T U N C
and	:	O R D E R
IOWA KEMPER INSURANCE CO.,	:	
Insurance Carrier, Defendants.	:	

Now on this 30th day of September, 1983 the undersigned deputy industrial commissioner finds that the following order should be entered.

That under the order portion of the above decision, the paragraph dealing with interest is revised to read: "Interest shall accrue from the date of this decision pursuant to the terms of section 85.30."

Signed and filed this 30th day of September, 1983.

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD L. GRIFFE,	:	
Claimant,	:	FILE NO. 694848
vs.	:	A R B I T R A T I O N
JOHN DEERE TRACTOR WORKS,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Richard L. Griffe, against John Deere Tractor Works, employer, self-insured for benefits as a result of an injury in December of 1979. On August 16, 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, Loraine Griffe and Carl Fox; claimant's exhibits 1-8; 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; the extent of temporary total, healing period and permanent partial disability benefits he is entitled to; a question as to notice pursuant to section 85.23; and a question as to whether claimant's action should be barred under section 85.26(1).

FACTS PRESENTED

Claimant testified that he started working for defendant in 1973 and in August of 1977 became a machine press operator. Claimant stated that in the fall of 1979 his right arm started bothering him. Claimant revealed that in December of 1979 his arm and neck got to hurting him so much that he was unable to use the arm, was seen by the company physician and went to the hospital where he was seen by another physician. Claimant alleges that this was the date of his injury. Claimant indicated

that he was put on a week's worth of light duty and the condition lessened although never disappeared. Claimant then alleges his condition became worse in August of 1980.

On cross-examination claimant testified that he felt his work had caused his problem when originally seen by the physicians. Claimant stated that he never told anyone at defendant's that his work caused his injury. Claimant also testified that he did not tell defendant's physician that he felt his injury was caused by his work.

APPLICABLE LAW

The first paragraph of section 85.26 states:

> No original proceedings for benefits under this chapter, chapter 85A or 86, shall be maintained in any contested case unless such proceedings shall be commenced within two years from the date of the occurrence of the injury for which benefits are claimed except as provided by section 86.20.

Section 85.23 states:

> 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 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.

ANALYSIS

The greater weight of evidence indicates that the undersigned is without jurisdiction of this matter and claimant's action must be dismissed. Claimant's own testimony indicated that he felt his job had caused his arm and neck problems as early as December of 1979. At the same time claimant did not file this action until March 10, 1982. This is not a case where claimant failed to discover the injury or its compensable nature until sometime after the injury occurred.

Although the greater weight of evidence indicates that claimant knew in December of 1979 his injury was caused by his work, the greater weight of evidence also indicates he failed to notify defendant that he felt his injury was work related. Claimant testified he did not tell defendant he felt his injury was work related. Claimant stated the defendant's physician knew his injury was work related but on cross-examination specifically stated that he did not tell the doctor what caused the injury.

At the time of hearing claimant made a motion to amend his petition to include a second date of August 24, 1980. Claimant stated that this was not a separate injury but was causally related to the injury in December of 1979. Again the undersigned does not have jurisdiction because the claimant failed to amend his petition to include the August 24, 1980 so that it could be considered filed within two years of the alleged date.

Furthermore, no evidence was presented which would indicate claimant gave notice to defendant as required by section 85.23 for any injury on August 24, 1980.

FINDING OF FACTS AND CONCLUSIONS OF LAW

WHEREFORE, based on the evidence presented and the principles of law previously stated, the following findings of fact and conclusions of law are made:

Finding 1. Claimant alleges he was injured while working for defendant in December of 1979.

Finding 2. Claimant felt there was a causal connection of his injury to his employment with defendant before seeing any physician.

Finding 3. Claimant failed to notify defendant or defendant's physician that he was injured on the job.

Finding 4. Claimant filed his petition in arbitration on March 10, 1982.

Conclusion A. The undersigned lacks jurisdiction because claimant failed to bring this action within two years of the occurrence of the injury.

Finding 5. Claimant alleges a second injury or injury date on August 24, 1980.

Finding 6. Claimant felt there was a causal connection of this second injury to his employment as early as August 24, 1980.

Finding 7. Claimant failed to notify defendant that he felt this second injury was work related until the time of hearing.

Finding 8. Claimant moved to amend his pleadings on the date of hearing.

Conclusion B. The undersigned lacks jurisdiction on the August 24, 1980 injury because claimant failed to amend his petition within two years of the date of this second alleged injury.

THEREFORE, claimant is to take nothing as a result of this proceeding.

Each party is to pay half of the costs of this proceeding.

Signed and filed this 31st day of August, 1983.

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BONNIE GUMPERT,	:	
Claimant,	:	FILE NO. 673748
vs.	:	A P P E A L
KELLY HEALTH CARE SERVICES,	:	D E C I S I O N
and	:	
INSURANCE FROM CNA,	:	
Insurance Carrier, Defendants.	:	

By order of the industrial commissioner filed January 17, 1984 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 consists of the transcript; claimant's exhibits A through L plus O, P, Q and R (exhibit R being a report of Dr. William Blakely which is attached to claimant's motion to reopen record filed March 23, 1983); and defendants' exhibits 1 through 8, all of which evidence was considered in reaching this final agency decision.

This appeal decision will modify the review-reopening decision in that benefits will be terminated as of October 11, 1982 instead of March 18, 1983.

ISSUES

Inter alia, the hearing deputy ordered payments as follows:

> That defendants shall pay the claimant healing period benefits for the period September 22, 1982 through October 11, 1982 at the stipulated rate of one hundred eleven and 66/100 dollars ($111.66) per week.
>
> That the employer/insurance carrier shall pay claimant additional temporary total disability benefits from September 22, 1982 through the date of hearing March 18, 1983 at the rate of one hundred eleven and 66/100 dollars ($111.66) per week.

Defendants state the issues on appeal as follows:

> I The proposed review-reopening decision of the deputy industrial commissioner is unsupported by substantial evidence in the record made before the agency when viewed as a whole, so as to allow an additional award of benefits from September 23, 1982, through October 11, 1982, designated as "healing period."
>
> II Where a claimant sustains an injury which is of a temporary nature only, any award for compensation shall be limited to that period of disability.
>
> IIA Claimant failed to carry her burden of proof by a preponderance of the evidence that the incident of June 22, 1981, caused any disability beyond the date of September 22, 1982, of either a temporary total or healing period nature. There was insufficient evidence in the record to allow the deputy to find or speculate that there may be some permanent disability attached to claimant's condition. A possibility is not sufficient; a probability is necessary.
>
> III Temporary total disability benefits are awarded until the claimant 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. Temporary total disability does not necessarily contemplate that all residuals from an injury must be completely healed and returned to normal. It is only awarded when the evidence shows that because of the effects of the injury, gainful employment cannot be pursued.
>
> IV Due process requirements of notice prior to termination of workers' compensation benefits, as set forth in Auxier v. Woodward State Hospital-School, were complied with herein, and an award of 178 days of benefits based upon a claim of ineffective notice, constitutes error.

For purposes of this appeal, those issues are taken to be (1) the extent of compensation payable to claimant and (2) the question of whether or not defendants gave adequate notice of termination of payments as required by §86.13, The Code.

REVIEW OF THE EVIDENCE

The review-reopening decision contains an extensive review of the record and that review is hereby incorporated as part of this case. For purposes of the appeal, certain parts of the record need to be emphasized.

As shown in the review-reopening decision, claimant hurt her low back on the job and was treated by several doctors here in Iowa. She had occasion to move to North Carolina and defendants authorized treatment there by E. H. Martinat, M.D.

Claimant saw Dr. Martinat three times and his note on a last occasion, October 11, 1982, states in part:

Discussion: This lady presents a rather difficult problem. We have here lady who has been felt by previous physicians to have difficulty and although I find essentially normal examination, I have no reason to disbelieve her complaints. Certainly, the venogram suggested some degree of midline disc herniation and this lady quite probably does have some recurrent dis [sic] herniation although I am not in a position to prove this at this time. Dr. Dubanski [sic] had recommeded that it might very well not be wise for her to return to a job as a nursing aide with its attendant lifting, bending, twisting, etc. and I would certainly concur with this.

The problem here is that there is very little objectively on which to base an impairment rating but it is my feeling based on my three examinations of this lady and observing her that she is having realistic back pain and I feel if she goes back to a job with various stresses which would be encountered in handling patients that she might indeed get into trouble again fairly rapidly.

In view of this, I had her talk to Mrs. Cherry Garmon, the State Vocational Rehabilitation Counselor, here in the Center who is going to refer her to the State VR counselor in her home town and she will see that counselor sometime this week.

I think that it may very well be wise to get PreVocational Evaluation and Psychological evaluation on this patient with the idea of getting her back into some type of work which she can do with more safety than the nurses aide position.

With respect to claimant's ability to return to work, she testified that Dr. Martinat has not told her she could return to work. (Tr., 33) She testified further:

Q. What are you doing in the way of treatment?

A. Dr. Martinat said to go to vacational rehabilitation. There's nothing more that can be done.

Q. If Kelly Health Care offered you a job today, would you be in a position to take it?

MS. KELLEY: I'm going to object to the form of the question. It calls for an opinion and conclusion on the part of this witness that is self-serving.

THE DEPUTY COMMISSIONER: Overruled. Go ahead.

A. Physically, I couldn't do it. (Tr., pp. 41-42 11. 22-25 and 1-6)

On the issue of the termination notice, defendants' brief states compensation was paid June 22, 1981 through July 2, 1981 [sic] and September 3, 1982 through September 22, 1982 making for a total of 56 weeks, 4 days. It is understood that the first period of disability should be June 22, 1981 through July 2, 1982.

The insurance carrier sent out two letters of termination, both addressed to claimant's attorney with copies directly to claimant. The first letter, dated August 19, 1982, stated as follows: "I have received a letter from Dr. Dubansky advising us that he feels that Mrs. Gumpert should try returning back to work. Attached is a copy of that medical report. This is also to advise you that we will no longer be paying any temporary total disability." The second letter, dated August 27, 1982, stated as follows:

> This in reference to our phone conversation of August 23, 1982. This is to advise you of the 30 day notice of additional temporary total disability. The temporary total will be caught up-to-date and payment will continue through September 22, 1982.
>
> As you know, if you have any evidence or documents disputing or contradicting the reason for termination please submit. And that you have the right to petition our review for reopen.

Claimant's attorney stated for the record that he would have received the August 27, 1982 letter on August 30, 1982.

APPLICABLE LAW

The statement of applicable law in the review-reopening decision is hereby adopted as a part of this decision. Further propositions of law must also be stated.

Section 85.33, 1979 Code of Iowa 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." Section 85.34(1), 1979 Code, states:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in 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.

The applicable portion of §86.13, 1983 Code, is the second sentence of the second unnumbered paragraph which states: "If commenced, the payments shall be terminated only when the employee has returned to work, or upon thirty days' notice stating the reason for the termination and advising the employee of the right to file a claim with the industrial commissioner."

ANALYSIS

It is clear that the two periods of disability which were ordered to be paid in the review-reopening decision overlap and for the period September 22 through October 11, 1982 constitute a double payment, which is not allowable under the workers' compensation law.

After the first period of compensation payments, which lasted from June 1981 to July 1982, claimant was paid from September 3, 1982 through September 22, 1982, so the question becomes whether or not she is entitled to any more temporary total disability payments or healing period disability payments. The hearing deputy may have speculated somewhat when he stated that claimant probably would have a permanent partial disability as a result of the injury. Nevertheless, Dr. Martinat's mention of vocational rehabilitation in his letter of October 11, 1982 would signal an end to claimant's temporary total disability.

Likewise, claimant does not qualify for benefits at this time under §85.34(1), the healing period provision because she has recuperated to the extent that "[t]here's nothing more that can be done" (claimant testifying, Tr. 41). Put another way, nothing in Dr. Martinat's report shows continuing recuperation; in fact, he recommends vocational rehabilitation. Finally, "[h]ealing period does not continue just because an employee is getting medical treatment if that treatment is basically maintenance in nature." Lawyer and Higgs Iowa Workers' Compensation-Law and Practice, §13-3, citing Derochie v. City of Sioux City, 2 Iowa Industrial Commissioner's Report 112 (Appeal Decision 1982)

It is therefore concluded that under the record made at the March 18, 1983 hearing, claimant has shown no temporary total or healing period disability.

Claimant has shown a right to a small entitlement on the issue of the notice of termination. The letter of August 27, 1982 satisfies the requirement of the code section with respect to the termination. Assuming that letter was received on August 30, 1982 claimant has a right to 30 days compensation beginning on that date which would carry her through September 28, 1982. Of that time, claimant has already been paid September 3, 1982 through September 22, 1982 leaving only 10 days which have not already been paid.

FINDINGS OF FACT

1. That on June 21, 1981 claimant was hurt at work when she strained her low back while turning over a patient in bed.

2. That claimant was paid weekly compensation benefits from June 22, 1981 through July 2, 1982 and from September 3, 1982 through and including September 22, 1982.

3. The letter of termination of benefits was written August 27, 1982 and received by claimant and her attorney on August 30, 1982.

4. That claimant has not returned to work during the period for which compensation benefits are sought.

5. That Dr. Martinat is now the treating physician.

6. That the record shows claimant reached maximum recuperation on October 11, 1982.

CONCLUSIONS OF LAW

That claimant has failed to show any temporary total or healing perod disability beyond that which has already been paid.

That claimant has a right to thirty (30) days compensation after receipt of the Auxier letter, twenty (20) days of which have already been paid.

ORDER

WHEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant at the rate of one hundred eleven and 66/100 dollars ($111.66) per week for a period of thirty (30) days beginning August 30, 1982, accrued payments to be made in a lump sum together with statutory interest beginning August 30, 1982 with defendants to receive full credit for the benefits already paid.

That defendants are ordered to pay the items listed on the nunc pro tunc order of October 13, 1983.

That the costs of this action are taxed to the defendants pursuant to Industrial Commissioner Rule 500-4.33, I.A.C.

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

Signed and filed at Des Moines, Iowa this 30th day of April, 1984.

Appealed to District Court;
Remanded for Settlement

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FINLEY GUNN,	:	
Claimant,	:	File No. 660917
vs.	:	A R B I T R A T I O N
J. I. CASE COMPANY,	:	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, Iowa on April 8, 1983 at which time the record was closed.

The record consists of the testimony of the claimant, Larry Ruschill, and Bob Hamrick; claimant's exhibits 1 through 4; and defendant's exhibits A, B, C and D.

ISSUE

The sole issue for resolution in this case is whether claimant's intoxication was the proximate cause of the injury within the meaning of section 85.16(3), Code of Iowa. Because this issue will be resolved against claimant, the issues of nature and extent of injury will only be discussed in a cursory fashion.

STATEMENT OF THE EVIDENCE

Claimant was 55 years old at the time of hearing. He started with Case in 1974 and at all times material hereto was the janitor who cleaned the main offices at Case. Claimant worked the evening shift (3:30 p.m. to midnight). Claimant testified on July 9, 1980 at about 6:30 or 7:00 p.m. he was dragging two denim bags down some steps. He testified that he fell down the last three or four steps and struck his left shoulder on back. On cross-examination, claimant testified that he sat on a step for a half hour to forty-five minutes. There is some dispute as to whether claimant passed out and then fell, or hit his shoulder and then blacked out. At any rate claimant went to First Aid after reporting his injury to the foreman.

Claimant was sent to the hospital and was treated at the emergency room of St. Luke's Hospital in Davenport. Claimant arrived at the hospital at about 10:00 p.m. (there are numerous references to time between 10:00 and 10:30 p.m. - see claimant's exhibit 1). The nurse's notes indicate that claimant "passed out on stairs at work." (page 7.) The records also indicate that claimant had two beers at 7:30 p.m. Claimant also was complaining of chest pains. The notes on page two of the exhibit indicates that claimant started having chest pains at 9:15 p.m. and noted that claimant had left shoulder pain and numbness of the left forearm and hand. An EKG was taken with normal results. The notes indicate that claimant "has marked smell of ETOH [ethanol] on breath." Blood tests indicated that claimant's level of alcohol was 300. Claimant was advised to "lay off ETOH [unreadable] tonight." The diagnostic impression was ethanol intoxication and chest pain of questionable etiology. Claimant testified that he had two beers with lunch.

Claimant testified that about two hours before he went to work he fell from a stepladder when he missed the last step. He testified that he caught himself against the building before falling.

Claimant was treated by a number of physicians. The eventual diagnosis was the claimant had degenerative disc disease of the cervical spine with radiculopathy of the left side. Claimant was terminated by the employer when it was determind that claimant was butchering hogs when on medical leave. An excellently written arbitrator's decision sets out the facts (defendants' exhibit C).

APPLICABLE LAW

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

2. Rule 88 of the Iowa Rules of Civil Procedure allows amendment to conform to proof.

3. Claimant has the burden of proving by a preponderance of the evidence that he received an injury on July 9, 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).

4. Certain statutory exceptions to the payment of compensation are set forth in section 85.16, Code of Iowa, which states:

> No contract, rule, or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this chapter except as herein provided.
>
> 1. By the employee's willful intent to injure himself or to willfully injure another.
>
> 2. When intoxication of the employee was the proximate cause of the injury.
>
> 3. By the willful act of a third party directed against the employee for reasons personal to such employee.

5. Professor Arthur Larson, in his tretise, The Law of Workmen's Compensation, deals with the intoxication defense at length in section 34.00 et seq in Volume 1B. In section 34.33, Larson states that the statute is "intermediate" (as in Iowa). It is strictly construed.

6. Conduct to be a proximate cause of injury to another must be a substantial factor in bringing about the harm. Oak Leaf Country Club, Inc. v. Wilson, 257 N.W.2d 739, 746 (Iowa 1977).

ANALYSIS

Defendant applied after hearing to amend its answer. Inasmuch as the issue raised in the answer was fully explored at hearing, the amendment will be allowed. See Rule of Civil Procedure 88.

The issue then presents itself--was the intoxication of Finley Dunn the proximate cause of the injury? The answer is "yes."

The first element of the assertion of the defense is whether claimant was intoxicated at the time of the injury. By any standard, claimant's blood level of alcohol some two or more hours after the injury was high. Claimant indicates that he had two beers at lunch before work. The hospital records indicate that claimant admitted having two beers at 7:30. No matter what, though, the blood test indicates that claimant was intoxicat Clearly, there must have been some diminution in blood alcohol levels before the test was taken at the hospital because the alcohol was presumably absorbed by the body. It will be found as a finding of fact that claimant was intoxicated at the time of injury.

In addition to proving that claimant was intoxicated, claimant's intoxication must also have been the proximate cause of the injury. Inasmuch as the cited case uses the indefinite article "a," a mere change to the definite article "the" would yield the definition that conduct to be the proximate cause of injury must be the substantial factor in bringing about the harm. In this case, the evidence indicates that claimant fell down the steps. There is no indication to me that claimant fell because he tripped over the bags which he was carrying. The admission notes at the hospital indicate that claimant "passed out on stairs at work" indicating to me that this was the cause as understood by the nurse at the hospital. It will be found that claimant's intoxication was the substantial factor in the injury.

FINDINGS OF FACT

1. Claimant was employed by J. I. Case on July 9, 1980.

2. Claimant injured his shoulder

3. Claimant was intoxicated at the time he fell at work on July 9, 1980.

4. Claimant's intoxication was the substantial factor in bringing about the fall at work on July 9, 1980.

5. Claimant's intoxication was the proximate cause of the fall at work on July 9, 1980.

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties and the subject matter.

2. Claimant was injured at work on July 9, 1980.

3. No compensation will be allowed for the injury because claimant's intoxication was the proximate cause of the injury.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from these proceedings.

Costs of this proceeding are taxed to claimant.

Signed and filed this 31st day of August, 1983.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARLIN G. GUSTAFSON,	:	
Claimant,	:	
vs.	:	
HYGRADE FOOD PRODUCTS CORPORATION,	:	File No. 670819
Employer,	:	A P P E A L
and	:	D E C I S I O N
CRAWFORD ADJUSTING,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Defendants appeal from a proposed review-reopening decision wherein claimant was awarded permanent total disability benefits. The record on appeal consists of the transcript of the review-reopening proceedings which contains the testimony of claimant, William Cullenward, Karen Gustafson, Mary Walsh, Don E. VanderVegt and Rich Molden; claimant's exhibits 1 through 7; defendants' exhibits A through D; and the briefs and filings of all parties on appeal.

ISSUES

Defendants state the issues as:

> Deputy industrial commissioner Kelly's conclusion that the claimant sustained his burden of proof and that claimant established a causal relationship between the injury of April 16, 1981 and the resulting disability is in error, is contrary to law, is not supported by a preponderance of the evidence and constitutes an abuse of discretion.
>
> Deputy industrial commissioner Kelly's finding that claimant is permanently and totally disabled is erroneous, not supported by a preponderance of the evidence, is contrary to law and constitutes an abuse of discretion.

REVIEW OF THE EVIDENCE

The parties stipulate that the applicable rate of compensation is $263.37 per week. (Transcript, page 2) The parties further agree that claimant has not returned to work since the date of the injury. (Tr., p. 2) In a post-hearing stipulation filed with the commissioner on March 24, 1983, the parties agree that, if called, the testimony of Allan Demorest, Ph.D., a psychologist, would be that he has had an opportunity to visit with Marlin Gustafson in a professional capacity within the past three months and that Marlin Gustafson is diagnosed as suffering a stress response with anxiety and depression secondary to injury and pain; that the stress response, anxiety and depression is not the cause of the pain of Marlin Gustafson; and that the injury referred to is to the cervical spine and right upper extremity which Mr. Gustafson informed him occurred on April 16, 1981 while in the employ of Hygrade Food products.

Claimant was 45 years old at the time of the hearing. He is married and has two children. (Tr., p. 9) Claimant has a GED obtained through his military service. (Tr., p. 65) His previous work experience has included three years in the army as a security policeman. (Tr., pp. 11, 17) Claimant has also worked as a policeman for the city of Cherokee and has been a nurse's aide and activity therapist for a mental health treatment facility. (Tr., pp. 15-19) Additional work experience includes operating machinery on an assembly line, construction, and driving a garbage truck and heavy road equipment. (Tr., pp. 11-14; Defendants' Exhibit C, pp. 6-7) Claimant has had 100 hours of in-class training for his nurses's aide duties and on-the-job training for his other work duties. (Tr., p. 15; Def. Ex. C, p. 4) Claimant began working for defendant employer in 1972 as a cooker operator in the tank house. (Tr., p. 21) During his employment with defendant employer he was on lay off for a year and returned to general cleanup work. (Tr., pp. 21-23) In 1976, claimant suffered a compensable lower lumbar injury while working and returned to light duties trimming glands. (Tr., pp. 23-27) He remained on light duty until 1979 and then began "regular work" rendering edible lard. (Tr., pp. 26-27) His duties involving climbing a ladder to operate valves on the rendering machinery. (Tr., p. 28) Claimant was paid $10.37 an hour. (Def. Ex. D) On April 16, 1981, claimant testified that he was attempting to turn a valve when he fell from the ladder. (Tr., p. 34) Claimant estimates he fell six feet to the floor. (Tr., p. 35) He stated he does not know what part of his body he landed on as he was "dazed" by the fall. (Tr., p. 83) Claimant testified that his shoulders began drawing together and that he went to the plant nurse to report the injury. (Tr., pp. 36-38) Claimant received Icy Hot from the nurse and returned to work. (Tr., p. 38) After he finished work, claimant visited W. E. Erps, M.D., who referred claimant to Buena Vista County Hospital for therapy. (Tr., p. 39) Claimant received physical therapy for a week and was referred by Dr. Erps to Harold Ladwig, M.D., and Edward Schima, M.D., of the Omaha Neurological Clinic. (Tr., p. 41; Def. Ex. B) Dr. Ladwig's April 29, 1981 report indicates that claimant had previously been examined in May 1978 for headaches associated with a strain of the cervical muscles, resulting in a diagnosis of "muscle contraction headache." (Def. Ex. B) A myelogram performed at that time indicated "a slight extra dural defect on the left at L5-S1, and mild irregularity in the cervical area, particularly at C5-6." (Def. Ex. B) Dr. Ladwig noted that claimant's present complaint of pain in the right cervical area was the result of "climbing about at his work and turning on and off various valves, following which he developed shooting, sharp pains in the right shoulder area." (Def. Ex. B) "The patient reported that he did not fall but had to perform considerable twisting movements of his body and shoulders in order to accomplish his task at work."

Dr. Ladwig further notes:

> The past history reveals the patient sustained a skull fracture in 1957 while serving in the Security Police in Germany. At that time he was jumped by three servicemen and evidently was struck several times on the head and kicked. He was unconscious but awakened while in the hospital. Following this he did have headaches for a short period of time but these subsequently improved until the period prior to his initial examination. (Ladwig 4/29/81 report; Def. Ex. B)

Dr. Ladwig reported that claimant was restricted in the movements of the cervical spine and had an elevation of the right shoulder. "IMPRESSION: It is felt the patient sustained a sprain of the cervical muscles. As noted previously the patient does have evidence of cervical spondylosis and currently has experienced an additional sprain of the cervical muscles superimposed upon his pre-existing illness." (Ladwig report 4/29/81; Def. Ex. B)

Claimant was hospitalized for purposes of traction, heat and ultrasound treatment. (Tr., p. 42) Following slow improvement, claimant was discharged on May 9, 1981 with a final diagnosis of cervical sprain. (Jerrad Hertzler, M.D., report dated 5/9/81, Def. Ex. B)

In June 1981 claimant reported to Jerrad Hertzler, M.D., a neurologist, that he was experiencing pain in his neck, arms and legs. Dr. Hertzler noted that claimant held the right shoulder higher and concluded: "At first I was tempted to think that this might be an involuntary spasm but on further examination, I believe that it is a defensive posture and a guarding maneuver." (Hertzler 6/29/81 report, Def. Ex. B) Dr. Hertzler ordered a myelogram to evaluate both the lumbar and cervical areas. Following the myelogram, claimant was referred by Dr. Ladwig to Joseph Gross, M.D., an orthopedic surgeon. (Claimant's Ex. 2, p. 4)

> The patient was seen in consultation regarding pain in the neck on the right side with radiation into the right arm and numbness into the right arm. The patient stated that he was injured at work on the 16th of April, 1981, when a ladder slipped while at work. He broke his fall by hooking his right shoulder over the beam. Following that, he had pain in the neck and pain in the right upper extremity. The patient also has had some difficulty with the low back. The patient recently stated he had a lot of difficulty with numbness and tingling of the hands. He's had some vertigo, which is dizziness, and double vision, in addition to his other complaints.
>
> His past history, the patient denied having any previous difficulty with his neck prior to the onset of his symptoms wich followed this accident.
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> ....
>
> The examination revealed the patient to have a lot of muscle spasm in the right shoulder girdle area. He elevates his right shoulder girdle and tilts his head because of pain and spasm in this area. All movements of the neck are moderately restricted and associated by pain. (Cl. Ex. 2, pp. 4-5)

Dr. Gross testified that the myelogram was positive for degenerated disc disease at C-5/6 and C-6/7 level. (Cl. Ex. 2, p. 6) On July 15, 1981, Dr. Gross performed surgery to remove two discs and fuse the 5-7 cervical vertebrae. (Cl. Ex. 2, p. 7) Claimant was dismissed from the hospital on July 25, 1981. On October 20, 1981 claimant saw Dr. Gross with a complaint of pain and burning in his arm. He received physical therapy but continued to complain of pain in the left shoulder area. (Cl. Ex. 2, pp. 8-9) His left shoulder was injected with Novocain and Cortisone. (Cl. Ex. 2, p. 9) On October 26, 1981 claimant saw Dr. Ladwig with complaints of pain in the anterior chest region and the scapular area. Claimant had been experiencing nausea in the morning and dizziness. Dr. Ladwig noted the presence of "considerable emotional overlay" associated with claimant's symptoms. (Def. Ex. B, 10/28/81 report) In testing motor strength, Dr. Ladwig reported: "MOTOR STRENGTH: The patient holds his right shoulder elevated. However, it was noted at times the shoulder is in a perfectly normal position. Associated with the elevation of his shoulder he tends to lean to the left and at that time complains of pain in the lower back area." (Def. Ex. B, 10/28/81 report)

Dr. Ladwig notes that claimant was experiencing episodes of hyperventilation, rapid pulse and elevated blood pressure. Claimant was taking Darvocet, Ativan and Tagamet. (Def. Ex. B, 10/28/81 report) On May 5, 1982, Dr. Gross performed a second surgery to remove the old graft between the fifth and sixth cervical vertebrae and refuse them. (Cl. Ex. 2, p. 9) On December 6, 1982 claimant was re-examined by Dr. Ladwig at the request of Dr. Gross. Claimant continued to have pain in the right shoulder area and headaches. (Def. Ex. B, Ladwig 12/10/82 report) Dr. Ladwig noted that claimant was taking Mini-Press, Valium, Klotrix and Duilo. Dr. Ladwig recommended physical therapy directed to the cervical area. On December 13, 1982 Dr. Gross sedated claimant in surgery and reported that upon relaxation of claimant's muscles, "the shoulder moved freely through a full range of motion without any sign of any organic pathology." His postoperative diagnosis is: "no evidence of any spasm of the muscles due to organic pathology." (Def. Ex. B, Gross report of operation dated 12/27/82) On December 20, 1982, Dr. Gross determined a disability rating of 25 percent impairment of the body as a whole as a result of the cervical fusion. (Def. Ex. B, Gross report dated 12/20/82) With regard to claimant's elevated right shoulder, Dr. Gross stated:

> There is, therefore, no organic explanation for the

elevation of his right shoulder as near as any of us can determine. It is my opinion that this probably is associated with a psychosomatic condition, most likely a hysterical reaction, and is not the result of his industrial injury and subsequent surgery.

Dr. Gross dismissed claimant from his care on January 12, 1983. (Cl. Ex. 2, p. 28) He stated he did not anticipate further treatment of claimant. At that time, Dr. Gross found claimant's shoulder to still suffer muscle spasms. (C. Ex. 2, p. 30)

On March 3, 1983, Dr. Ladwig determined an impairment rating of 15 percent of the body as a whole:

Currently the patient does have a disability of 10% of the body as a whole as the result of his surgery on the cervical area.

The patient also has an elevated right shoulder. However, this has been shown to disappear at the time of a general anesthetic. Also one observes, while in the hospital, at times his shoulder did not appear at the same degree of elevation until attention was paid to that area.

It is felt that the patient will be able to return to some type of gainful occupation.

It is my opinion that the elvation of the right shoulder is associated with an additional 5% permanent partial disability of the body as a whole. (Def. Ex. B, Ladwig report dated 3/3/83)

Claimant testified that at present his neck is stiff and sore. He is limited in his ability to move his head up and down or sideways. (Tr., p. 58) His right hand is sometimes numb and occasionally shakes. He can no longer work on his vehicles or run his garden tiller. (Tr., p. 59) Defendant employer's plant in Storm Lake has closed. Claimant made inquiries at Job Service for assistance in getting back to work. (Tr., pp. 61-62) He states he is interested in electronics or telephone repair. (Tr., p. 105) He is scheduled to take aptitude tests with the rehabilitation counselor. (Tr., p. 105) Claimant reported he is also interested in the music field and has recently concluded a five week course of guitar lessons. (Tr., p. 107) Around the house he is able to wash dishes, vacuum and dust, but he does no lifting. (Tr., p. 109)

William Cullenward, vocational rehabilitation counselor for the state, testified he had talked with claimant regarding claimant's vocational interests in electronics and music. (Tr., p. 112-116) Mr. Cullenward stated that claimant was motivated to find another occupation and had written to schools for their catalogs. (Tr., p. 118) He testified that band instrument repair would pay $4 - $5 an hour but that electronics, after a one-year course, could pay $18,000 a year at entry level. (Tr., p. 118) Mr. Cullenward stated he believed claimant's physical restrictions for work would involve avoidance of heavy lifting and carrying. (Tr., p. 125)

Karen Gustafson, claimant's wife, testified that claimant can no longer work on his cars, mow the grass or cast when fishing. (Tr., pp. 129, 134) She stated that claimant complains of pain in his shoulder and rests in the afternoons to relieve the pain. (Tr., p. 131) Mrs. Gustafson testified that claimant's right arm shakes when he eats or writes. (Tr., p. 132) She stated claimant's shoulder is elevated at different levels but is never down in a normal position. (Tr., p. 133)

Mary Walsh, former plant nurse for defendant employer, testified that on the last day claimant worked, he carried his head tipped to one side. He said he did not know what happened to him and no report of injury was made. (Tr., p. 145) She stated she learned of claimant's injury from claimant's wife on April 30, 1981. (Tr., p. 151)

Don VanderVegt, director of Crawford Rehabilitation Services, testified that he had not interviewed claimant but had reviewed claimant's medical, educational and employment records. (Tr., p. 164) He testified that much of claimant's past work experiences were in the light range of physical demands as outlined by the Dictionary of Occupational Titles. (Tr., p. 165) Skills and abilities from previous work which would transfer to other work included using judgment and reason in working with machines, directing activities, and dealing with people. He stated that claimant had skills in reading, writing and management planning. (Tr., p. 166) Mr. VanderVegt testified that claimant's employment history indicates he would be a likely candidate for rehabilitation training. (Tr., pp. 167-168) Claimant should be able to accomplish sedentary or light work tasks. (Tr., p. 182)

Rich Molden, insurance adjuster for Crawford & Company, testified that his company handled workers' compensation claims for defendant employer. (Tr., p. 184) Mr. Molden stated he had taped a telephone statement by claimant on May 6, 1981. (Tr., pp. 185-186) The tape casette was received into evidence. (Tr., p. 187) On the tape, claimant described his injury as a popping in his shoulder when he twisted the valves of the machinery. Claimant states that his shoulder "drawed up" and he went to the plant nurse and received "Icy Hot." He finished his work day and consulted Dr. Erps. Claimant does not mention falling from the ladder on the day of the injury, nor is he questioned about a fall.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 16, 1981 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, 760-761 (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, 815 (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, 902 (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, 257 (1963).

ANALYSIS

The record shows that on April 16, 1981 while working for defendant employer, claimant reported to the plant nurse with complaints of shoulder pain. He completed the work day and consulted his doctor, who found evidence of muscle spasm in the right shoulder and recommended physical therapy and further evaluation by a neurologist. The neurologist, Dr. Ladwig, diagnosed the injury as a sprain of the cervical muscles superimposed upon a preexisting condition of cervical spondylosis. Claimant was restricted by pain in his movements and continued to experience pain following hospitalization for traction and therapy. A myelogram indicated degenerative disk disease at C5/6 and C6/7 and eventually two separate surgeries were performed to fuse the disks.

Defendants contend on appeal that claimant has failed to establish a causal connection between the work related injury and the disability primarily because claimant has told differing versions of how the injury occurred. This decision will not rely on claimant's later recounting of a fall or near-fall from a ladder. Sufficient evidence exists through the reports of Dr. Ladwig and the taped interview with Mr. Molden that claimant has from the beginning reported that his injury occurred while he was twisting his body and shoulders to perform his tasks. He experienced pain; he sought relief that same day, first from the plant medical services and then from his own doctor; and for the next 18 months underwent continuous medical treatment for the cervical spine and muscle condition. Claimant has not pleaded aggravation of a preexisting condition nor attempted to establish that the work-incurred muscle sprain accelerated or lightened up the preexisting condition of spondylosis found by Dr. Ladwig, but the deteriorating cervical condition which followed the muscle sprain and led to eventual surgery is sufficiently documented through medical reports to establish a causal connection between the industrial injury and claimant's subsequent disability.

The nature and extent of that disability is the second issue that defendants raise on appeal. The proposed decision is lacking in rationale as to why the decision was made to find claimant permanently totally disabled. The proposed decision is therefor of little assistance in arriving at this final agency decision on this issue.

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 commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability.

At the time of the industrial injury, claimant was earning $10.37 an hour in a full time position which required physical dexterity and strength for climbing ladders, twisting valves, and moving loaded carts. The record indicates claimant was able to perform such work tasks without restriction.

Following the injury and recovery period, Dr. Joseph Gross determined a rating of 25 percent impairment of the body as a whole as a result of the cervical fusion. At the date of his last evaluation of claimant in January of 1983, Dr. Gross reported that claimant continued to suffer muscle spasms of the shoulder and a loss of mobility of the neck. In March of 1983, Dr. Ladwig determined an impairment rating of 15 percent of the body as a whole.

Claimant is limited by pain in his ability to move his head. He holds his right shoulder in an elevated position which has been characterized by Dr. Jerrad Hertzler as a "defensive posture and a guarding maneuver." Dr. Gross finds no organic explanation for the elevation and terms it a probable "psychosomatic condition." Claimant was evaluated by a psychologist who determined that claimant was suffering a stress response of anxiety and depression secondary to injury and pain. The weight of the evidence suggests that the elevated shoulder at least partially stems from claimant's psychological state and is causally related to the industrial injury.

There is little indication in the record as to exactly what claimant's work restrictions are in terms of limitations of lifting or body movement. The 25 percent functional impairment determined by Dr. Gross and centered in the cervical area, would preclude claimant from returning to the kind of duties he was performing at the time of injury which required strength and mobility of the shoulder area. Similarly, much of claimant's previous employment experience involved some tasks which could exert pressure on the shoulder and neck.

Claimant has expressed a willingness to explore new areas of work involving light duty tasks which he would be able to perform. At age 46, claimant has a number of productive work years remaining. He has developed skills in management and reasoning which are transferable to more sedentary employment, but without retraining claimant may find that the unskilled positions he can qualify for are primarily minimum wage paying. Claimant seems a likely candidate for vocational rehabilitation if he is willing to broaden his range of interests and seek vocational assistance. Although claimant's ability to compete in the job market and his earnings potential have been diminished by his industrial injury and ensuing disability, the deputy's finding of permanent total disability is unwarranted by the evidence.

FINDINGS OF FACT

1. At the time of the hearing, claimant was 45 years old and had a GED.

2. Claimant's previous work experience has included operating various machinery, patient therapy and police work.

3. Claimant has had 100 hours of classroom training for patient care and varied on-the-job training.

4. On April 16, 1981 claimant was injured while operating a cooker for defendant employer.

5. Claimant's injury was diagnosed as a sprain of the cervical muscles.

6. Claimant was hospitalized for traction treatment.

7. Cervical fusion surgery was performed on July 15, 1981 and again on May 5, 1982.

8. Claimant has not returned to work since the April 16, 1981 industrial injury.

9. Claimant's orthopedic surgeon has determined a rating of 25 percent impairment of the body as a whole as a result of the cervical fusions.

10. Claimant carries his right shoulder in an elevated position for which the surgeon can find no organic explanation and terms a "psychosomatic condition."

11. Claimant is limited by pain in the motion of his head.

12. Claimant was dismissed from the care of the treating physician on January 12, 1983.

13. Claimant has an industrial disability as a result of the April 16, 1981 injury.

14. Claimant has not actively sought re-employment since his injury.

15. Claimant has management and planning skills and experience which will transfer to new employment.

16. Claimant is a likely candidate for successful retraining in light duty work.

17. Claimant's earning potential and range of job opportunities have been diminished by his industrial disability.

18. It was medically indicated that significant improvement from the injury was not anticipated on January 12, 1983.

19. Claimant has sustained an industrial disability of 50 percent.

20. The rate of compensation is $263.37 per week.

CONCLUSIONS OF LAW

Claimant has sustained the burden of proof in establishing a causal relationship between the April 16, 1981 industrial injury and the resulting disability. Claimant is entitled to permanent partial disability benefits based upon a finding of an industrial disability of 50 percent.

The healing period terminated January 12, 1983.

WHEREFORE, the decision of the deputy is affirmed in part and modified in part.

ORDER

THEREFORE, it is ordered:

That the defendants shall pay unto claimant healing period benefits for the period April 16, 1981 through January 12, 1983 at the rate of two hundred sixty-three and 37/100 dollars ($263.37 per week.

That the defendants shall pay unto claimant two hundred fifty (250) weeks of permanent partial disability benefits at the rate of two hundred sixty-three and 37/100 dollars ($263.37) per week.

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

That interest shall accrue from January 12, 1983 pursuant to section 85.30, Code of Iowa.

That defendants are given credit for all benefits previously paid.

That all accrued benefits which have not been paid shall be paid to claimant in a lump sum together with statutory interest.

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

Signed and filed this 30th day of May, 1984.

Appealed to District Court;
Remanded for Settlement

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BRIAN HAINDFIELD, Claimant, vs. THOMAS ULLRICH, Employer, AID INSURANCE COMPANY, Petitioner, vs. JAYSON T. ZORTMAN, D.C., d/b/a ZORTMAN CHIROPRACTIC CENTER, Respondent.	:	File No. 731541 A P P E A L D E C I S I O N

On September 21, 1983 AID Insurance Company, petitioner, filed an original notice and petition against Jayson T. Zortman, D.C., d/b/a Zortman Chiropractic Center, respondent. Petitioner cited respondent's refusal to provide medical records relating to the treatment of Brian Haindfield, and further questioned the amount and necessity of charges relating to that treatment. In an order filed October 24, 1983 the deputy sustained respondent's motion to dismiss the petition. Petitioner now appeals from the October 24, 1983 order.

Iowa Code section 85.26(4) provides: "No claim or proceedings for benefits shall be maintained by any person other than the injured employee, his or her dependent or his or her legal representative if entitled to benefits." This section was enacted after and as a result of the Iowa Supreme Court decision in Brauer v. J. C. White Concrete Co., 115 N.W.2d 202 (Iowa 1962), upon which appellant relies.

Iowa Code section 85.27, second unnumbered paragraph, provides:

> Any employee, employer or insurance carrier making or defending a claim for benefits agrees to the release of all information to which the employee, employer, or carrier has access concerning the employee's physical or mental condition relative to the claim and further waives any privilege for the release of the information. The information shall be made available to any party or the party's representative upon request. Any institution or person releasing the information to a party or the party's representative shall not be liable criminally or for civil damages by reason of the release of the information. If release of information is refused the party requesting the information may apply to the industrial commissioner for relief. The information requested shall be submitted to the industrial commissioner for relief. The information requested shall be submitted to the industrial commissioner who shall determine the relevance and materiality of the information to the claim and enter an order accordingly.

The provisions of Iowa Code section 85.27 clearly indicate that an employee, employer, or insurance carrier making or defending a claim for benefits may be compelled to release information concerning the employee's physical or mental condition. While the record does indicate that Brian Haindfield, the injured employee, did authorize respondent to release treatment records to petitioner in April 1983, that does not make respondent a proper party to this type of a proceeding before this tribunal. Furthermore, Iowa Code section 85.26(4) appears to preclude petitioner from initiating a claim of this type on its own behalf.

WHEREFORE, the order filed October 24, 1983, wherein respondent's motion to dismiss was sustained, is affirmed.

THEREFORE, respondent's motion to dismiss is sustained and the matter dismissed.

Signed and filed this 27th day of March, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY DELFORD HALL, Claimant, vs. BUREAU OF ADULT CORRECTIONS, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	File No. 658155 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision wherein it was held that he had failed to prove that his disability was causally related to an injury sustained on November 21, 1979.

The record on appeal consists of the hearing transcript which contains the testimony of claimant; claimant's exhibits 1 through 6 (exhibit 6 being the deposition of Randall F. Dryer, M.D.); defendants' exhibits A through O; and the briefs and filings of all parties on appeal.

ISSUES

1. Whether a causal relationship exists between claimant's present disability and the injury to his back which arose out of and in the course of his employment on November 21, 1979.

2. Whether claimant is entitled to healing period benefits pursuant to Iowa Code section 85.34(1) for the period subsequent to his release from the penitentiary on May 4, 1981 to the present.

REVIEW OF THE EVIDENCE

At the time of the hearing the parties stipulated the applicable workers' compensation rate, in the event of an award to be $144.09 per week. (Transcript, p. 4)

Claimant, who was 44 years old at the time of the hearing, testified to having suffered from tuberculosis as a child, but believed that he had been cured at age three. (Tr., pp. 11, 39) In 1964 claimant fell off a ladder causing him to experience pain in his lower back and above the hips. (Tr., p. 31) Claimant visited University Hospitals in Iowa City for a staph infection of the scrotum in July of 1970. In a July 15, 1970 report, Dr. Kohler of University Hospitals reported calcific density of claimant's left kidney and renal area. Dr. Kohler also noted that claimant complained of monthly episodes of low back pain associated with suprapubic pain. (Defendants' Exhibit N) Claimant testified that he was to have returned to University Hospitals for testing to determine if he had renal tuberculosis, but was unable to do so because of the costs involved. He received no treatment for tuberculosis from 1970 through 1980. (Tr., pp. 31-32, 38)

Claimant was an inmate at the state penitentiary in Fort Madison from February 10, 1978 through May 4, 1981. Claimant held a number of jobs within the prison community, the last of which was in the "clothing room." Claimant's duties in the clothing room consisted primarily of sorting clothes into sacks, which were similar to mail bags, and delivering them to lockup cells. Claimant testified that in order to reach the clothing sacks he had to reach across a table and that the job lasted six to eight hours each day. (Tr., pp. 15-16)

Claimant was working in the clothing room on November 21, 1979 when he was unable to straighten up after reaching for a clothing sack. He was taken to the infirmary where an accident report (Claimant's Ex. 2) was prepared and was given a prescription for Motrin. Claimant stated that his back was better for a few days, but "[t]hen all hell broke loose, and I was at the infirmary almost daily from then on." Claimant admitted to having had some back problems two or three weeks prior to November 21, 1979 after helping to carry the clothing room equipment to a new location within the penitentiary, but insisted that the pain subsided after a night's rest. (Tr., pp. 17-18)

Claimant was transported to University Hospitals on February 26, 1980, where he was examined by M. R. Mickelson, M.D. In clinical notes prepared February 26, 1980, Dr. Mickelson recorded a history of low back pain radiating into the thigh as a result of falling off a ladder in November of 1979. Dr. Mickelson reported an impression of low back pain of uncertain etiology, possibly secondary to degenerative disc disease at the level of L3-4. (Def. Ex. I) Dr. Mickelson later stated that the cause of claimant's complaints is related to tuberculosis of the spine, and its subsequent deterioration of the vertebrae in that region. (Def. Ex. B)

Claimant returned to University Hospitals on May 7, 1980 and was examined by C. Hawtrey, M.D., and A.W. Devine, Jr., M.D., of the urology department. A May 19, 1980 report signed by the above mentioned doctors did not indicate the cause of claimant's back problems, but noted a history of tuberculosis. The report stated that claimant showed existence of systemic tuberculosis of a burned out nature and that there was no evidence of active tuberculosis, but recommended that claimant return for evaluation with tuberculosis cultures. (Def. Ex. O)

Claimant was seen by Julie Brooks, M.D., a neurologist at University Hospitals, in June of 1980 and again in August of 1980. Her report of August 20, 1980 indicated that claimant's back pain started in November or December of 1979 when a 60 pound box full of clothing fell on him. Dr. Brooks examined spinal x-rays taken of claimant in February of 1980 which showed a narrowing of the disc space at L3 to L4. The report stated that spinal x-rays taken in August of 1980 showed deterioration at the L-4 to L-5 level with a compression fracture present. (Def. Ex. F) On August 24, 1980 Dr. Brooks referred claimant to the orthopedic department for testing to determine if he suffered from Pott's disease. (Def. Ex. H)

Claimant was admitted to University Hospitals as an inpatient on August 25, 1980 under the care of Randall F. Dryer, M.D., a resident in the orthopedic surgery department. Dr. Dryer testified by deposition that claimant did indeed suffer from Pott's disease. The doctor explained that Pott's disease is an infection involving the disc spaces between vertebral bodies which is caused by tuberculosis. He went on to explain that Pott's disease occurs when tuberculosis spreads from the lungs and eventually effects the spine. Dr. Dryer noted claimant's childhood history of tuberculosis and the clinical notes prepared after claimant's examination in July of 1970. Dr. Dryer interpreted the 1970 report as being presumptive of tuberculosis of the kidneys and urinary tract, and that the destructive process made apparent by comparing the spinal x-rays taken in August of 1980 with those taken in August of 1980 was much more severe than could be expected to occur as a result of a minor trauma. Dr. Dryer traced the probable progression of claimant's tuberculosis:

> A. That's right. The way I would put together his--the sequence of events is that he probably had tuberculosis of the lung since childhood that was not treated; and then, presumably, it was spread to his urinary tract in 1970, and he refused appropriate medical work-up and treatment. Then he had further spread of the tuberculosis, which became manifested and obvious in the middle part of 1980. (Dryer Deposition, p. 11)

Dr. Dryer was questioned as to whether trauma such as reaching across a table in November of 1979 had any relationship to claimant's back condition:

> A. I think that the trauma probably was something that incidentally aggravated an already present condition--namely, the infection--and exacerbated the condition to the point or brought the point to--stimulated the patient to seek medical attention. After he obtained medical attention, it became clear that Pott's disease was the underlying disease.
>
> We see this frequently, for example, with tumors, as an analogy, where a patient has an underlying tumor, and then it sustains a very minor injury and has pain and seeks medical attention, and then is found to have an underlying tumor. The minor injury is not the significant problem. It's the underlying tumor which is only brought to the patient's attention because of the minor injury which was incidental.
>
> Q. So what you're saying is that even if there had been no trauma in November of '79, he probably still would have faced these problems sometime in his life?
>
> A. Yes. I think that's a fair statement, based on what I actually think is going on.
>
> Q. What do you think is going on?
>
> A. I believe that he has Pott's disease, and it was untreated.
>
> Q. You believe it was untreated?
>
> A. Up until that point.
>
> Q. So he may very well have had this Pott's disease since he was a child.
>
> A. Probably not as a child, but sometime between 1970 and 1980, the tuberculous infection spread to infect his spine.
>
> Q. How would it spread? How could it spread in the body? Does it just kind of seep out through the rest of your body system?
>
> A. It's carried through the blood supply, and there's a direct venous communication between the blood supply of the urinary tract and the blood supply of the spine. Often times urinary tract infections can lead to seeing the infection in areas of the spine.
> (Dryer Dep., pp. 15-16)

On cross-examination of Dr. Dryer by claimant's counsel the following ensued:

> Q. You were talking about--before--an exacerbation of the disease, or how some type of trauma might have incidentally brought Pott's disease to the attention of both the patient and the doctor. Could the patient have been doing anything--for instance, turning wrong in bed, something like that-- Could the patient have been doing anything that might have exacerbated his disease and brought it to his own attention that there was pain in his back?
>
> A. I would say that any sort of minor trauma could have brought this to the patient's attention.
>
> Q. Could you describe or define what you mean by "trauma" in that context that you've just stated?
>
> A. Anything above and beyond your usual routine activities of daily living such as heavy lifting, hard manual labor, accidental falls, or collisions, as in a motor vehicle accident, something like that.
>
> Q. Would you describe a simple slip and fall, perhaps anywhere in the patient's cell or something like that, could that be described as a minor trauma?
>
> A. Yes.
> (Dryer Dep., pp. 23-24)

Dr. Dryer was also questioned as to the effect that claimant's job may have had on his back:

> Q. How about continual bending and reaching and leaning over a table about twice the size you're setting at right now in an 8-hour to 10-hour work day for a person who has suspected or who might have Pott's disease?
>
> A. Those kinds of activities would be hard on someone who had a normal back, and certainly would be very difficult for a patient who had active Pott's disease.
> (Dryer Dep., pp. 31-32)

Dr. Dryer testified that claimant had not always provided consistant responses in discussing the history of his back problems. The doctor related that he understood claimant's back problems to have started after an episode where a heavy box had fallen on his back after he had slipped and fallen off a ladder in the penitentiary linen area. (Dryer Dep., pp. 8-9)

In an examination on March 11, 1981, Edward L. Pesanti, M.D., took no history but related that claimant's illness and disability, if any, is due to tuberculosis of the spine. (Def. Exs. C & D)

Thomas B. Summers, M.D., saw claimant on July 1, 1981 and noted a history of a "broken back" while reaching over a table. The doctor noted the x-rays showed destruction of most of L4 and the inferior portion of L3, with mild scoliosis developing at L3-4. Dr. Summers' impression was Pott's disease. (Def. Ex. A)

G. Charles Roland, M.D., also examined claimant and reported his findings in a June 14, 1982 letter. He noted that claimant's initial back problems started when he bent over a low table to pick up a paper bag. Dr. Roland reported:

> Physical examination: He stands erect in a lumbosacral corset. With the corset off he still stands erect. On palpation he is tender in the midline between approximate level L3 to the sacrum as well as in the right paravertebral lumbar musculature just superior to the SI joint. Active range of motion; forward flexion 70 degrees, extension 0 degrees left and right lateral bend 5 degrees. Sensory exam is within normal limits. Straight leg raising test, bilateral, is 80/80 with tight hamstrings, bilateral, without marked back pain. The deep tendon reflexes are graded 1+/1+ at the knees and 0/0 at the ankles. The motor exam is graded 5/5.
>
> X-rays reveal almost complete loss and bony destruction of L4. I do not see evidence of complete auto fusion on the lateral and this would require tomography. There is an angular deformity, scoliotic, of 20 degrees of his apex at L4 and the curve is to the left.
>
> Impression: Status post Potts [sic] disease with L4 involvement with pseudoarthrosis vs. auto fusion, L3-4 level with no neurologic residual presently.
>
> Recommendation: This patient may require further surgery with a fusion between levels L2 and the sacrum to stabilize his lumbosacral spine. If it is found to be unstable with flexion-extension views, then tomography and possible CAT scan. Since he has been improving, however and if he does not desire a surgical approach, then brace support would probably be adequate. I do not feel that fracture of his spine was a result of the trivial trauma he describes but obviously it was a result of his tuberculosis problem. (Def. Ex. E)

Claimant admitted that boxes had fallen on him while working, both before and after November 21, 1979. He also admitted that he may have told Dr. Brooks that his back pain began after a carton of clothing had fallen on him in November or December of 1979. (Tr., pp. 35-36)

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on November 21, 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 an injury of November 21, 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).

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

In Musselman, 261 Iowa 352, 154 N.W.2d 128, the Iowa Supreme Court stated:

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

ANALYSIS

The first issue on appeal is whether a causal relationship exists between claimant's present disability and the November 21, 1979 injury to his back. The deputy's finding that the November 21, 1979 injury arose out of and in the course of claimant's employment has not been framed as an issue by either party and will not be considered herein.

It is undisputed that claimant has had a long history of tuberculosis and that he presently suffers from Pott's disease. The question which must be resolved is whether the trauma suffered by claimant on November 21, 1979 (bending and reaching across a low table) materially aggravated claimant's preexisting tuberculosis to the extent that it was a factor in bringing about claimant's present disability. Dr. Dryer indicated that the mishap of November 21, 1979 may have incidentially aggravated claimant's preexisting tuberculosis, but went on to suggest that the incident exacerbated the condition to the point where the claimant sought medical attention to diagnose his condition which was found to be Pott's disease. Dr. Roland stated that tuberculosis, and not the trivial trauma he experienced, was the cause of the fracture on claimant's spine. All other doctors stating an opinion regarding causation of claimant's disability related it to tuberculosis, but even if aware of the November 21, 1979 injury related no causation to that incident. Claimant's present disability appears to be the result of Pott's disease which was contracted due to his failure to receive treatment for a possible case of tuberculosis after his 1970 examination at University Hospitals. No evidence has been presented to indicate that the work incident of November 21, 1979 was a proximate contributing cause of claimant's disability. As such, it is concluded that the incident of November 21, 1979 did not materially aggravate claimant's preexisting condition (Pott's disease), rather claimant simply reached an inevitable point of disablement during a time in which he was pursuing his work.

In addition, problems exist as to the point in time that claimant's back pain actually began. Claimant testified that his back hurt two or three weeks prior to November 21, 1979 after having moved laundry room equipment. He also admitted that heavy boxes had fallen on him both before and after the alleged injury date. The history reported by Dr. Mickelson noted that claimant's back pain began after falling from a ladder. Dr. Brooks reported that claimant's back pain began after a 60 pound box fell on his back. Claimant admitted that he may have provided histories to previous physicians that his back pain did indeed begin to occur after a heavy box had dropped. In addition, the report of Dr. Mickelson indicates that claimant suffered monthly episodes of suprapubic back pain as early as July of 1970, at which time it was suspected that claimant's tuberculosis may have become active again. For the above reasons it must be concluded that claimant had not demonstrated a causal connection between his present disability and the November 21, 1979 incident. In light of the resolution of the issue of causation, it is unnecessary to address the remaining issue.

FINDINGS OF FACT

1. Claimant has had a history of tuberculosis since early childhood.

2. Claimant was seen in Iowa City in 1979, at which time testing to determine if he had renal tuberculosis was prescribed.

3. Claimant received no tests or treatment for tuberculosis from 1970 through 1980.

4. Claimant experienced monthly episodes of low back pain as early as July of 1970.

5. Claimant experienced back pain two or three weeks previous to November 21, 1979 while moving laundry equipment.

6. Claimant was unable to straighten up after reaching across a table while working in the state penitentiary clothing room on November 21, 1979.

7. Claimant had boxes full of clothing fall on him both before and after November 21, 1979.

8. Claimant was diagnosed in 1980 as having Pott's disease.

9. Claimant's disability was the result of Pott's disease which he had contracted some time between 1970 and 1979.

10. The work incident of November 21, 1979 did not materially aggravate claimant's preexisting condition of Pott's disease.

CONCLUSION OF LAW

Claimant had failed to prove a causal connection between his present disability and his incident of November 21, 1979.

WHEREFORE, the deputy's decision filed December 13, 1982 is affirmed.

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

Costs of the arbitration proceeding are charged to the defendants including a one hundred fifty dollar ($150) witness fee for Dr. Dryer and the cost of his deposition. Claimant is to pay the costs of the appeal.

Signed and filed this 31st day of August, 1983.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TERRENCE L. HALLIGAN,	:	
Claimant,	:	File No. 692757
vs.	:	
HARKLAU INDUSTRIES,	:	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
IOWA MUTUAL INSURANCE CO.,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Terrance Halligan, the claimant, against his employer, Harklau Industries, and the insurance carrier, Iowa Mutual Insurance Co., to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on January 12, 1982.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Webster County Courthouse, Fort Dodge, Iowa, on May 18, 1983. The record was considered fully submitted on that date.

An examination of the industrial commissioner's file indicates that a first report of injury was filed January 27, 1982. A memorandum of agreement was filed February 1, 1982.

The record in this case consists of the testimony of the claimant, Paula Halligan, Terry Bussey, Rod Harklau; claimant's exhibits A through P inclusive; and defendants' exhibits 1 through 4 inclusive.

ISSUES

The issues to be resolved are the existence of a causal relationship between the injury and the resulting disability, as well as the nature and extent of that disability.

REVIEW OF THE EVIDENCE

At the time of hearing the parties stipulated that the applicable rate in the event of an award is $109.08. There is no agreement as to length of healing period. It was stipulated that medical charges as reflected in this record are fair and reasonable.

With respect to the issue of healing period, the Form 2A on file indicates that claimant was paid 15 3/7 weeks of temporary total disability benefits. Claimant alleges that the healing period extends through March 9, 1983, when the physician made an impairment rating.

The claimant, Terrance Halligan, testified that he is 22 years of age, married, and presently a resident of Port Dodge, Iowa.

He is a high school graduate.

His employment history indicates that he initially worked for his father in the satellite communications business. He was primarily involved in erecting relay towers. He did this for three years. Subsequently, he was employed at the U.S. Gypsum plant in Port Dodge as a paperhanger. He was laid off from this position in May 1980. He next secured employment at Johnson Masonry in Humboldt, Iowa, mixing cement and working as a bricklayer. This appears to have been summer work only. Next he was employed at the Terrace Lounge as a bartender and, subsequently, laid off. Claimant began his employment relationship with Harklau Industries in May 1981. Initially, he began welding trailers and acknowledges that a certain degree of lifting was required in conjunction with this work function.

The claimant recited the facts of the incident which occurred January 12, 1982 while in the employ of Harklau Industries. On that date he was carrying a steel beam for a trailer with the assistance of a partner. While in the process of carrying this beam the claimant tripped on the floor and fell, landing on some cables with his low back. Mr. Halligan testified that he immediately felt a sharp pain in the low back but continued to work during the date of the injury. The following day additional pain and muscle spasms were noted, and claimant was then examined by Paul L. Stitt, M.D. It appears, initially, conservative treatment was undertaken and medication prescribed. The record reveals that Dr. Stitt then referred the claimant to Robert G. Gitchell, M.D., who placed the claimant on an exercise program and prescribed various muscle relaxants.

The record then indicates that Mr. Halligan, on his own accord, came under the care of Horst G. Blume, M.D., a neurosurgeon in Sioux City. Apparently, this referral was accomplished through a friend of the claimant.

The record indicates that according to claimant, Dr. Gitchell released him on April 30, 1982 and he returned to work for the employer. He attempted to work for a period of time but due to continuing back discomfort was unable to perform his job function. Claimant alleges he returned to Dr. Gitchell with continuing complaints.

The record reveals that in the summer of 1982 the claimant went to California where his mother lives. He alleges that in no way could he support himself and thought the warm climate might help him. The claimant was examined by Dr. Brown in California without the authorization of the employer. After a four month stay in California the claimant returned to Fort Dodge where he was again treated by Dr. Blume. Mr. Halligan indicates that a nerve block procedure was performed by Dr. Blume and that the last examination by Dr. Blume was in March 1983.

Mr. Halligan's present complaints include constant pain between the shoulders and into the low back. He complains of continuous soreness when sitting or sleeping. He indicates that the back brace he was wearing at the time of trial was prescribed by Dr. Blume. Mr. Halligan indicates that in his present condition he is unable to do the work he did before, as previously outlined. He has an inability to lift and to carry, and cannot climb. He has an inability to bend, stoop or pull. Mr. Halligan is of the opinion that he could not perform any of the jobs previously recited in his work history due to this pain and low back condition.

On cross examination, the claimant denied any prior low back injuries. However, he acknowledged a rib injury while playing football. He admited that he had prior complaints of rib pain.

Claimant confirms that he did the exercises prescribed by Dr. Gitchell. However, he noted difficulty doing some of the sit-up exercises. When pain became too intense he would discontinue the exercise procedure. It appears from the record that the claimant is somewhat critical of Dr. Gitchell, as Dr. Gitchell may have indicated that he was out of shape.

Claimant confirms there are only two places he has looked for work since the date of injury, one being in California and the second being a telephone sales position which he held for a period of time. However, claimant indicates due to the continuous sitting he was unable to perform the telephone sales work. Mr. Halligan does not believe he could perform any of the jobs at the employer's place of business because they require lifting and standing. The record reveals that claimant is not presently involved in any rehabilitation program. The record reveals that other than the brace and the drugs, Dr. Blume has not instituted any other treatment. Claimant denies telling one of the physicians that he wanted to go to school and did not want to do work involved in heavy lifting.

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

Paula Halligan, the claimant's spouse, testified on his behalf. She confirmed his complaints of pain and his inability to rest at night. She also confirmed that she does most of the household chores.

Terry Bussey, age 24, testified on behalf ot the claimant.

He has known the claimant for a period of time and has had an opportunity to work with him. He witnessed the incident of January 12, 1982 and confirms claimant's version of the facts.

Rod Harklau testified in these proceedings. He is the plant manager for the employer and is related to the owner of the business. He confirmed that the claimant worked only one hour in May 1982 post-injury. He confirmed that claimant had not contacted the employer for a job since May 1982. He indicated that the employer has employees at their plant who presently are suffering from back injuries.

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

Robert G. Gitchell, M.D., testified in these proceedings. Dr. Gitchell is a board certified orthopedic surgeon, licensed to practice in the state of Iowa.

His initial examination of the claimant occurred March 21, 1982. Dr. Gitchell confirmed that the claimant was referred to him by Dr. Stitt.

The history recited to Dr. Gitchell by the claimant is basically consistent with claimant's testimony. An examination was conducted by this physician and a variety of diagnostic tests performed. X-rays were examined which revealed no abnormalities suggestive of injury. With respect to the diagnosis, Dr. Gitchell notes:

> A. I felt that he had sustained a strain to the lumbosacral muscles of his low back that could have put increased stress upon his disks in the low back which would be in the diagnostic category of producing some degeneration in a disk without causing a true rupture or herniation or a slip of the disk, that this muscle strain could have strained or caused the disk in the lumbar area to degenerate to a mild degree.
>
> Q. Was there any actual evidence of a herniated or a ruptured disk?
>
> A. No.

A program of muscle building and exercise was prescribed by this physician. Dr. Gitchell confirms that he released the claimant to return to work April 5, 1982. It appears that the physician feels the claimant reached maximum recuperation on that date. A follow-up examination was conducted on April 15, 1982. At that time, claimant complained of throbbing pain in his back. An examination was conducted and the physician learned that the claimant was doing prescribed exercises improperly. A change in diagnosis was made on this follow-up examination. Claimant was again released to return to work on May 1, 1982. Follow-up examinations were scheduled but the claimant did not keep the appointments.

On cross-examination, the physician confirms that the muscle strain experienced by the claimant may have been contributed somewhat to the degenerative disc problem.

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

Ralph Woodard, M.D., board certified general surgeon, testified in these proceedings. Dr. Woodard conducted an examination of the claimant in February 1983. This physician, after examination, concluded that the claimant was in good physical condition and had no acute injuries. This physician finds no reason why the claimant could not return to his prior form of work. He notes that the claimant mentally did not believe he wanted to return to that form of work. He indicates that the claimant did not want to do heavy work anymore. The claimant indicated that he wanted to go to school. He acknowledged that the claimant's continuing complaints of disability and/or inability to work are not consistent with the physician's findings.

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

Paul Stitt, a physician and surgeon, testified in these proceedings. He confirms that he treated the claimant in January 1982. An examination of this individual was conducted by Dr. Stitt and a diagnosis of contusion of the muscles of the low back was made. Medication was prescribed and conservative treatment undertaken. The last examination of the claimant was made in March 1982, at which time the claimant was referred to Dr. Gitchell.

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

Horst G. Blume, M.D., in a report dated March 9, 1983, marked claimant's exhibit A, indicates that in his opinion the claimant has a permanent partial disability to the body as a whole of twelve percent.

The balance of the exhibits have been reviewed and 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 January 12, 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).

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. Perris 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 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).

ANALYSIS

As previously noted in this decision, the employer/insurance carrier filed a memorandum of agreement with respect to the claimant's injury. By that unilateral act they acknowledge that on the date of injury, January 12, 1982 the claimant was an employee of Harklau Industries. They further acknowledge that on that date he sustained a personal injury which both arose out of and in the course of his employment with Harklau Industries.

The record is clear that the claimant has been examined and treated by several highly qualified specialists. These include orthopedists and a neurosurgeon.

The evidence would reveal that perhaps the claimant had some preexisting degenerative difficulties. The record also indicates that the claimant sustained a football injury. There is some discrepancy as to what precise area of his body was injured. At any rate, the football injury and/or the degenerative difficulties diagnosed do not appear to have prevented the claimant from being an active worker in his chosen trade. The record establishes that the claimant has been able to work and noted some difficulty since the injury in question.

The opinions with regard to the extent of disability are at wide variance. Certainly two of the physicians involved find, in substance, no disability. Dr. Blume notes a permanent partial impairment of twelve percent of the body as a whole.

Interspersed throughout this record is the underlying indication that the claimant may not be well motivated. One of the physicians testified that the claimant was not interested in pursuing work that involved heavy lifting, but, in fact, was interested in going to school. Furthering the claimant's education is, of course, a valuable goal and he should be encouraged at all costs to develop himself along those lines. It would, however, be grossly unfair to the employer/insurance carrier to penalize them, in substance, by way of a substantial award in a case where the claimant is not motivated to return to the form of work he was pursuing.

The claimant in this case is a very young individual. He has numerous educational opportunities available to him if he will motivate himself to pursue those lines of endeavor.

Based upon the record as a whole and taking into consideration all of the industrial disability considerations, it is the opinion of the undersigned that the claimant has sustained a permanent partial disability of five percent of the body as a whole.

There is an issue of healing period in this case. It appears from the record that the healing period terminates on May 1, 1982, when the claimant was released by the physician just before Dr. Blume. Dr. Blume's reports are in the record and do not appear to address the issue of healing period.

FINDINGS OF FACT

That on January 12, 1982 the claimant was an employee of the defendants herein.

That on January 12, 1982 the claimant sustained a personal injury which both arose out of and in the course of his employment.

That the claimant has been examined and treated by several highly qualified physicians, including orthopedists and a neurosurgeon.

That the claimant has a preexisting degenerative condition of his low back.

That the claimant now has some pain and restrictions which he did not have prior to the date of injury.

That the claimant has sustained permanent partial disability of five percent (5%) of the body as a whole.

That the healing period ends on May 1, 1982.

CONCLUSIONS OF LAW

That the claimant has sustained his burden of proof and has established a causal relationship between his injury and his resulting disability.

ORDER

THEREFORE, IT IS ORDERED that the defendants shall pay unto the claimant twenty-five (25) weeks of permanent partial disability benefits at the stipulated rate of one hundred nine and 08/100 dollars ($109.08) per week.

That the defendants shall pay healing period benefits from the date of injury, January 12, 1982, through May 1, 1982 at the stipulated rate of one hundred nine and 08/100 dollars ($109.08) per week.

That the defendants are given credit for benefits previously paid.

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

That interest shall accrue as of the date of this decision 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 the defendants shall file a final report upon payment of this award.

Signed and filed this 21 day of October, 1983.

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DOROTHY L. HANKINS,	:	
Claimant,	:	522985
vs.	:	
PHIL HUNGET d/b/a FRIENDS AND NEIGHBORS SUPPER CLUB,	:	REVIEW-REOPENING
Employer,	:	DECISION
and	:	
NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This matter came on for hearing at the Cerro Gordo County Courthouse in Mason City, Iowa on June 28, 1983 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 January 17, 1979. A memorandum of agreement was filed on May 7, 1979 calling for the payment of $88.87 per week in weekly compensation. A review-reopening decision by Deputy Industrial Commissioner David Linquist was filed on December 7, 1981 wherein healing period compensation and sixty weeks of permanent partial disability compensation were awarded. Another review-reopening decision was proposed on October 20, 1982 by Deputy Industrial Commissioner Helmut Mueller. This decision awarded a "running" healing period award commencing July 13, 1981 until such time as the test for cessation of healing period had been met. Both of these decisions awarded medical expenses. The record at this time consists of the testimony of the claimant; claimant's exhibits 1 through 7; and all previous records contained in the file.

ISSUES

1. Whether claimant is entitled to further permanent partial disability compensation;

2. Whether claimant is entitled to further examinations; and

3. Whether claimant is entitled to the "penalty" provisions of section 86.13, Code of Iowa.

STATEMENT OF THE EVIDENCE

Before recapitulating the record in its present form, I feel it is necessary to review the two prior decisions written in this case. The review of the excellently described facts and conclusions enunciated in those decisions is sufficient, and this decision will only deal with them in a cursory manner.

At the commencement of the present hearing which is intended to resolve the above cited issues the parties stipulated that the rate of compensation was $88.12 per week; that the medical bills presented for payment were fair and reasonable; and that if permanent partial disability compensation was awarded, it would commence on December 28, 1982.

Claimant sustained an injury arising out of and in the course of her employment on December 16, 1978. (See memorandum of agreement filed on May 7, 1979 and prior decisions.) Claimant hurt her back while making coffee and later was unable to straighten up when she was bent over. Claimant was treated by a chiropractor and was eventually treated by D. E. Fisher, M.D., a Mason City orthopedist. On August 1, 1979 claimant had surgery in the form of a removal of a herniated disc. She did not return to work for defendant employer because the business closed. Claimant had returned to work in April 1979 and worked until February 1980 (excepting time lost for surgery and recuperation). Claimant testified that in February 1980 her new employer placed her in a "resign or be fired situation" so she quit. Claimant testified that she tried to find employment through May 1981 at several establishments. She then got a GED. As indicated in Deputy Linquist's decision, claimant's salary increased when she did return to work. As a result thereof, the matter came on for hearing. Claimant was then awarded sixty weeks of permanent partial disability compensation.

Claimant then brought a subsequent review-reopening proceeding which culminated in a proposed decision on October 20, 1981 by Deputy Helmut Mueller. This decision awarded healing period compensation commencing July 13, 1981 until such time as the test for the cessation of healing period was met.

An agreement for settlement was submitted on November 30, 1982 and approved on December 7, 1982 by Deputy Barry Moranville. the parties stipulated:

Par. 1. That except as herein modified, the Review-Reopening Decision dated October 20, 1982, should be in full force and effect;

Par. 2. The Defendants shall pay all medical expenses, costs and interest as required by the October 20, 1982, Review-Reopening Decision except as set forth herein.

Par. 3. That Defendants shall pay to Claimant an additional healing period beginning January 25, 1982 and continuing through November 1, 1982, by which date it is agreed no further significant medical improvement is contemplated for Claimant following her surgery of January 25, 1982.

Par. 4. That in accordance with Paragraph 3 hereof, Defendants shall pay the Claimant Forty (40) weeks of healing period benefits at $88.12 per week or $3,524.80 in a lump sum together with interest of $132.18.

Par. 5. Defendants shall pay all 85.27 medical and allied expenses incurred by the Claimant from hearing date of August 15, 1982 through the date hereof.

Par. 6. That the parties agree that the extent of Claimant's industrial disability, if any, occasioned by her surgery of January 25, 1982, and resulting impairment, if any, shall not be resolved by this Agreement but shall be agreed upon by the parties after further discovery, or upon failure of agreement, by determination following a contested case proceeding.

Par. 7. That Dr. Fisher of Surgical Associates of North Iowa, P.C. (or his associates) is the authorized treating physician to whom Claimant may present herself for appropriate treatment; that except as to Dr. Fisher (and his associates) and those to whom Dr. Fisher may refer Claimant for appropriate x-rays, therapy and consultation, Claimant shall first obtain written authorization from the Defendants before seeking other treatment except in emergency situations.

Par. 8. That all drafts pursuant to the Review-Reopening Decision of October 20, 1982, as modified herein, shall be sent payable to the Claimant, care of Robert S. Kinsey III, P.O. Box 679, Mason City, Iowa, 50401.

Claimant testified that she weighed 148 pounds at the time of hearing. Claimant testified that she had a subsequent back surgery on January 12, 1982. Claimant indicated that since this surgery, she has had more pain, and that it is constant. Claimant testified that she has had part-time work as a school cook since November 1982 but was laid off in March 1983 because of declining school enrollment. Claimant testified that she still checks for jobs and has her name available for employment through Job Service.

Deputy Linquist indicated that claimant had only gone through the first semester of ninth grade and some schooling as a nursing assistant. Prior to her injury claimant had three years experience working in grocery stores, approximately 7 1/2 years experience in factory work, six months experience in a program for nursing assistants and experience in food service as a cashier, waitress, cook and dishwasher. Claimant has obtained a GED since that hearing. She was 47 at the time of hearing.

Dr. Fisher testified by way of deposition in this case. He conducted both surgeries on the claimant and as of January 12, 1983 rated claimant as having sustained a ten percent loss to the body as a whole as a result of these surgeries. An extensive record was made regarding the nature of the second back surgery and its purpose--the removal of scar tissue. He recommended that claimant avoid any job requiring lifting in excess of 25 pounds or one of constant standing or sitting.

Claimant had (previous to the agreement for settlement) been examined by John R. Walker, M.D., a Waterloo orthopedist. She was also examined on March 7, 1983. His physical examination revealed the following:

> Examination today reveals that the right Achilles and plantar reflexes are reduced in relation to that on the left. The Lasegue sign is definitely positive on the right as is the flip sign. She has 1/2 inch atrophy of the right calf and 1/2 inch atrophy of the right thigh. This is due to limping. Her scar is well-healed in the midline, some 5 1/2 inches in length and somewhat tender. She comes down to only 14 inches of touching her fingers to her toes and then it becomes painful.
>
> AP & lateral, right, left, oblique views and spot views of the lumbar spine show no particular change except for the operative intervention.
>
> OPINION: The patient is improved somewhat. This surgery has been efficacious and advantageous for the patient and I am certain that it was carried out very properly and with a good indication. I believe, however, that the patient still has a permanent, partial disability of 12% of the body as a whole.
>
> As far as further treatment is concerned, I have advised the patient that she should probably continue with a back exercise program and a few more pounds of loss would be excellent.

APPLICABLE LAW

1. Sections 85.3 and 85.20, Code of Iowa, provide this agency with jurisdiction 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., 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 December 16, 1978 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. Section 86.14(2), 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.

5. In Blackwmith v. All-American, Inc., 290 N.W.2d 348, 350 (Iowa 1980), the court stated:

> An increase in industrial disability may occur without a change in physical condition. A change in earning capacity subsequent to the original award which is proximately caused by the original injury also constitutes a change in condition under section 85.26(2) and 86.14(2). See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (Iowa 1980); 3 A. Larson, The Law of Workmen's Compensation, section 81.31, at 15-502 (1976).

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. 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).

8. Section 85.27, Code of Iowa, provides for the payment of medical expenses.

9. Section 86.13, Code of Iowa, provides in pertinent part:

> 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 the chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

ANALYSIS

Based upon the principles enunciated above, it is concluded that claimant has sustained a change of condition since the submission and approval of the agreement for settlement on December 2, 1982. Since that time claimant was laid off because of declining school enrollment, and has been unsuccessful in obtaining other employment. Although claimant's layoff may not in itself be considered to be attributed to injury, the unaltered fact is that claimant has sought and has been unable to obtain employment since the layoff. This is a sufficient change of condition since the entry of the award of approval of the agreement.

Inasmuch as the claimant's claim for relief of any prior claims for healing period (it was not raised as an issue), the sole issue at this juncture is permanent partial disability. In that claimant's earning capacity has indeed lowered, some increase of permanent partial disability is in order.

Claimant has had two back surgeries. Most of claimant's career has been devoted to jobs which require some lifting. Claimant's prior work history has been amply set forth in prior decisions. Claimant need not prove medical change--she must and has proven loss of earning capacity. She was 47 at the time of hearing and holds a GED with a ninth grade formal education. Claimant appears to be well motivated as evidenced by her excellent weight loss. I feel claimant is well motivated. Based upon the record, it is found that claimant's disability is 35 percent of the body as a whole. Defendants will receive credit for permanency paid.

Claimant has asked for sanctions pursuant to section 86.13, Code of Iowa. The basis of claimant's request appears to be the alleged untimeliness of payment of medical expenses. The opinion of this agency is that the sanction does not apply to untimely payment of medical expenses. The "sanction subparagraph" was specifically added to the section of the code dealing with payment of weekly compensation to confine its its use to weekly compensation alone. Therefore, no ruling on claimant's request for 86.13 benefits will be made at this time.

The additional medical and related expenses will be allowed.

FINDINGS OF FACT

1. Claimant was employed by defendant employer on December 16, 1978.

2. Defendants filed a memorandum of agreement on May 7, 1979.

3. The parties stipulated that the rate of compensation is eighty-eight and 12/100 dollars ($88.12) per week.

4. Two prior decisions were entered in this matter.

5. The parties agreed to settle the case and an agreement for settlement was approved on December 7, 1982.

6. Claimant has sustained a change of condition since the entry of the approval of the agreement for settlement.

7. Claimant's condition warrants an increase of compensation.

8. Claimant is disabled to the extent of thirty-five percent (35%) of the body as a whole for industrial purposes.

9. Claimant has sustained certain medical expenses and costs which are related to the injury. These will be ordered to be paid.

CONCLUSIONS OF LAW

1. This agency has jurisdiction over the parties and the subject matter.

2. Claimant was employed by defendant employer on December 16, 1978.

3. Defendants will be ordered to pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability compensation at the stipulated rate of eighty-eight and 12/100 dollars ($88.12) per week.

4. Defendants will receive credit for permanent partial disability compensation previously paid.

5. Defendants will be ordered to pay unto claimant the following medical expenses (includes mileage and costs):

Gilfort Drug Company	$ 34.05
John R. Walker, M.D.	105.00
Medical Repot	45.00
Mileage (Exhibits 5 & 7)	112.08

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability compensation at the rate of eighty-eight and 12/100 dollars ($88.12) per week. Defendants are to receive credit for permanent partial disability compensation already paid.

IT IS FURTHER ORDERED that defendants pay unto claimant the following approved medical and related expenses:

Gilfort Drug Company	$ 34.05
John R. Walker, M.D.	105.00
Medical Report	45.00
Mileage	112.08

Interest will accrue on this award from the date of this decision.

Costs of this proceeding are taxed to defendants.

A final report is to be filed upon payment of this award.

Signed and filed this 21st day of November, 1983.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LE ROY C. HANSEN, Claimant, vs. INSULATION SERVICES, INC., Employer, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Defendants.	Files Nos. 525821/539770 A P P E A L D E C I S I O N

By order of the industrial commissioner filed November 15, 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 review-reopening decision.

The record consists of three transcripts, May 10, 1982, January 20, 1983, and April 14, 1983; claimant's exhibits 1 through 7, inclusive; and defendants' exhibit A, 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 reached by the hearing deputy; however, the evaluation of the evidence and the findings of fact will be significantly different.

ISSUES

The review-reopening decision awarded healing period benefits from April 23, 1979 to September 2, 1982 at the rate of $265 per week plus a permanent partial disability period of 250 weeks at $244 per week plus certain medical expenses.

Defendants state the issues on appeal:

1. That the Deputy Industrial Commissioner, Helmut Mueller, is in error on the finding of fact that the claimant's healing period ended on September 2, 1982.

2. That the Deputy Industrial Commissioner, Helmut Mueller, is in error in that the claimant is suffering from disabling pain for which he is currently receiving oral and injectable medication. In that the Deputy Industrial Commissioner, Helmut Mueller, found that the claimant had a [sic] aseptic necrosis either to the right or left hip were [sic] caused by any injuries of November 10, 1978 or April 23, 1979.

3. That the Deputy Industrial Commissioner is in error in finding that the claimant is a functional illiterate.

STATEMENT OF THE CASE

On October 19, 1982 the undersigned deputy industrial commissioner wrote a final agency decision which awarded a running healing period for claimant beginning April 23, 1979. That decision was later affirmed in the district court. That ruling was based upon injuries of November 10, 1978 and April 23, 1979 which involved two falls of claimant onto his right side. These falls were found to be the cause of back problems and aseptic necrosis of the right femoral head. However, upon considering the report of January 25, 1983 by Cemal M. Adli, M.D., an orthopedic surgeon, (to the effect that the avascular necrosis in both femoral heads was not related to the injuries) the hearing deputy found that the conditions were not caused or aggravated by the industrial accident. Otherwise, the review-reopening decision awarded the benefits as stated above.

Defendants rely on a report of Horst G. Blume, M.D., a neurosurgeon, claiming that a report of September 12, 1980 supports the position that claimant's healing period would have ended at that time. A report of April 19, 1982 by Dr. Blume stated, however, that claimant had not reached maximum medical recovery. The hearing deputy found that a letter of September 2, 1982 signalled the end of claimant's healing period wherein Dr. Blume stated that claimant's back would not improve further.

The facts surrounding issue #2 relate both back to the first issue and forward to the third issue. That is, the questions concern whether or not the aseptic necrosis is a compensable matter and, if so, how it relates to industrial disability. Finding of fact #24 of the appeal decision of October 19, 1982 ruled that the aseptic necrosis of the head of the right femur was connected to the injuries. Claimant's excellent brief, page 9, states the evidence and reasoning behind that finding. Claimant further points out that Dr. Adli's letter of January 25, 1983 which states that the condition in both hips was not related to the injury also says that on the "right side it manifested itself sooner on account of the injury..."

With respect to the issue concerning the hearing deputy's finding that claimant is a functional illiterate, the record shows that the result of a Wechsler Adult Intelligence Scale of December 28, 1981 shows claimant has an IQ of 83 which is in the dull normal range. He did poorly in both reading and arithmetic; he has an eighth grade education. Claimant's wife testified that claimant cannot read a tape measure.

APPLICABLE LAW

Section 86.34(1), Code of Iowa, 1977 states:

> If an employee has suffered a personal injury causing permament 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 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. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960); 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 (1936); Almquist v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 (1934).

The affirmance by the district court of the final agency decision of October 19, 1982 was an affirmance with respect to all the issues in the case. Finch v. Hollinger, 46 Iowa 216 (1877).

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). "The incident or activity need not be the sole proximate cause, if the injury is directly traceable to it." Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974); Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971).

Industrial disability includes considerations of functional impairment, age, education, qualifications and 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). 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

The final agency decision of October 19, 1982 awarded a running healing period starting April 23, 1979 based upon evidence at a hearing of May 10, 1982. Thus, although defendants argue the healing period should have ended in September 1980, that issue was determined by a prior adjudication at least until the date of May 10, 1982. As for the time between May and September 1982, Dr. Blume's letter of April 19, 1982 stated claimant had not reached maximum recovery which would extend the healing period until that same doctor made a rating of permanent impairment which was, as the deputy found, on September 2, 1982. Therefore, no change will be made in the order to pay healing period.

Defendants argue two other issues, one concerning medication and the other concerning claimant's alleged functional illiteracy. Both of these will be treated as they relate to the overall issue of industrial disability. Again, the principle of a prior adjudication arises because, whereas the decision of October 19, 1982 decided in claimant's favor as to the aseptic necrosis being connected to the injury, the subsequent review-reopening decision of August 29, 1983 found the opposite. The reason for that change in the second mentioned decision was the letter by Dr. Adli previously referred to. As was shown above, that doctor clearly stated that the condition was aggravated by the injuries, at least on the right side. Thus, regardless of the issue of the prior adjudication, that evidence plus other evidence by Dr. Adli summarized in the decision of October 19, 1982 clearly shows the causal relationship. That decision states on page three: "Finally, Cemal M. Adli, M.D., stated that he 'strongly feels[s] this [the aseptic necrosis] might have taken place at the time of either injury.' (Defendants' exhibit 5, Adli report, May 20, 1981)" One concludes, therefore, that Dr. Adli describes an aggravation which is compensable under the Iowa law.

Defendants insist claimant is not functionally illiterate. Perhaps not, technically; however, he obviously is in the dull normal range of intelligence, and the difference between that range and functional illiteracy would seem to be a small one.

Finally, then, is the question of claimant's overall industrial disability resulting from the injury. Dr. Blume assesses a functional impairment of five percent of the body as a whole as a result of the back problem, and Dr. Adli assesses an impairment of 25 percent of the right leg as a result of the aseptic necrosis. A vocational rehabilitation expert, Don. E. VanderVegt, testified in the hearing of April 14, 1983 that claimant would be eliminated from medium jobs and some light jobs which require standing. Claimant's education is minimal and his work experience, as is shown below in the findings of fact, is limited. He is an alcoholic. Considering claimant's various limitations and qualifications, it appears that an award of 50 percent industrial disability is correct.

Thus, the result of the review-reopening decision of August 29, 1983 is adopted; however, the finding that the avascular necrosis was not connected to the injury is not adopted and the following sentence is likewise specifically not adopted: "Claimant's avascular necrosis is a preexisting condition which plays a part in claimant's industrial disability."

FINDINGS OF FACT

1. That claimant has an eighth grade education.

2. That claimant served in the army where he worked with a Howitzer, drove various vehicles, loaded and unloaded trucks and engaged in other routine duty.

3. That claimant's work experiences include work in a sawmill, in packinghouses and in construction.

4. That claimant has done some work as a janitor.

5. That claimant's work has been medium to heavy and has required working with things as opposed to people or ideas.

6. That claimant's work necessitated lifting, standing and bending.

7. That claimant cannot return to his past work.

8. That on November 10, 1978 while on the job site, claimant slipped on a step and fell on his right hip and elbow.

9. That claimant was given conservative treatment.

10. That claimant was released to return to work on April 9, 1979.

11. That after his return to work, claimant continued to have pain in his right leg and back.

12. That on April 23, 1979 while claimant was at work he fell on his right side and buttocks.

13. That claimant has been seen by a number of physicians and hospitalized several times.

14. That claimant, when he stopped receiving workers' compensation benefits, sought treatment from the Veterans Administration Hospital.

15. That claimant complained of his hips from the time of his injury on November 10, 1978.

16. That claimant had no injuries to or problems with his back before his accident on November 10, 1978.

17. That claimant is an alcoholic and has had treatment for alcoholism.

18. That as a result of a biopsy, claimant was found to have aseptic necrosis of the right femoral head.

19. The aseptic necrosis, right, and the low back conditions were caused by the injuries.

20. That on June 23, 1981 claimant had a resurface arthroplasty.

21. Claimant has pain in his low back and right leg, and can stand for only about 20 minutes.

22. Claimant takes Librium and Demerol.

23. Claimant has a functional impairment of five percent of the body as a whole as a result of his back condition and 25 percent of the right leg.

24. Claimant's intelligence quotion is in the dull normal range.

CONCLUSIONS OF LAW

Claimant sustained injuries which arose out of and in the course of his employment on November 10, 1978 and April 23, 1979 and which resulted in healing period entitlement from April 23, 1979 to September 2, 1982 and to a period of permament partial disability of two hundred fifty (250) weeks.

ORDER

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant from April 23, 1979 to September 2, 1982 for the healing period disability and to pay claimant thereafter two hundred fifty (250) weeks permanent partial disability, accrued payments to be made in a lump sum together with statutory interest, defendants to receive credit for payments heretofore made.

Defendants are ordered to pay the unpaid bill of the South Sioux City Medical Clinic, P.C., of one hundred and ten dollars ($110) as well as the bill of Horst Blume, M.D., in the sum of five hundred and fifty-three and 30/100 dollars ($553.30).

The costs of this action are taxed against defendants.

Defendants are further ordered to file a report of payments within one (1) year of the date of this decision.

Signed and filed at Des Moines, Iowa this 8th day of February, 1984.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FRANCIS P. HARTWIG,	:	
Claimant,	:	File No. 664791
vs.	:	A P P E A L
BISHOP IMPLEMENT COMPANY,	:	D E C I S I O N
Employer,	:	
and	:	
UNITED FIRE & CASUALTY CO.,	:	
Insurance Carrier, Defendants.	:	

By order of the industrial commissioner filed April 20, 1984 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; claimant's exhibits 1 through 3; and defendants' exhibits A and B, all of which evidence was considered in reaching this final agency decision.

The outcome of this appeal decision will be the same as that reached in the review-reopening decision.

ISSUES

The review-reopening decision awarded benefits of 100 weeks of permanent partial disability at the rate of $160.99 per week for a 20 percent disability of the body as a whole for industrial purposes.

Defendants state the issues on appeal: "1. Claimant failed to prove by the preponderance of the evidence any permanent disability causally relating to his employment. 2. Industrial disability should not have been awarded under the record facts."

EVIDENCE PRESENTED

Claimant was hurt on the employer's premises when he fell on a jack and the shaft or handle pierced his right buttock some 10 inches into his body. (Tr., 6-7) The original diagnosis was a "[t]raumatic puncture wound of the right buttocks with perforation of the bladder, perforation of the small bowel (ileum), a tear in the sigmoid colon mesentery with intra-abdominal bleeding." (Exhibit A)

Claimant was treated for the acute phase of his injury and was not treated for any back problems until November following the March 1981 injury. At the hearing, claimant complained of pain in his low back on the right side and down his left leg and part of the time in the right leg as well as a feeling of cold and numbness in his legs. (Tr., 8-9) As to when he first noticed back problems, he testified:

A. It started immediately right after I returned home and back to work.

Q. Did you have or were you experiencing this problem in the hospital?

A. I told them of my legs being cold, yes.

Q. Okay. Did you tell them of any pain or other difficulties you were having with your back?

A. You mean--

Q. In the hospital?

A. In the hospital, no, no, because most of the time I was laying. I mean I wasn't up that much.

Q. Okay. Prior to March 19 of 1981, did you ever experience any problems with your back?

A. None other than just a minor back ache once in a while, but I-- As far as losing any work, I've never lost a day's work in my life on account of my back. And I guess every once in a while you'll strain yourself too much. (Tr., pp. 9-10 ll. 20-25 and 1-11)

Claimant denied any prior back difficulties except for occasional visits to chiropractors over the years. (Tr., p. 12, 18) As to his present limitations, claimant testified:

Q. What would you say your limitations are when you talk about lifting objects? Would you have--

A. Half.

Q. Half of what?

A. Half of what I could have done -- or did do before, I should say.

Q. In your daily work have you had occasion to be unable to lift things, that you had to get another employee to help you?

A. Yes. (Tr., p. 12 ll. 16-25)

Robert Bishop, a partner in the employer's business, testified with respect to claimant's ability to work after the injury:

Q. Did you observe any difficulties that he may have had physically prior to this occasion?

A. No, not that I recall.

Q. What have you observed since this March of '81?

A. Well, he complains of his leg and back problem and favors it sometimes more than others when he's around the shop, this part is true. I-- As far as the percent of lifting that he mentioned, I have no idea. I know he was and still is very strong. He's-- I've admonished him on things that he has done as far as get some of the younger fellows to help. This part is-- As far as he feeling embarrassed about it, that has been his problem, I think, more than anything, that we-- I'm sure he feels the same way as far as we expecting it of him, but he's pretty self-sufficient and something needs to be done, he probably had done some things he shouldn't. I don't know. (Tr., p. 23 ll. 1-16)

A. He -- he satisfies us. He probably doesn't do some of the things though that he would have done before. One thing I admonished him for-- Of course he's almost as old as I am. --is climbing and doing things that why can't some of the younger guys do this, see. (Tr., p. 25 ll. 6-10)

Claimant was was seen by John A. Grant, M.D., a qualified orthopedic surgeon, for his back difficulty. Dr. Grant saw claimant in November of 1981 and summed up his original findings in a note of June 17, 1982:

It was my feeling that he presented with chronic back stress, the etiology of which was obscure. He did have x-rays of the lumbosacral spine demonstrating

> a Grade I spondylolisthesis, L-4 on 5 with a narrowed disc interspace and sclerosis of the end plates at that level. The difficulty encountered was trying to equate how much of his difficulty was related to the fall, how much to the spondylosis and how much to degenerative disc disease.

A myelogram showed no specific nerve defects.

In a report of October 27, 1982, Dr. Grant stated:

> In view of the fact that I did not see this man until over a year following his injury, I am not certain I can equate his current back pain with the injury sustained in March of 1981. It is possible that the pre-existing spondylolisthesis of L-4 and 5 has been aggravated and become symptomatic as the result of his injury.

In a report of April 26, 1983, Dr. Grant stated:

> Assuming that this man is giving me an accurate history that he had never had any problems with his back prior to the accident and that now he is having difficulty plus the fact that he has known abnormality of his lumbosacral spine that without question preexisted the injury, I would have to assume that the injury very likely aggravated a preexisting condition.

Claimant was also seen by a neurologist, Michael J. Kitchell, M.D., who stated in an office note typed March 29, 1983:

> It is difficult to say how much this particular injury aggrevated [sic] his back pain from the spondylolisthesis. The spondylolithesis [sic] is a longstanding problem which proceeded this injury of March, 1981, though it is entirely possible that the fall did aggrevate [sic] his pain, and then initiated radicular irritation in the legs.

In a report of May 16, 1983, Dr. Kitchell stated:

> Let me say that if he did not have evidence of a polyneuropathy, then I would certainly believe that the injury aggravated his preexisting condition, giving him the back pain. Now, because of the fact that Mr. Hartwig also has a neuropathy, I have to somewhat more subjective but I would say that it is likely that his injury did aggravate his preexisting condition, though I still cannot be certain of the role that his neuropathy is playing.

From that evidence, it is clear that claimant has a polyneuropathy and a spondylolisthesis, and the question is whether claimant's back was injured or the spondylolisthesis was aggravated by the traumatic event.

APPLICABLE LAW

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 v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 (1934).

Matters of causal relationship are essentially within the realm of expert testimony. Medical testimony that a causal relationship is possible in a given injury is insufficient, standing alone, to prove the causal relationship. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

"The incident or activity need not be the sole proximate cause, if the injury is directly traceable to it." Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974); Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971). "A cause is proximate if it is a substantial factor in bringing about the result." Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

Industrial disability is reduction of earning capacity, not mere functional impairment. Such disability includes considerations of functional impairment, age, education, qualifications, experience, and the 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).

ANALYSIS

On the whole, the evidence showed that claimant did not have any appreciable back symptoms prior to the injury. That being the case, the question is whether or not the trauma caused claimant's back problem or aggravated the spondylolisthesis. In that regard, although his opinion changed, Dr. Grant states that injury "very likely aggravated a preexisting condition" in his letter of April 26, 1983 and stated that an aggravation was possible in his letter of October 27, 1982. Also, Dr. Kitchell says in his report of May 16, 1983 that it is "likely that his injury did aggravate his preexisting condition." That evidence is enough to establish the causal relationship.

With respect to the question of industrial disability, Dr. Grant rated claimant as having a 15 percent permanent partial impairment. Claimant is 59 years old, and his education consists of two years of high school and some training in employer-sponsored schools. His main experience appears to have been as a mechanic. His wages have not been lowered as a result of the injury, and he continues to work for the employer. The employer's testimony, quoted above, is taken to mean that claimant's disability is tolerated well in his current employment, but that does not mean any toleration would transfer to another job. Claimant's present job situation, then, is good but the elements of age, education and impairment work against claimant's ability to compete in the job marketplace. Therefore, the finding of 20 percent permanent partial disability of the body as a whole for industrial purposes appears to be correct.

The findings of fact, conclusion of law and order of the review-reopening decision are adopted except that the order of interest payment has been changed.

FINDINGS OF FACT

IT IS THEREFORE FOUND:

That claimant is 59 years of age.

That claimant completed two years of high school.

That claimant has attended training schools to which he was sent by his employers.

That claimant's work experience up to the time of his injury consisted primarily of employment as a mechanic and a limited amount of heavy physical labor.

That claimant had a preexisting spondylolisthesis and a polyneuropathy which were aggravated by his March 19, 1981 injury.

That claimant had been essentially asymptomatic prior to March 19, 1981.

That claimant's present disability is a result of his preexisting conditions and the March 19, 1981 injury.

That claimant has a 15 percent permanent partial impairment of the body as a whole as a result of his back condition.

That claimant remains doing the same work as at the time of the injury and performs to the satisfaction of his employer.

That claimant has not experienced a reduction in earnings or wage increases as a result of his injury.

That claimant's work activities are limited by his back problems.

That claimant presently experiences pain in his lower back and left leg, which pain is a result of the March 19, 1981 injury.

CONCLUSION OF LAW

IT IS THEREFORE CONCLUDED that claimant has sustained a permanent partial industrial disability of 20 percent resulting from his injury of March 19, 1981.

ORDER

THEREFORE, IT IS ORDERED that defendants pay unto claimant permanent partial disability benefits for one hundred (100) weeks at a rate of one hundred sixty and 99/100 dollars ($160.99) per week.

That defendants shall pay interest from March 6, 1984 pursuant to section 85.30, The Code.

That such payments shall be paid in a lump sum.

That defendants pay any costs in this proceeding pursuant to Industrial Commissioner Rule 500-4.33.

That defendants file a final report within twenty (20) days from the date below.

Signed and filed this 28th day of June, 1984.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHERYLON HAYES,
Claimant,
vs.
THE CLUB RENDEZVOUS,
Employer,
Defendant.

FILE NO. 682200

D E C I S I O N

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

The defendant, having filed a motion for summary judgment on December 29, 1982, the same comes on for hearing before the undersigned on August 19, 1983. The defendant appeared through its' attorney Robert C. Andres. The claimant failed to appear but the hearing was held on defendant's motion.

Section 85.16 states in part:

> No Compensation under this chapter shall be allowed for an injury caused:
>
> ....
>
> 3. By the willful act of a third party directed against the employee for reasons personal to such employee.

The allegations outlined in the affidavit filed by defendant would indicate that claimant's injury would fall under section 85.16(3). Claimant has made no denial and did not even appear at the time of hearing to contest defendant's allegations. There does not appear to be any genuine issue as to this material fact. Defendant appears to be entitled to this judgment as a matter of law.

FINDING OF FACTS AND CONCLUSIONS OF LAW

WHEREFORE, based on the evidence presented and the principles of law previously stated, the following findings of fact and conclusions of law are made:

Finding 1. Claimant's injury on October 25, 1979 resulted from an argument unrelated to claimant's employment and directed against claimant for reasons personal to claimant.

Conclusion A. Claimant's claim is barred by section 85.16(3).

ORDER

THEREFORE, defendant's motion for summary judgment is sustained.

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

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VIRGIL E. HENNAGER,
Claimant,
vs.
BLUE STAR FOODS, INC.,
Employer,
and
MARYLAND CASUALTY COMPANY,
Insurance Carrier,
Defendants.

File No. 714082

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 the employee, Virgil E. Hennager, against his employer, Blue Star Foods, Inc., and its insurance carrier, Maryland Casualty Company, to recover compensation benefits for a personal injury he alleges he sustained on or about September 21, 1982. On December 16, 1983 the case came on for hearing before the undersigned deputy industrial commissioner at the courthouse in Council Bluffs, Iowa. The case was fully submitted at the time of the hearing.

The record consists of the testimony at the hearing; exhibits 1 through 22, inclusive (exhibit 21 is the deposition of Robert J. Fitzgibbons, Sr., M.D., and exhibit 22 is the discovery deposition of claimant), all of which evidence was taken into consideration in reaching this proposed agency decision.

The parties stipulated that in the event of an award for benefits under §85.27, Code of Iowa, defendants would get credit for any payments made by other insurance and that the parties would work out that problem between themselves. The parties also stipulated that in the event of an award the applicable rate of weekly compensation would be $118.80 and that claimant was off work 6 weeks, 4 days.

ISSUES

Claimant states the issues in his brief thus: "I. Whether Virgil Hennager's injury arose out of and in the course of employment at Blue Star Foods, Inc. II. Whether there is a causal relationship between the injury and the disability. III. What benefits Virgil Hennager is entitled to as a result of his injury."

STATEMENT OF THE CASE

Claimant's work involved pulling tubs weighing 400 to 600 pounds from the back of a machine and pushing the tub to a line. He also lifted bags of beans weighing some 100 pounds. He testified that on August 30, 1982, his side hurt while doing his work. He testified that he reported this twice to the plant nurse and was returned to work on each occasion.

Constance Grabe testified that her notes of July 16, 1982 showed claimant had pain in his left groin and had sawed wood the prior weekend.

Claimant admitted having problems for about a month before the incident at work and admitted that a hauling business he operated would have contributed to his groin pain. He testified further, however, that his truck broke down in the summer of 1982 (he thought about August 1, 1982) and that he had done no hauling since that time. This testimony was corroborated by his wife who estimated it was May or June of 1982 that the truck broke down.

Claimant had surgery for the hernia in late September of 1982 by Ralph L. Hopp, M.D., a surgeon. On the issue of causal relationship, Dr. Hopp stated:

> Since the apparent injury was not reported to the foreman at Blue Star on any one day, it would be impossible to point to anyone [sic] day or anyone [sic] incident which caused the hernia. The only thing we can say is that it was probable that the heavy pushing and lifting at Blue Star caused the incident since the patient had stated that his work outside his work at Blue Star had been relatively light and that he had not been doing any heavy lifting.

Claimant was examined by Robert Fitzgibbons, Sr., M.D., a surgeon, on September 26, 1983. In Dr. Fitzgibbons' opinion, a hernia can recur in sedentary work as easily as with harder work.

Neither physician assessed a permanent impairment, but Dr. Hopp said claimant would have a permanent lifting limit of 75 pounds. Dr. Fitzgibbons said that claimant was "exactly the same now as he was before the hernia recurred." (Dep., p. 11)

Claimant testified that he was age 47 at the time of the hearing and had lived in Council Bluffs for 15 years. He worked for Blue Star Foods, Inc. for 10 years and was earning $4.15 per hour at the time of the injury. Claimant testified the employer would not take him back to work with the lifting restriction. After the injury, he looked many places for janitor's work, including Mercy Hospital, Washington School, HyVee Foods, Don's Texaco, Home Furniture, American Furniture and the employment office. Claimant is currently employed by Midwest Maintenance and is involved in the cleaning of HyVee Food Stores and truck stops. He earns $3.35 per hour and works 32 hours per week.

James Rogers, a vocational rehabilitation counselor for the the state of Iowa since 1969, testified that he began working with claimant on July 18, 1983. He stated that claimant's memory was impaired and that he can easily be led to agree with a statement. Claimant's present work is within his capacity mentally and physically. Mr. Rogers stated claimant was limited somewhat, because in the metropolitan area of Council Bluffs-Omaha, he cannot find his way around Omaha.

Gail Leonhardt, a vocational counsultant for the North Central Rehabilitation Company testified that he reviewed the reports of Mr. Rogers and claimant's deposition; further he listened to the testimony of claimant, his wife, the nurse, and Mr. Rogers. He had had no personal contact with claimant. In the witness' opinion, claimant's present employment is appropriate. In his opinion claimant could get around Omaha by bus. He stated that 75 pounds lifting restriction is on the "light side of heavy." Finally, he stated it would be difficult to place claimant in a job.

B. L. Cogley, M.S.W., Ph.D., administered three tests to claimant: (1) a clinical interview, (2) a Wechsler Adult Intelligence Scale-Revised, and (3) a wide range achievement test. Dr. Cogley's impressions were as follows: "1. IQ: 70 ± 5. According to Wechsler, the mentally retarded range of intelligence is set at 69 and below. The borderline range of intelligence is from 70 through 79. 2. Adjustment disorder with depressed mood, associated with a physically limiting condition and job loss."

APPLICABLE LAW

Claimant has the burden to show he received an injury which arose out of and in the course of his employment. Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945); Almquist v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 (1934). A personal injury is an impairment of health which results 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; 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); Forde v. Goode, 240 Iowa 1219, 38 N.W.2d 158 (1949); and 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). "The incident or activity need not be the sole proximate cause, if the injury is directly traceable to it." Holmes v Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (1974); Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971). "A cause is proximate if it is a substantial factor in bringing about the result." Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

Industrial disability is reduction of earning capacity, not mere functional impairment. Such disability includes considerations of functional impairment, 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., 251 Iowa 128, 106 N.W.2d 95 (1960). An employee who has no functional impairment but is precluded from returning to work because the employer believes that the injury disqualifies him for such work has a resulting reduction in earning capacity. Blacksmith, 290 N.W.2d 348.

ANALYSIS

There is, of course, no rebuttal of claimant's description of his occurrence at work. In this case, the two physicians, both qualified surgeons, do not agree as to whether or not claimant's work caused or aggravated the hernia. Since there was obviously some preexisting difficulty, any recovery would have to be based on a theory of aggravation. On the whole, the evidence of the treating physician, Dr. Hopp, is taken over that of Dr. Fitzgibbons, who only examined claimant. And, although the preexisting condition and the chopping of some wood about a month prior have some relevance, the work incident appears to be enough of a substantial factor to enable claimant to carry the burden of proof.

The records show that claimant is a person of limited attainments and potential. The record also shows that the employer did not keep claimant on the job after the injury, and the reason appears to be lifting limitation. Under the Blacksmith case, the employer's failure to furnish work to claimant becomes a factor in assessing permanent disability. Claimant's disability is therefore industrial disability.

Further, although claimant has no permanent impairment rating, under the Blacksmith case he has a loss of earning capacity because of the injury in that his weight lifting limitation was occasioned by the injury. Somewhat offsetting these facts in this case is claimant's superior motivation to work. Considering all the factors of industrial disability, then, claimant has a permanent loss of earning capacity because of the injury of ten percent.

FINDINGS OF FACT

1. Claimant was age 47 at the time of the hearing and has limited intelligence.

2. Claimant was hurt at work on or about August 30, 1982 while pushing heavy tubs and lifting 100 pound bags of beans.

3. Claimant had worked at Blue Star Foods, Inc., for ten years and was earning $4.15 per hour; he now works for Midwest Maintenance and earns $3.35 per hour.

4. The work injury caused claimant's left inguinal hernia to develop to the point that surgery was necessary.

5. Claimant has no permanent impairment but has a permanent weight lifting restriction of 75 pounds.

6. Claimant had a prior left inguinal hernia repair.

7. Although limited in intelligence and experience, claimant is a very highly work motivated individual.

CONCLUSIONS OF LAW

Claimant sustained an injury on or about August 30, 1982 which arose out of and in the course of his employment and which was the cause of the necessity for left inguinal hernia repair.

Because of the injury, claimant has an industrial disability of ten (10) percent.

The proper rate of weekly compensation is one hundred eighteen and 80/100 dollars ($118.80).

The length of healing period was six (6) weeks, four (4) days.

ORDER

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits to claimant for a period of six (6) weeks, four (4) days beginning September 22, 1982 for the healing period at the rate of one hundred eighteen and 80/100 dollars ($118.80) and thereafter to pay claimant permanent partial disability benefits for a period of fifty (50) weeks at the same rate, accrued payments to be made in a lump sum together with statutory interest beginning September 22, 1982.

Defendants are further ordered to pay the following doctor and hospital bills:

Mercy Hospital	$1,481.31
Cogley Clinic	670.50
Anesthesia Associates	207.00

Costs of this action are hereby taxed against defendants and are to include a witness fee of one hundred fifty dollars ($150) for the expert testimony of Mr. James T. Rogers.

Defendants are ordered to file a final report of payments upon the completion thereof.

Signed and filed at Des Moines, Iowa this 16th day of February, 1984.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES HERBIG, Claimant, vs. ROCKINGHAM MACHINE COMPANY, Employer, and EMPLOYERS INSURANCE OF WAUSAU, Insurance Carrier, Defendants.	File No. 424196 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 Charles Herbig, claimant, against Rockingham Machine Co., employer, and Employers Insurance of Wausau, insurance carrier, for the recovery of further benefits as the result of an injury on October 13, 1974. Claimant's rate of compensation as stipulated by the parties is $97.00 for healing period or temporary total disability benefits and $89.00 for permanent partial disability. A hearing was held before the undersigned on April 13, 1983 at which time the case was considered fully submitted.

The record consists of the testimony of claimant, Mike Kiegerl and Regina McIntosh; claimant's exhibits 1 through 7; and defendants' exhibits A through F.

ISSUES

The issues presented by the parties at the time of the prehearing and the hearing are whether there is a causal relationship between the alleged injury and the disability on which claimant is now basing his claim; the extent of temporary total, healing period and permanent partial disability benefits he is entitled to; and whether or not certain 85.27 expenses were authorized.

FACTS PRESENTED

On October 13, 1974 claimant received an injury arising out of and in the course of his employment with defendant when while running a sheer he experienced pain in his low back. Claimant started to work for defendant in January of 1974 as a welder but his job also required him to do a number of other tasks. Claimant disclosed that while running the sheer he was required to pick up 4 x 10 foot sheets of metal from approximately six inches off the floor. Claimant had been doing this job on the sheer for ten to twelve hours a day seven days a week for approximately a month. Claimant testified his back became worse and worse until October 13, 1974 when he went to the hospital. Claimant indicated that he was instructed to use heat on his back and rest. Claimant stated that one morning it took him an hour to get out of bed. Defendants had claimant go to Dr. Sinning.

Claimant was hospitalized for three weeks and off work for another one or two weeks before returning to work. Claimant testified that when he returned to work he had a little pain but felt pretty good. Claimant was returned to operating a sheer. All of his work required heavy lifting. Claimant stated that from 1974 until 1975 his back continued to hurt and in 1977 he was laid off because of his back.

Claimant testified that he hasn't worked for pay since approximately October 13, 1977. Claimant revealed that since he lost work the problems have been the same--the more he does, the worse it is.

Claimant testified that he has sought medical treatment on his own and at the suggestion of friends, went to McGaw Hospital in Chicago.

Claimant stated that he continues to have pain in his back and in his legs below his knees. Claimant indicated that walking causes him problems as does sitting. Claimant describes pain on any lifting and problems driving.

On cross-examination, claimant revealed that when he went to the hospital in Chicago a shunt was placed in his skull and that the draining of fluid helped headaches that he had been experiencing.

Mike Kiegerl testified that he works for Professional Rehabilitation Management and was contacted by the defendant insurance carrier in 1978 to assess whether claimant could be assisted. Mr. Kiegerl stated that at that time defendants still felt claimant was on the payroll and were willing to take him back, Mr. Kiegerl explored the possibility of modification or accommodation. Defendants had no light duty. Mr. Kiegerl opined that claimant thought he was totally disabled. Mr. Kiegerl testified he told claimant several times that defendants were willing to take him back, but claimant indicated he was unwilling to go back on an experimental basis.

On cross-examination, Mr. Kiegerl opined that claimant exaggerated his pain.

Regina McIntosh testified that she works for Professional Rehabilitation Management and helped on claimant's file. Ms. McIntosh stated that claimant didn't feel that he should be required to work as long as he had pain.

J. R. Lee, M.D., who testified by way of deposition, stated he is an orthopedic surgeon and on December 8, 1982 evaluated claimant at the request of claimant's attorney. Dr. Lee revealed that claimant was complaining of pain from his toes to his head. Dr. Lee stated:

Q. I would next ask you to describe the examination that was conducted. Give your visual observations of this patient.

A. I examined him that he was well developed, well nourished male, seems to be in pain, but there was not any acute or chronic ill appearance. I examined him standing up and he seemed to be quite straight and there's not any curvature in his back. And I examined him walking. His gait was very unstable, lack of balance. Then I examined him in the sitting position and his legs and muscles seem to be quite normal; not any signs of neurological deficit. He was able to walk on his tiptoes and heels, but was very much out of balance.

Q. Other than these three types of tests that you conducted, walking, standing and sitting, were any other specific tests conducted?

A. I have him lying down on the table and I test straight leg raising, mainly to see whether he has any sciatic nerve pain. Seemed to be quite normal, not any neurological deficit in both sciatic nerves, and I also examined his joint in both legs and hip joint and knees. It was quite normal; not any neurological deficit in any sciatic nerves.

Q. Doctor, was that the extent of your explanation regarding the test conducted while he was laying on the table?

A. Yes.

Q. Were any other methods employed or tests conducted?

A. Yes. I did x ray [sic] his back to check his lumbar spine X ray.

Q. And what were your findings?

A. I find that he had some mild arthritic change in his lumbar spine.

Q. You indicate a mild arthritic change --

A. Mainly, I see spur and I see narrowing of the joint. That just tell me that he had lumbar arthritis.

Q. Anything else?

A. Not that I can recall.

Q. After conducting these various tests, completing these procedures, did you find yourself in a position to give an evaluation regarding any disability experienced by Mr. Herbig?

A. Now, before I make any conclusions, I did review his CT scan and X ray taken at Mercy Hospital two months prior to this examination. I review his X ray of lumbar spine. It shows the same amount of arthritis -- arthritic change in his lumbar spine; and also I review his CAT scan that shows not any evidence of herniated disk, not any evidence of spinal canal stenosis.

....

Q. Other than these -- this CT scan and the X rays taken at Mercy Hospital, did you review any other outside material or findings other than Mr. Herbig himself?

A. No, I did not review any other material, but I did omit past history that I have taken from him. He told me he had shunt surgery done in Chicago a few years ago for his hydrocephalus and he told me that he has not been taking any medicine and he had no history of diabetes or hypertension. He also had a cleft palate.

Dr. Lee opined that claimant has some disability that is "possibly caused by work" but was not very sure because of it being based on subjective findings. Dr. Lee's diagnosis was lumbar arthritis with lumbar degenerative disc disease. Dr. Lee opined that claimant has a twenty percent functional deficit to his back as a result of an injury in 1972 or 1974 to his back.

Dr. Lee stated:

A. He does have some muscle imbalance, most likely due to hydrocephalus. This also cause [sic] his disability as well, but this is not caused by the injury.

Q. Okay. And can you state, within a reasonable degree of medical certainty again, the degree of disability -- overall disability caused by this -- as you stated, caused by his head or his imbalance? Can you state his degree of functional disability?

A. Totally disabled. Totally permanently disabled.

On cross-examination, Dr. Lee indicated there was no sign of a herniated disc in claimant's CT scan and no stenosis. Dr. Lee stated:

Q. Now, when Mr. Herbig was here, did he complain to you about having pain in literally all of his bones?

A. That's what exactly he told me.

Q. All right. From an anatomical or physiological standpoint, doctor, if a person has some arthritis in the areas that you have talked about, is there any way that that arthritis is going to produce pain in your legs or your feet or all your bones?

A. Just by having arthritis in his back, that will not produce any pain in his hands and toes and upper extremities and head.

Q. All right.

A. His pain is all the way from head down to the toes.

Q. That's what he told me too when I took his deposition. That's a description he used, from the tip of his head down to his toes. If a person --

A. There's no anatomical relationship to his complaint or the X ray findings.

Q. From that standpoint, would his complaints of pain be out of proportion to the X ray findings that you saw?

A. That's correct.

Dr. Lee disclosed that the accident of 1972 or 1974 did not cause claimant's arthritis because it was already there at the time of his injury. Dr. Lee testified that his rating of disability was mainly related to the pain claimant complained of and he is unable to work.

Dr. Lee's report of December 9, 1982 states:

MEDICAL HISTORY:
This 50-year-old, male, used to work as a welder for the past 30 years. However, at his last job he worked only three years for a company and during employment he sustained an injury to his back. According to the patient he stated that he was lifting too much at work. The patient has been off work since October 1977 with back disability. States that "there is all kinds of pain from toes to head and all bones." Pain seems to be localized in upper and lower extremities, migrative in nature. Problems of sleeping with the pain. Denies any morning stiffness. He states that he can walk four or five blocks at the most. He can drive long distances without any problems even from the Quad-Cities to Chicago, IL. The patient was told by his doctor that the L4-L5 vertebrate are rubbing each other. Coughing and sneezing sometimes causes back and leg pain. Recently, he was admitted to Mercy Hospital. An x-ray and Ct scan was [sic] done at that time. The CT scan revealed evidence of previous myelography, but no evidence of herniated disc or lateral recess stenosis. There were no signs of central canal stenosis. The x-ray taken at that time revealed a minimal amount of osteophyte formation.

PAST HISTORY:
Has not been taking any medication and no history of diabetes or hypertension. He had surgery done for CSF shunt and has a cleft palate.

EXAMINATION:
Well-developed, well-nourished, male, in no acute or chronic ill appearance. His gait is quite imbalanced. In the standing position, shoulders and pelvic are level, spine straight and the range of motion is restricted somewhat in all directions. Can perform tiptoe and heel walking. The gait is very much out of balance. The Romberg's test revealed negative. In the sitting position, his eyes, nose and mouth are normal. Right ear has difficulty of hearing. Neck full motion and nontender. Lumbar and dorsal spine is quite straight. Lumbar spine is slightly tender. Deep tendon reflexes of knees and ankles are normal. No weakness of extensor hallucis longus. Peripheral pulsation is quite normal. Normal motor and sensory functions. Straight leg raising, bilaterally, at 80 degrees induces back discomfort, but no sciatia pain.

X-RAY: Lumbar Spine:
No signs of congenital deformity, developmental defect and there are multiple traction spurs at L1-L2. Slight narrowing disc between L1-L2 lumbar vertebrate.

DIAGNOSIS:
1. Lumbar arthritis with Lumbar Degenerative Disease between L1-L2.

CONCLUSION:
On the basis of history, physical examination and x-ray study, I believe that this patient has the above diagnosis. I do not believe that he has any permanent disability from his work injury, however, he does have disability from his lumbar arthritis and disc degenerative disease. He is quite disabled and functionally impaired due to his central nervous system disorder. These conditions were all pre-existing conditions. His work injury merely provoked his per-existing [sic] condition.

In a report dated October 18, 1978 Michael Fine, M.D., stated:

LUMBOSACRAL SPINE AP, LATERAL, SPOT, OBLIQUE

The normal lordotic curve is maintained. There is no evidence of fracture or bony abnormality. The disc spaces are intact. The laminae, pedicles and transverse processes are maintained. The sacroiliac joints are of normal width. There are no unusual soft tissue shadows. There are no arthritic manifestations.

IMPRESSION: Normal lumbosacral spine.

Dr. Fine's report of November 10, 1979 stated:

LUMBOSACRAL SPINE

Mild degenerative changes with osteophyte formation are noted throughout the lumbar spine, and there is narrowing of the L2/3 intervertebral disc space. There is no evidence of fracture or subluxation.

Incidentally noted is calcification of the abdominal aorta.

In his report of October 20, 1982 John E. Sinning, Jr., M.D., stated:

As you know Charles Herbig was hospitalized from September 7 to September 11, 1982 at Mercy Hospital and during that time we conducted a series of tests evaluating his complaint of low back pain. The results of our evaluation are that Mr. Herbig has no significant arthritic changes in his back, has no neurological impairment of function and no indication of anything that would be damaged by his returning to some kind of job. I reviewed the pain problem with him. We found no organic basis for the complaint of pain of the magnitude of disability that Mr. Herbig complains. There is in fact a considerable discrepancy between the degree of complaint and the findings. With lack of psychological findings to explain the pain complaint, then exaggeration must be considered the prime reason for the magnitude of the pain complaint and the accompanying disability.

I suggested that Mr. Herbig had the alternative of working himself back into the job market by way of Vocational Rehabilitation or Job Service on his own. I found no evidence of any condition that would justify the findings of impairment of function beyond the most minimal level which has already been more than accounted for by the settlement he made on his workmenx [sic] compensation claim.

In his note of July 11, 1978 Dr. Sinning stated:

Conference with Ron McKenzie of Employers Insurance of Wausau regarding future plans with Charles Herbig. Consider brace and psychiatric referral. Overall view probably a 20% orthopaedic impairment, though this might go to 100% as an industrial disability based on his lack of potential for rehabilitation. Reviewed past treatment.

R. H. Fitzgerald, Jr., M.D., in a report from Mayo Clinic dated April 3, 1978, revealed that he told claimant he could not explain the pain in all of his bones.

In a reported dated May 16, 1979 F. Dale Wilson, M.D., opined claimant's disability to be 33 percent of the whole man.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 13, 1974 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).

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, 902 (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, 1121, 125 N.W.2d 251, 257 (1963) 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 has said on many occasions:

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 Company, II Iowa Industrial Commissioner Report 39 (1981); Enstrom v. Iowa Public Services Company, II Iowa Industrial Commissioner Report 142 (1981); Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981).

Although Iowa Code section 85.27 in 1974 did not contain the following language, case law made the same applicable.

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 86.39 provides:

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

commissioner. For services rendered in the district court and supreme court, the attorney's fee shall be subject to the approval of a judge of the district court.

ANALYSIS

Claimant has met his burden in proving that he has some permanent impairment as a result of his injury on October 13, 1974. The undersigned gives more weight to the opinion of Dr. Sinning who was one of claimant's treating physicians. Dr. Sinning opined that claimant had a twenty percent impairment. The opinion of Dr. Wilson is given little weight in that Dr. Wilson considered problems with claimant's extremities and neck. The greater weight of evidence limits claimant's problems as a result of the work injury to the area of claimant's low back. It should also be noted that little weight will be given to the testimony of Dr. Lee. Dr. Lee's report of December 9, 1982 and his testimony are not consistent. The record fails to disclose why Dr. Lee changed his opinion of no impairment related to the injury as disclosed by his report of December 9, 1982 and his testimony at the time of his deposition that an impairment of twenty percent was related to his injury at work.

However, functional impairment is only one of the factors in determining a person's industrial disability. Claimant is 50 years old and has only completed the sixth grade. Claimant has taken a course in welding at a trade school but has no other formal education. There is also no question but that claimant's speech problem would limit the number of jobs that he could engage in. Claimant should not return to the job he was employed in at the time of his injury or any other job that would require heavy lifting.

The greater weight of evidence clearly indicates that claimant has exaggerated his complaints of pain and that those complaints have been relied on by the physicians. The greater weight of evidence also reveals that Dr. Sinning thought returning to work would help claimant. Claimant, on the other hand, fails to demonstrate any motivation or interest in returning to any type of employment. Claimant's lack of motivation affects his employability but is not causally related to claimant's injury.

It is determined that as a result of his injury with defendant, claimant has an industrial disability of thirty percent.

The notes of Dr. Sinning reveal that he determined claimant's impairment on July 11, 1978. The greater weight of evidence reveals that claimant has not improved since. If one were to believe claimant's testimony, he has just got worse since the injury or at least has not improved.

It is determined that claimant reached maximum recuperation on July 11, 1978. Claimant's testimony revealed that the medical expenses he incurred in Chicago were unauthorized. The greater weight of evidence also indicates that the head problems that claimant suffered from were not related to his injury.

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Claimant's testimony revealed that the medical expenses he incurred in Chicago were unauthorized. The greater weight of evidence also indicates that the head problems that claimant suffered from were not related to his injury. Therefore, none of the Chicago bills are defendants' responsibility.

The last issue that must be discussed is the purported lien of attorney James M. Hood on any award or settlement claimant might make. The file fails to contain any other reference to Mr. Hood. It is evident that he never filed an action for claimant or had any contact with this agency regarding claimant's problems. Claimant's original petition was filed on December 28, 1981 over three months after Mr. Hood's letter to defendants. The undersigned can not see any evidence of work by Mr. Hood on this matter and has no indication of expenses or time spent by Mr. Hood. It is determined that any award is free from any lien by Mr. Hood.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WHEREFORE, based on the evidence presented and the principles of law previously stated, the following findings of fact and conclusions of law are made:

FINDING 1. On October 13, 1974 claimant injured his back while working for defendants.

FINDING 2. The only disability claimant had as a result of said injury is impairment to his back.

FINDING 3. As a result of the injury, claimant had a functional impairment of twenty percent (20%) of the body.

FINDING 4. At the time of hearing claimant was fifty (50) years old.

FINDING 5. Claimant has a sixth grade education and has taken a course in welding at a trade school.

FINDING 6. Claimant has a speech problem.

FINDING 7. Claimant can not return to the job that he was performing at the time of his injury or any other job requiring heavy lifting.

FINDING 8. Claimant's testimony and the greater weight of evidence would indicate claimant exaggerated his complaints of pain.

FINDING 9. Claimant has no motivation to return to work.

CONCLUSION A. As a result of his injury, claimant has an industrial disability of thirty percent (30%).

FINDING 10. On July 11, 1978 claimant's permanent impairment was determined by Dr. Sinning.

FINDING 11. Claimant's condition has not improved since July 11, 1978.

CONCLUSION B. Claimant reached maximum recuperation on July 11, 1978.

CONCLUSION 12. Claimant saw physicians in Chicago at the suggestion of friends.

FINDING 13. Defendants had been providing claimant with medical care.

FINDING 14. Claimant made no attempt to get authorization for the Chicago medical treatment.

CONCLUSION C. Claimant's treatment in Chicago was unauthorized for purposes of section 85.27 and unrelated to his injury.

FINDING 15. Mr. Hood did not present any evidence that he did any work for claimant.

FINDING 16. Any work which could have been done was done prior to any filings in this action.

CONCLUSION D. Mr. Hood's alleged lien should not attach to this award.

ORDER

THEREFORE, defendants are to pay unto claimant healing period benefits from the date of injury until July 11, 1978 with the exception of the period he worked at a rate of ninety-seven dollars ($97.00) per week and one hundred fifty (150) weeks of permanent partial disability benefits at a rate of eighty-nine dollars ($89.00) per week.

Defendants are to reimburse claimant for the following medical expenses:

Patrick G. Campbell, M.D.	$ 215.00
Mercy Hospital	1,240.00
Orthopaedic Surgery Associates, P.C.	215.00

Defendants are to be given credit for benefits previously paid.

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.

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 27th day of April, 1984.

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FLOYD HOLLOWAY, Claimant, vs. SWIFT AND COMPANY, Employer, and NATIONAL UNION FIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	FILE NO. 743551 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 Floyd Holloway, claimant, against Swift and Company, employer, and National Union Fire Insurance Company, insurance carrier. The petition which was filed was designated as a review-reopening proceeding but the answer and Form 2A on file reflect that this action is in arbitration.

Claimant alleges that he sustained an injury to his back on July 12, 1983.

The hearing was commenced April 10, 1984 at the Pottawattamie County Courthouse in Council Bluffs, Iowa. The case was considered fully submitted upon the conclusion of the hearing. The record in this proceeding consists of the testimony of claimant, Floyd Holloway, Timothy P. Hiller, Barbara K. Wright and Ernest F. Becker. Claimant's exhibits are numbered 1 through 5 inclusive and defendants' exhibits are designated A through K inclusive.

ISSUES

The parties identified the issues to be determined by this proceeding as whether or not claimant sustained an injury arising out of and in the course of his employment as alleged; a determination of the nature and extent of claimant's disability, if any; a determination of whether there is a causal relationship between a work related injury and any disability which may be found to exist; a determination of claimant's entitlement to medical benefits under section 85.27 of the Code of Iowa, particularly with regard to whether or not a causal connection exists between a work related injury and the expenses introduced; and whether or not the care was authorized by the employer. Claimant also seeks additional benefits under the provision of Iowa Code section 86.13 for unreasonable denial or delay of benefits.

The parties stipulated that all claimant's medical bills had been paid by the employer except a charge of $22.00 from Louis F. Tribulato, M.D. It was also stipulated that the correct rate of compensation is $241.17 per week in the event of an award.

REVIEW OF THE EVIDENCE

Claimant testified that he was born March 24, 1936, is married and that on July 12, 1983 he had four dependent minor children.

Claimant testified that he dropped out of school in the eleventh grade and obtained a GED two or three years ago. Claimant denied having any other educational or vocational training.

Claimant testified that he served in the air force from 1954 through 1958 and received an honorable discharge.

Claimant reviewed his work experience as including working at a leather company where he was night foreman and performed several other tasks, working in packinghouses, a feedmill and a flour mill. All the positions he described involved significant lifting and standing and would be termed in the range of medium to heavy labor.

Claimant commenced work with the defendant employer in August of 1973 working in its plant at Glenwood, Iowa where he had remained until his recent absence. He described working on a number of different positions including cleaning intestines, trimming heads, stacking boxes in the cooler, a brief period of janitor work and rolling hogs as they came out of the de-hairing process. He stated that most of his work had been in the cooler. Claimant belongs to the meat cutter's union and job placement is determined by seniority.

Claimant testified that he first experienced trouble with his back in 1976 when he lifted a steel grate while cleaning. He related that it rendered him nearly unable to walk, that he received medical care and was off work nine weeks. He received temporary disability but no compensation for permanency. He related that he had trouble with his back off and on over the years, mostly when bending, but denied missing other work for which he received workers' compensation until 1983.

Claimant testified that on July 19 and 20, 1979 he was working rolling hogs as they left the de-hairing machine and that they had a run of unusually large hogs. He related that on the 20th his back starting hurting before lunch and that shortly after the afternoon break it became so bad that he could not stand up and went to see the company nurse. He stated that he was sent to see the company doctor in Glenwood who referred him to a specialist but that personnel at the plant sent him to a different specialist, namely Michael T. O'Neil, M.D. Claimant testified that Dr. O'Neil directed that he exercise and wear a girdle. He stated that he was sent to University of Nebraska Hospitals for physical therapy and ultrasound treatments. He made reference to exhibit 4 and stated that the glucose tests were not related to this proceeding and that his ultrasound and therapy treatments start on the first page of the exhibit where the number 20 appears in the day column. He related that the month column of the exhibit is missing and that the month shown on the first page is July.

Claimant stated that he returned to work on the day after Labor Day and performed janitor work for two weeks while the regular janitor was on vacation. He stated that he moved to the head table where he worked for two days. He felt that he could not endure the constant standing and went to see the doctor.

Claimant has not worked since that day and has not attempted to return to work. He states that he understands his limitations and restrictions to prohibit standing, stooping, bending, lifting and climbing. He knows of no job at Swift that would fall within those restrictions for which he is qualified. He stated that his superintendent, Mr. Keane, told him that there were no jobs which fit those restrictions and that a doctor's release would be needed before he could return to work.

Claimant testified that he has not sought vocational rehabilitation and stated that he does not know of any work which he could perform with the limitations which have been placed on him. He stated that he was paid temporary disability before his return to work in September and has received only one check since September 20, 1983.

Claimant testified that Bud Severn is the foreman who came to the hog rolling area when the back pain became acute and that he saw foreman Becker on the way to the nurses' station. He stated that the pate and chitterling jobs both require standing.

On cross-examination claimant stated that the pain was located in the lower middle portion of his back near his belt line. He stated that when it initially occurred he thought that it was possibly a kidney infection.

Claimant stated that rumors of the plant closing have been around ever since he worked there. He agreed that there was a rumor that the plant would close in March, 1984 but denied that Gerald F. Gehling, M.D., related the rumor to him.

Claimant confirmed that he has not had back surgery and has not been treated at any hospital since July, 1983 except the University of Nebraska Hospitals.

Claimant stated that he was off work initially for four weeks but that it took seven weeks to receive the first payment. Claimant agreed that he had conferred with people at the plant concerning a possible return to work. He agreed that the pate and chitterling work would be light duty but that such would be inconsistent with the medical restrictions as he understands them to exist.

Ernest F. Becker testified that he recently retired after 40 years with the defendant employer. He stated that in July, 1983 he was claimant's foreman and that he was acquainted with claimant. He stated that during claimant's ten years with Swift, two to three years had been under his supervision.

Becker confirmed that claimant had been working as a roller on the day he left work. He described the work as very hot due to the hogs coming from a vat of water which was approximately 102 degrees.

Becker said claimant was a good worker when he was present but that he missed a lot of work.

He recalled the last day that claimant worked in July, 1983. He stated that claimant told him that he was sick and wanted to see the nurse. He observed that claimant was all wet. He stated that claimant made no complaint concerning his back and that he was under the impression that claimant was overheated.

Barbara K. Wright stated that she is a registered nurse employed at Swift and Company where she performs emergency first aid and prepares paper work related to insurance and workers' compensation.

She related a day when claimant came to her office and stated that he did not feel well. She observed that he was cold and clammy. She stated that she cooled him down and that while he was there he placed his hand on his back and said that it hurt. She stated that she asked him if he had kidney infection and he said that he had.

Wright went on to say that a few days later claimant told her that he was going to see his own doctor and that approximately a week after that he told her that the problem was his back, not his kidneys, and asked to see the company doctor. She stated that she sent him to see Dr. Gehling.

Wright related that when claimant returned to work after the first absence medical restrictions were received and that she gave them to Larry King, the plant superintendent. She stated that claimant was placed in the pate position and that it met the restrictions which had been medically imposed.

She stated that a dispute occurred concerning the nature of claimant's restrictions and that claimant received another slip which contained a restriction against prolonged standing. She stated that Swift's awareness of restrictions comes from reports such as exhibit 1.

Timothy P. Hiller testified that he has been employed by Swift and Company for approximately three years and that he is presently the administrative assistant in the personnel department at Glenwood, Iowa. He described his duties as assisting the personnel manager.

He stated that company procedure is to review the medical restrictions and then ask the employee what he feels he can do. He stated that the employee can bid a number of jobs in the plant and that there are many which do not require lifting more

than 25 pounds.

He stated that the company believes that it has jobs available which claimant could perform. He stated that all the jobs require some standing and walking. He stated that the pate position requires lifting less than 25 pounds, that janitor work is light duty and that claimant probably could not perform maintenance work because such requires knowledge of air-conditioning and similar systems.

Hiller agreed that the term "prolonged standing" is subject to interpretation but stated that in his opinion he did not consider a couple of hours of standing as would be required at the pate or chitterling jobs to be "prolonged standing" since the employees have regularly scheduled breaks.

Claimant's exhibit 1 is a report from Michael T. O'Neil, M.D., regarding an examination of claimant he performed September 22, 1983, the results of which are as follows:

> Height, six foot, three inches; weight, two hundred thirty six pounds. He has fifty percent limitation of motion of the lumbosacral spine in all directions with pain in the low back with flexion with the fingertips twenty four inches from the floor. There is generalized fist percussion tenderness in the midline low back area. There is no muscle spasm. Straight leg raising tests are negative at ninety degrees bilaterally. He stands erect and walks without a limp. Toe and heel gaits are normal. The pelvis is level and there are no abnormal thoracic or lumbar curvatures. No fist percussion tenderness in the lumbosacral, sacroiliac or gluteal regions. Patrick's test is negative bilaterally. Leg lengths are equal as measured from the anterior superior iliac spine to the medial malleoli. Neurological examination of the lower extremities shows no motor weakness, sensory deficits or reflex changes.
>
> Anteroposterior and lateral xrays of the lumbosacral spine show moderate narrowing of the L5-S1 interspace. Early hypertrophic spurring is noted at L4-L5. There is some sclerotic changes of the zygoapophyseal joints in the lower regions of the back. No other abnormalities are noted. On the right side, there is a large spur at the L2-L3 level.
>
> This man has degenerative lumbar disc disease in the low back area. His condition is permanent and will progress with time. He should avoid work which requires stooping, lifting, bending or twisting. I would suggest some other type light work with lifting restricted to twenty five pounds, and no repeated stooping and bending.

Exhibit 1 also contains a slip signed by Dr. O'Neil dated October 4, 1983 which states, "I failed to state that Mr. Holloway should avoid long periods of standing, walking & climbing."

Claimant's exhibits 2 and 3 are reports from Louis F. Tribulato, M.D., regarding examinations of claimant performed November 2, 1983 and March 23, 1984. The physical examination performed on both occasions is consistent with the results found by Dr. O'Neil except that straight leg raising tests showed results that were positive in the range of 45 to 50 degrees. Dr. Tribulato found no particular change to have occurred between the two examinations. In exhibit 2 Dr. Tribulato states:

> The diagnosis is moderately severe chronic lumbar strain and degenerative lumbar disease. The patient appears to be at a reasonably static situation. I would judge that he is not suitable for heavy work or labor or prolonged standing as that does tend to aggravate his back pain. I would judge he has 15 percent total body permanent residual disability.

With regard to medical improvement Dr. Tribulato stated in exhibit 3:

> You also ask in your letter how long it will take Floyd to recover from his back injury of July 1983. Of course, he is not completely recovered from it and has moderate disability as a result of the back injury so actually the question is probably when will he meet maximum improvement. This I can obtain only from his history and what I saw on the examination of November 1983. When I saw him in Novem.1983 [sic] I thought he had pretty much reached maximum improvement at that time and from my experience it does take a few months or several months for a severe lumbar strain to stabilize and reach maximum improvement. From July to November would be four months and I would say that was an average time for a severe lumbar strain to reach maximum improvement. As near as I can judge about four months would be a reasonable figure.

Exhibit 4 is a statement of charges from University Hospitals which shows claimant to have incurred medical expenses under the category "PHYS THER ULTRASOUND" which the undersigned interpretes to be physical therapy and untrasound treatments in an amount which totals $384.00. Also are shown charges of $18.50 and $35.75 for what the undersigned interprets to be physical therapy evaluation and physical therapy ambulation. The four remaining charges in the amount of $11.00 each are unable to be interpreted.

Exhibit 5 relates an unpaid charge from Dr. Tribulato for an office visit on March 23, 1984 in the amount of $22.00.

Defendants' exhibits A through H inclusive reflect that claimant sustained an injury to his back on May 5, 1977 lifting a steel plate while carrying a hose. The exhibits reflect that his treatment included hot packs and massage. Examinations include notes which reveal limited forward and lateral bending and limited lumbosacral mobility. Noted in exhibit G is a release to return to work on July 11, 1977. From that exhibit it appears that the final diagnosis was an acute sprain of the lumbar spine.

Exhibit I reports an injury on January 6, 1982 in the nature of an acute lumbosacral strain due to bending with no time loss.

Exhibit K is a report from Gerald F. Gehling, M.D., dated September 21, 1983 which is in handwritten form. Examination shows negative straight leg raising bilaterally and requests orthopedic consultation. Dr. Gehling notes that the Swift plant will be closing in March, 1984. His diagnosis is a lumbar strain.

Defendants' exhibit J is claimant's deposition which was taken November 23, 1983. It is generally consistent with the testimony given by him at hearing although somewhat more detailed.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on July 20, 1983 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, 731-32, 254 N.W. 35, 38 (1934), discussed the definition of personal injury in workers' compensation cases as follows:

> While a personal injury does not include an occupational disease under the Workmen's Compensation Act, yet an injury to the health may be a personal injury. [Citations omitted.] Likewise a personal injury includes a disease resulting from an injury.... The result of changes in the human body incident to the general processes of nature do not amount to a personal injury. This must follow, even though such natural change may come about because the life has been devoted to labor and hard work. Such result of those natural changes does not constitute a personal injury even though the same brings about impairment of health or the total or partial incapacity of the functions of the human body.
>
> ....
>
> A personal injury, contemplated by the Workmen's Compensation Law, obviously means an injury to the body, the impairment of health, or a disease, not excluded by the act, which comes about, not through the natural building up and tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee. [Citations omitted.] The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body.

However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732. 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. See also Musselman, 261 Iowa 352, 154 N.W.2d 128 (1967).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 760-761 (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, 815 (1962).

Claimant's testimony concerning his work activity is corroborated by the testimony of Ernest Becker. Drs. O'Neil and Tribulato have placed nothing in their reports which would indicate that claimant's symptoms were fabricated. A straight leg raising test is somewhat subjective depending upon the level of discomfort at which the rating is taken. Although there appears some inconsistency regarding whether claimant's initial back injury occurred in 1976 or 1977, his medical history has generally been fairly related when all the medical reports are compared with his testimony which was given at hearing and in his deposition. The failure to relate insignificant occurrences is not found to be material. It is therefore found that claimant did sustain an injury arising out of and in the course of his employment on July 20, 1983.

Dr. Tribulato diagnosed the injury to be a severe chronic lumbar strain and opined that maximum improvement occurred on approximately November 2, 1983. Dr. O'Neil does not make a diagnosis beyond the degenerative lumbar disc disease. He does not indicate the point at which maximum recovery occurred. Dr. Tribulato indicates that claimant has a 15 percent total body permanent partial disability while Dr. O'Neil makes no disability rating. Dr. O'Neil does, however, suggest restrictions on claimant's activity which would be consistent with a 15 percent permanent partial functional impairment.

There is no medical evidence in the record of this case which addresses the issues of whether or not the injury of July 20, 1983 is the cause of claimant's present disability or whether the injury in any way changed the course of the under-

lying degenerative disc disease. In view of the fact that claimant was able to work prior to July 20, 1983, the existence of an identifiable activity from which his complaints arose, the lack of any basis for questioning claimant's credibility and the absence of a contrary medical opinion, it is found that a causal relationship does exist between claimant's disability and the work related injury.

There is no indication that defendants were mislead based upon the variance between the alleged injury date of July 12 contained within the petition and the date of July 20, 1983 which appears in claimant's testimony. Where no objection is raised, any variance between pleading and proof is waived and the matter is tried by consent. Iowa Rule of Civil Procedure 106; Holland v. Holland, 161 N.W.2d 744 (Iowa 1968). Yeager v. Firestone Tire and Rubber Co., 253 Iowa 369, 373, 112 N.W.2d 299 (1961).

It is also found that a causal relationship exists between the injury and claimant's physical therapy at University Hospitals as shown on exhibit 4. It is significant to note that defendants denied the occurrence of an injury arising out of and in the course of employment. In view of such, defendants cannot complain of a lack of authorization for any of the medical care which claimant received. Barnhart v. M.A.Q. Inc., 1 Iowa Industrial Commissioner Report 16 (Appeal Decision 1981).

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, 902 (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, 257 (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. McSpadden, 288 N.W.2d 181 (Iowa 1980).

Claimant's functional impairment is in the range of 15 percent of the body as a whole. He is 48 years of age. His education is limited to his GED and he appears to have little in the way of prior work experience beyond occupations involving moderate to heavy labor. Claimant has not sought other employment and does not seem motivated to engage in any other employment. Claimant did not appear to be of less than average intelligence and there is no reason why his functional impairment should be totally disabling at the age of 48. He must return to substantial gainful activity.

Claimant's age and lack of formal education appear to be the main drawbacks to entering into a new field of work. It is unlikely that he will be able to experience the rate of earnings which he previously experienced while working for defendants. Defendants have made some attempt to restore claimant to gainful employment but that attempt has apparently been unsuccessful.

Claimant's back condition is that of degenerative arthritis. It is a disease which is progressive in nature. The amount of pain experienced by one suffering from the disease is not necessarily related to the amount of degeneration which has occurred. It is common for pain to actually decrease with the passage of time even though the degenerative process is continuing. It appears that restrictions have been placed upon claimant's activities since the injury which had not been previously imposed and that claimant now, several months after the injury, still experiences a high level of discomfort which he did not experience prior to the injury. It is concluded that the injury did result in some permanent impairment.

When all the material factors are considered it appears that when the disability which claimant sustained as a result of the injury is evaluated industrially he has sustained a 20 percent permanent partial disability from it.

A determination of claimant's healing period is not readily apparent. Claimant returned to work with restrictions on what appears to have been September 6, 1983. He continued to work until September 21, 1983 when he saw Dr. Gehling. He has not returned to work since. Dr. Tribulato opined that his healing period ended approximately November 2, 1983. There is no evidence in the record, however, which indicates that claimant's condition changed in any manner subsequent to September 21, 1983. In view of claimant's underlying condition the only change which can be expected is a gradual resolution of the pain and Dr. Tribulato's expression is adopted as correct. It is concluded that claimant's healing period extends to November 2, 1983 with an interruption during the period of September 6 through 21, 1983 inclusive.

Section 86.13 of the Code of Iowa states:

> If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award benefits...up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

The Form 2A which was dated September 1, 1983 appears in the file as a final report. It relates that claimant was paid four weeks and five days of temporary total disability compensation. It relates that the disability ended August 21, 1983 and that the first payment was made September 1, 1983. Claimant testified that seven weeks passed before he received the first payment following the July injury. There is no explanation offered by defendants as to why the delay in commencement of benefits occurred. That delay is, accordingly, found to be unreasonable. It also appears that claimant was absent from work initially for 48 days. This computes to six weeks, six days. Even if the incident were assumed to have resulted only in temporary disability with no permanency, it appears that claimant should have received six weeks, six days of compensation, which amount computes to $1,653.70. When compared to the final report it appears that he was underpaid by $516.77. No justification for the underpayment was offered and, accordingly, it is found to be unreasonable. Dr. O'Neil did not concisely state that claimant had sustained any permanent impairment as a result of the injury. Dr. Tribulato's reports lack a clear concise relationship of the injury to claimant's disability. Even though such has been found to exist in this decision defendants' failure to recognize the same and make appropriate payment is not unreasonable. It is found that defendants' delay in commencing payment and denial of payments in the amount of $516.77 would permit a maximum penalty of $826.85. A penalty of $500.00 will be imposed representing approximately 25 percent of the amount unreasonably delayed and 50 percent of the amount which was found to have been unreasonably denied. No penalty will be imposed for the failure to pay continued healing period benefits subsequent to September 21, 1983 since that issue is a subject of good faith dispute.

In attaining this decision the undersigned has considered all of the evidence which was presented. All the witnesses who testified are found to be credible to the extent of their knowledge and memory.

FINDINGS OF FACT

1. Claimant is a 48 year old married male who had four dependent children on July 20, 1983.

2. Claimant suffered a lumbosacral strain while performing his job of rolling hogs at his employer's plant in Glenwood, Iowa on July 20, 1983.

3. Claimant also suffers from degenerative disc disease which was aggravated by the strain.

4. Claimant returned to work, initially performing light duty, from September 6, 1983 until September 21, 1983.

5. Claimant has permanent medically imposed restrictions which prohibit repeated stooping and bending, long periods of standing, walking and climbing and lifting more than 25 pounds.

6. Swift's kill floor has no positions which would permit claimant to work in compliance with the restrictions.

7. The injury claimant sustained caused permanent impairment.

8. Claimant's only work experience has involved moderate to heavy labor.

9. Claimant has not sought retraining or other employment and is not well motivated to return to work.

10. Defendants unreasonably delayed commencement of compensation payments for 30 days.

11. Defendants unreasonably failed to pay 2 1/7 weeks of compensation.

12. Claimant incurred medical expenses of $438.25 with University Hospitals and $22.00 with Dr. Tribulato which were reasonably necessary for treatment of his injury and was not unauthorized.

13. Claimant continues to experience pain as a result of the injury.

CONCLUSIONS OF LAW

This agency has jurisdiction of the subject matter of this proceeding and of the parties hereto.

Claimant sustained an injury arising out of and in the course of his employment on July 20, 1983. The injury was an aggravation of his preexisting degenerative disc disease.

A causal relationship exists between the injury and the disability which claimant has been found to possess.

Claimant is entitled to 12 6/7 weeks of compensation benefits for healing period and 100 weeks of compensation for 20 percent permanent partial disability.

Claimant is entitled to receive payment for medical expenses incurred at University Hospitals in the amount of $438.25 and for $22.00 charged by Dr. Tribulato.

Defendants unreasonably delayed the commencement of compensation and unreasonably denied payment of two weeks and one day of compensation for which a penalty in the amount of $500.00 should be imposed under the provisions of Iowa Code section 86.13.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant six and six-sevenths (6 6/7) weeks of compensation for healing period at the rate of two hundred forty-one and 17/100 dollars ($241.17) per week commencing July 21, 1983.

IT IS FURTHER ORDERED that defendants pay claimant an additional six (6) weeks of compensation for healing period at the rate of two hundred forty-one and 17/100 dollars ($241.17) per week commencing September 22, 1983.

IT IS FURTHER ORDERED that defendants pay claimant one hundred (100) weeks of compensation for permanent partial disability at the rate of two hundred forty-one and 17/100 dollars ($241.17) per week commencing November 3, 1983.

IT IS FURTHER ORDERED that defendants pay claimant additional benefits in the amount of five hundred and no/100 dollars ($500.00) as a result of the unreasonable delay and denial of payment of compensation.

IT IS FURTHER ORDERED that defendants pay claimant's medical expenses incurred with Dr. Tribulato in the amount of twenty-two and no/100 dollars ($22.00) and with University Hospitals in the amount of four hundred thirty-eight and 25/100 dollars ($438.25).

IT IS FURTHER ORDERED that defendants shall pay interest pursuant to Iowa Code section 85.30 on any amounts which were unpaid as the same became due.

IT IS FURTHER ORDERED that defendants pay all amounts which are past due in a lump sum and that defendants shall receive full credit for any amount which they are herein ordered to pay but which has been previously been paid by them.

IT IS FURTHER ORDERED that defendants pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

IT IS FURTHER ORDERED that defendants file an activity report within twenty (20) days from the date of this decision.

Signed and filed this 25th day of June, 1984.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WESLEY HOWARD, Claimant, vs. AMERICAN BRIDGE COMPANY, DIVISION OF U.S. STEEL CORP., Employer, Self-Insured, Defendant.	File No. 656238 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 Wesley P. Howard, claimant, against American Bridge Company, a division of United States Steel Corporation, self-insured employer, defendant, to recover additional benefits under the Iowa Workers' Compensation Act for an injury of November 21, 1980. It came on for hearing on the October 11, 1983 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 December 15, 1980. Claimant has been paid temporary total disability from December 8, 1980 to February 20, 1982.

At the time of hearing the parties stipulated to a rate of $331.74, that W. Malcolm Granberry is a qualified orthopedic surgeon and that further permanent partial disability payments if awarded would commence on February 21, 1982.

The record in this matter consists of the testimony of claimant; claimant's exhibit 1, various medical reports; claimant's exhibit 2, various medical reports; claimant's exhibit 3, reports from W. Malcolm Granberry, M.D.; defendant's exhibit A, the deposition of Bruce L. Sprague, M.D., and defendant's exhibit B, the deposition of Paul C. Cunnick, M.D.

ISSUES

The issues in this matter are whether or not there is a causal relationship between claimant's injury of November 21, 1980 and his present disability and whether or not claimant is entitled to permanent partial disability payments.

STATEMENT OF THE CASE

Forty-two year old claimant, who has completed a year of junior college, testified to serving with the army infantry with 13 months in Viet Nam. After he got out of the service he started doing iron work on a permit. He got into the union in 1968 or 1969. He described iron working as putting together the skeleton of a building. Sometimes climbing must be done. At other times the work consists of welding and foundation work. His rate of pay has ranged from $12 to $15 per hour.

On the weekends claimant participated in rodeos -- participation which yielded him $20,000 to $30,000 a year. He took part in all events and had horses which he has sold since his injury.

Claimant recalled having a number of injuries prior to November 21, 1980 at least some of which had occurred as a result of rodeoing including a broken knee, broken wrist, broken left arm, broken hip, broken fingers on his right hand, a twice broken leg, a broken ankle, a broken left shoulder and broken collar bone. In spite of these he was able to return to iron work and the rodeos. He broke his ankle on the job in the 1960's. He lost about half his small and ring fingers on his left hand in a hunting accident. He said that his hand gave him no trouble and was "just ugly that's all." Although he testified he has been thrown off horses and broncs "about every time" he has been on them, he denied having any neck, back or headache problems prior to his injury, and he claimed he was under no restriction.

Claimant remembered his injury thusly: He was inside helping the welders. He went to the restroom. He was walking through a line of big rolls of aluminum. He slipped and fell hitting the back of his neck and catching his hand on a roll of aluminum. He was dazed. The back of his neck hurt. He was taken to the doctor. He told the doctor about his neck, but the physician was more concerned over his hand. Claimant was referred to Dr. Sprague, who x-rayed his hand and neck and then performed surgery on the hand.

Shortly after the operation claimant went to Houston where he tried to see a doctor recommended by Dr. Sprague, but that physician was on vacation. He attempted to contact Dr. Sprague for another doctor and found Dr. Sprague had gone on vacation, too. He didn't like the way the bandages on his hand smelled and he removed them himself. Through the efforts of some Chicago attorneys he got to Dr. Granberry, who did surgery on his hand and later operated on his neck as well. He did not remember exercises being prescribed for the hand.

Claimant has done neither rodeo nor iron work since his accident. He has been doing day work a couple days each week for three to 12 hours a day with pay of $30. This work includes doctoring and feeding cows and cleaning lots.

As to what sort of work he might be able to do, he suggested he could select good young animals and "raise them up and sell them to someone with lots of money." He expressed the feeling that doctors, lawyers, Indian chiefs and haircutters have all the money in that people will pay to to feel and look good. Therefore, he was interested in haircutting because it does not take a long time to train and keeps a person out of the elements. He did not see welding as a viable alternative because he could not hold up his right hand for long periods. He also observed that welding for an iron worker requires climbing. Claimant reported he has visited the unemployment agency, but available jobs were for minimum wage. He seemed to view this work as a return to square one. His interest in obtaining further schooling was tempered by the institution's basic requirement -- money.

Claimant complained that his hand is very sensitive to touch with an electric shock sensation running through it. He has some loss of grip. He has pain from his neck area around and down his arm. Such things as bending his head down to read and horseback riding give him headaches. He acknowledged that since surgery his headache is gone except in these situations. Pain in his arm is staying the same, and his hand is getting weaker from lack of use. He has trouble with his neck when he turns his head too quickly or tries to look up or down. He has not seen a doctor since February.

Paul C. Cunnick, M.D., saw claimant on November 21, 1980 after claimant had been seen in the emergency room by Dr. Vernun who referred him for a laceration to the palm of his hand. Dr. Cunnick sutured the laceration.

Claimant was back for recheck on November 24 and at that time this notation was made "neck still sore, right side. He had some numbness down the inside of his right arm." Claimant continued to have pain on the outside of the index finger and base of the midfinger. The pain was attributed to the laceration involving scar tissue from the old injury.

Claimant was rechecked on December 2, 1980 at which time he was complaining of pain in the metacarpal phalangeal joint. There was movement in the joint and claimant was referred to Dr. Krieter. Dr. Cunnick said that he had made only a superficial examination of claimant's neck because claimant was not complaining about it.

A form from Richard L. Krieter, M.D., shows claimant was seen by him on December 3, 1980 and referred to Dr. Sprague.

Bruce L. Sprague, M.D., orthopedic surgeon saw claimant on referral from Dr. Krieter on December 8, 1980 at which time he was complaining of numbness and tingling in his left index finger. Claimant gave a history of falling backward and sustaining pain in the back of his neck and lacerating the palm of his left hand. There was limitation of flexion and extension in the neck with muscle spasms on the right and limited bending to the left. X-rays showed narrowing at C5-6 and the doctor felt claimant had some nerve root irritation involving the posterior rami of the cervical spine. The doctor said that the narrowing can appear suddenly or gradually. The deterioriation might be attributed to a natural degenerative process. The nerve roots exiting in the area of the narrowing could be irritated either by disk fragments or by degenerative changes.

Dr. Sprague was unable to determine whether the narrowing seen in claimant was gradual or sudden. The physician said that claimant's doing rodeo riding would not influence his opinion one way or another as to whether the narrowing might have preexisted the slip and fall based on activities not having anything to do with degenerative changes. Other x-rays showed degenerative changes at C5-C6 which were long standing and revealed encroachment on the foramina and osteophytes of long standing.

Claimant was hospitalized and a surgical procedure on his hand described as follows was carried out:

> We actually just exposed the proper radial digital nerve in the palm -- distal palm of his left hand -- that's the site of the previous injury -- and separated it from the surrounding granulation tissue and early scar tissue. Looked at it with the microscope and basically just removed some of the granulation tissue and scar tissue and closed the wound. (Sprague dep., pp. 7-8 11. 19-25 and 1)

Dr. Sprague related his treatment of the hand to claimant's injury. The doctor also acknowledged that the accident would have aggravated a preexisting condition in claimant's neck or that there could have been a spontaneous occurrence.

W. Malcolm Granberry, M.D., reported seeing claimant on December 30, 1980 at which time claimant complained of pain, electrical shock feelings in his hand and numbness in the end of his index finger. Claimant was found to have lacerations across his palm which were superficial on the ulnar side and a "deep unhealed portion" on the inner side. He had altered sensation and hypersensitivity on the radial aspect of the index finger and decreased sensation on the ulnar side. There was a patch of numbness at the base of the long finger. In a letter dated January 6, 1981 the doctor wrote: "I told Mr. Howard that he may have pulled the nerves apart when he took his bandage off about a week sooner than is standard." Claimant was instructed in proper care of his hand.

Claimant returned on January 13, 1981 at which time he had full flexion of the fingers. He was told to massage and to use his fingers and hand. Dr. Granberry on March 12, 1981 performed a neurolysis and repair of claimant's finger.

Claimant was seen for recheck on April 17, 1981 at which time he was instructed in range of motion exercises, massage and washing. Claimant was complaining of pain in the posterior neck which radiated into the right chest wall, pain with flexion, headaches varying from slight to severe, and radiating pain and numbness in his right arm. On examination there was moderate restriction of motion. He also mentioned recurrent dislocation of the shoulder. Degenerative disc disease was found between C5 and 6. Physical therapy and medication were prescribed. In a letter dated April 22, 1981 Dr. Granberry wrote: "It is my feeling that Mr. Howard has had a degenerative disc for a period of time. The accident simply brought this to the surface and produced the symptoms we so recongize...." The surgeon also expressed the opinion that claimant could not return to iron working, should not continue rodeo riding and should try to be retrained for sedentary work.

Claimant was admitted to the hospital on October 7, 1981. X-rays revealed reduction in the C5-6 disc space, marginal osteophytic lipping and posterior osteophytes. A metrizamide study was interpreted by J. Cooduhoun, M.D., as showing "persistent marked deformity of the right C6 root sleeve at the same level as the posterior osteophytic bar on the inferior margin of the body of C5 but the defect is larger than one would expect from this osteophyte alone and there is probably a disc protrusion present." Surgery was performed with a postoperative diagnosis of herniated nucleus pulposus and degenerative disc disease at C5-6. An anterior diskectomy, foraminotomy and anterior cervial fusion were completed.

On January 25, 1982 Dr. Granberry wrote: "Specific diagnosis is degenerative disc disease with marked aggravation on the above mentioned injury resulting in progressive incapacitation and nerve root compression requiring surgical relief." The doctor estimated claimant's impairment at 35 percent of the cervical spine. In a subsequent letter the surgeon explained:

> The amount of his disability is based on the fact that he would not be able to resume his usual tasks as a workman and he would require retraining for work activities that would not require heavy lifting, bending, reaching, climbing, crawling and prolonged positions. It is probable he can expect to have recurrences of neck pain from time to time in the future which will require conservative measures.

In a letter dated May 17, 1983 Dr. Granberry determined claimant had a 10 percent impairment in the function of his left hand due to his injury and subsequent surgery.

APPLICABLE LAW AND ANALYSIS

The first issue to be considered in this matter is whether there is a causal relationship between claimant's injury of November 21, 1980 and his present disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 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).

Claimant testified he told his doctor about his neck hurting at the time of injury, but the doctor was more concerned about claimant's hand. It would seem natural for the doctor to give his first attention to a readily apparent traumatic injury. When claimant was seen on November 24, 1980 only a few days after his injury, the doctor noted that his neck was still sore on the right with numbness down the inside of his arm. Only a couple of weeks post-injury claimant had limitation of motion and muscle spasms on the right with limited bending to the left.

Dr. Sprague related his treatment of claimant's hand to claimant's accident. Both Drs. Sprague and Granberry recognized that claimant had preexisting degenerative disc disease and his neck with symptoms surfacing with the accident.

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).

Dr. Granberry expressed the opinion that claimant may have pulled nerves apart when he removed his hand bandage about a week sooner than would be done. Professor Larson in 1 Workmen's Compensation Law section 1322 states: "The degree of claimant's misconduct required to break the chain of causation should therefore be not mere negligence, but intentional conduct which is clearly unreasonable." The test in cases of this sort therefore is whether or not a claimant's actions are clearly reasonable. Claimant's conduct under his particular circumstances in removing bandages was reasonable. He was unable to find a physician recommended by Dr. Sprague. Then he was unable to contact Dr. Sprague. The bandages on his hand smelled. Removing them himself does not preclude his recovery of additional benefits. The record viewed as a whole allows the claimant to carry his burden of proving by a prepondernace of the evidence that his injury of November 21, 1980 is a cause of the disability on which he now bases his claim.

The next issue to be considered is whether or not claimant is entitled to permanent partial disability payments.

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 industrial commissioner has said on many occasions:

> 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 Company, II Iowa Industrial Commissioner Report 39 (1981); Enstrom v. Iowa

Public Services Company, II Iowa Industrial Commissioner Report 142 (1981); Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981).

Claimant's primary work experience as an ironworker necessitated good mobility and good grip for climbing. His treating surgeon expressed the opinion that he can no longer perform ironwork. The doctor has suggested retraining for sedentary work. It is noteworthy that defendant in this matter has not made an attempt to return claimant to work thereby reduce its ultimate liability. Claimant on the other hand has not appeared to have made much attempt to rehabilitate himself allegedly because of a lack of funds. Claimant is a younger worker with a long work life ahead of him. He seems to be bright and capable and to have the capacity for retraining. Because ironworking paid him a substantial salary he has had a significant reduction in actual earnings as well as a reduction in his earning capacity. His injury has left him with impairment to both his hand and his neck. Note is made that Dr. Granberry's rating is to claimant's cervical spine as opposed to the body as a whole and that the rating is based on factors other than pure physical impairment including on claimant's inability to resume his prior work activities, his requirement of retraining and his recurrent pain requiring treatment from time to time. Dr. Granberry has suggested retraining for work activities not requiring heavy lifting, bending, reaching, climbing, crawling and staying in one position for prolonged periods.

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 25 percent industrial disability attributable to claimant's injury of November 21, 1980.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is 42 years of age.

That claimant has completed one year of junior college.

That claimant became a union ironworker in 1968 or 1969.

That ironwork requires climbing and good grip.

That claimant participated in rodeos on weekends.

That claimant had many broken bones prior to his injury on November 21, 1980, but he had returned to work following each.

That claimant had a traumatic loss to portions of his small and ring fingers, but he was able to do ironworking in spite of that loss.

That claimant was injured on November 21, 1980 at his work site when he slipped and fell catching his hand on a roll of aluminum and hitting the back of his neck.

That claimant had surgeries on both his hand and his neck.

That claimant removed surgical bandages to his hand himself.

That claimant has not returned either to ironwork or rodeo riding.

That jobs available to claimant pay less money than ironworking.

That claimant continues to have sensitivity in his hand with loss of grip strength.

That claimant has pain in his neck and a headache with some motions.

That claimant had a preexisting condition in his neck.

That the impairment rating provided by the claimant's treating physician to claimant's cervical spine considered factors other than loss of motion and includes pain.

That Defendant has not attempted to return claimant to work.

That claimant has not sought vocational rehabilitation on his own.

That claimant should not do work requiring heavy lifting, bending, reaching, climbing, crawling and maintaining a position for a prolonged period.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established by a prepondernace of the evidence that his injury of November 21, 1980 is the cause of the disability on which he now bases his claim.

That claimant has established a permanent partial industrial disability resulting from his injury of November 21, 1980 of 25 percent.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay unto claimant permanent partial disability benefits for one hundrad twenty-five (125) weeks at the rate of three hundred thirty-one and 74/100 dollars ($331.74) commencing on February 21, 1982.

That defendant pay interest pursuant to Iowa Code section 85.30 as amended.

That defendant pay costs pursuant to Industrial Commissioner Rule 500-4.33.

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

Signed and filed this 18 day of November, 1983.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JINATH G. HUBBARD, Claimant, vs. DICKEY'S PRAIRIE HOME, Employer, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Defendants.	:	File No. 637666 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an order in which claimant's motion to amend petition to include a claim under Iowa Code section 86.13 was denied.

ISSUE

Whether the deputy erred in overruling claimant's motion to amend petition.

REVIEW OF THE EVIDENCE

Claimant filed application for a section 85.39 examination on July 1, 1982. A hearing was held on July 27, 1982, and a decision granting claimant's application for a section 85.39 examination was issued on July 30, 1982. On January 17, 1983 claimant filed a motion to amend petition to include sanctions mentioned in section 86.13. Defendants filed a resistance to claimant's motion on January 27, 1983 and an order denying the motion was issued February 17, 1983, was also deemed denied. On April 22, 1983 a hearing as to the reasonableness of section 85.39 examination expenses was held. A final decision as to the reasonableness of the examination is presently pending.

APPLICABLE LAW

Iowa Code Section 86.39 provides, in 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. The physician chosen by the employee has the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination.

ANALYSIS

Defendants appear to have questioned the fairness and reasonableness of expenses incurred in the section 85.39 examination which was ordered in a previous decision. Inasmuch as claimant has the burden of proof that the expenses of such examination are fair and reasonable, and a decision is presently pending following the April 1983 hearing regarding that issue, claimant's motion to amend is overruled.

FINDINGS OF FACT

1. Claimant's application for a section 85.39 examination was granted in an earler decision.

2. Defendants have contested the fairness and reasonableness of section 85.39 examination expenses.

3. A hearing regarding the fairness and reasonableness of section 85.39 examination expenses has been held and the decision is presently pending.

CONCLUSION OF LAW

A determination as to the fairness and reasonableness of section 85.39 examination expenses has not yet been issued.

WHEREFORE, the deputy's order denying claimant's motion to amend petition to include the sanctions contained in section 86.13 is affirmed.

THEREFORE, claimant's appeal is dismissed.

Signed and filed this 14th day of October, 1983.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PATRICIA L. HUDSON,	:	
	:	
Claimant,	:	File No. 690619
	:	
vs.	:	A R B I T R A T I O N
	:	
INTERNATIONAL PAPER COMPANY,	:	D E C I S I O N
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Patricia L. Hudson, the claimant, against her employer, International Paper Company, a self-insured employer, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury she sustained on January 16, 1980.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Scott County District Courthouse in Davenport, Iowa on February 8, 1983. The record was considered fully submitted on that date.

An examination of the industrial commissioner's file indicates that a first report of injury was filed February 19, 1982. There are no other official filings of record.

The record in this case consists of the testimony of claimant, Thomas Roy Hudson, Leonard Faber, Terry Gertson; claimant's exhibits 1 through 8 inclusive; defendant's exhibits 1 through 17 inclusive; and joint exhibit A. Frank B. Rogers, M.D., testified in these proceedings by deposition (claimant's exhibit 8).

ISSUES

The issues to be determined are whether the claimant sustained a personal injury which both arose out of and in the course of her employment, the existence of a causal relationship between that injury and the resulting disability, as well as the nature and extent of that disability. There is an issue of the length of healing period as a result of the work injury. There is an affirmative defense of notice under section 85.23, and an affirmative defense of the statute of limitations under section 85.26 of the Code.

REVIEW OF THE EVIDENCE

At the time of the hearing, the parties stipulated and agreed that the applicable rate in the event of an award is $155.06. The parties agreed that the claimant has been off work, except for one day, since the date of injury, January 16, 1980. The parties were able to stipulate and agree to the fairness of any medical bills involved in the proceeding. They further advised the undersigned that all medical bills have been paid via the group insurance coverage.

Thomas Roy Hudson testified on behalf of the claimant. He is 47 years of age and has been married to the claimant for 22 years. He testified with regard to the claimant's work history and confirmed that she was initially employed at Swift & Company as a laborer. Subsequently, she was employed at Collis in Clinton, Iowa, in a general laborer capacity. She also worked as a bartender in a tavern, and subsequently as a waitress. He confirmed that she began her employment relationship with International Paper Company on April 29, 1969 and has worked continuously for them since that date.

Regarding the claimant's educational background, he confirmed that she has an eighth grade education and completed a portion of the ninth grade. According to this witness, the claimant has no other training or education in any specialized field.

Mr. Hudson testified that prior to January 1980 claimant was able to perform her employment duties for the defendant. He further confirmed that during the period 1969 through 1980 the claimant was able to work most of the time. He confirmed that prior to January 1980 the claimant had her gall bladder removed, and also had a hiatal hernia. He confirmed that Frank Rogers, M.D., has been the family physician for 13 years.

Mr. Hudson testified that on January 16, 1980 claimant was taken to the hospital after work by a friend. Mrs. Hudson was having problems breathing; hence, the hospital visit. He indicated that she was released that evening from the hospital and returned hom with continuing complaints.

On January 20, 1980 Mrs. Hudson was re-hospitalized, according to this witness. Surgery for a hiatal hernia was performed on February 22, 1980 by Dr. Rogers. Mr. Hudson testified that for the first six months, post surgery, his spouse was bedridden. During the second six month period, post surgery, she was able to sit up in a chair. Today, he indicates, claimant can do only the most minimum of activities. She takes three days to clean her house. It appears as though claimant spends a substantial amount of time in bed.

Mrs. Hudson is, according to her spouse, constantly plagued by episodes of belching and gas. He confirmed that she has not looked for employment and is unaware of any job she could perform. Prior to the date of injury claimant was able to dance, bowl, drive, shop and do household chores. According to her husband she is unable to do any of these activities today.

On cross-examination, it was established that claimant's gall bladder was removed in 1968. Her first surgery for a hiatal hernia was in 1971. At the time of this surgery, Mrs. Hudson experienced episodes of belching and suffered from dumping syndrome. It was confirmed that claimant had colon problems in 1974, an ulcer flareup in 1976 and lower neck discomfort in 1977.

On redirect examination, it was established that claimant had wrist surgery at some point in the past.

The claimant, Patricia L. Hudson, testified in these proceedings by deposition. As a consequence, the undersigned did not have the opportunity to observe her in person. She is 41 years old and a resident of Clinton. She quit school in the ninth grade and has no specialized formal training.

Mrs. Hudson began her career as an employee of Swift and Company in their poultry processing plant. She remained in their employ for two years and then was married. Subsequently, she returned to Swift & Company for a brief period of time. Later she was employed as a bartender at a local tavern.

Collis Company of Clinton was her next employer. Mrs. Hudson did spot welding and other manufacturing-related tasks for this employer. She voluntarily quit this job to remain at home with her family.

In 1969 claimant commenced work for the employer, herein, International Paper Company. The record establishes that this individual has performed a variety of manufacturing-related functions for this employer.

Claimant freely acknowledges that prior to January 16, 1980 she had problems with her stomach and esophagus. She also acknowledged prior hospitalization and treatment, including surgery for a hiatal hernia. She concedes that after the first hiatal hernia surgery she suffered from what is described as dumping syndrome.

She further testified:

Q. Now, between the time that you had Tonette in nineteen seventy --

A. Three.

Q. -- three and 1980, did you have any other occasions when you had stomach or chest problems?

A. I had stomach trouble once.

Q. When was that, do you recall?

A. No, I don't remember the year.

Q. Did you seek medical attention for that problem?

A. Yes.

An ulcer was diagnosed by Dr. Rogers at this time.

In early 1980 claimant was employed by the defendant as a "window machine feeder." Her duties required that she pick up stacks of cartons out of a basket, place them on a table and feed them into a machine. Claimant is unsure of the weight of a stack of cartons. Bending over and lifting were required to complete this task.

Claimant testified as follows concerning the occurrence on January 16, 1980:

A. I was feeding the window machine, and I reached in the back of the basket just to pick up that last big stack. And I thought I'd pick it up and put it in the table and that way the forklift driver could take the basket out and put me in a new one before we go to break so he'd be kind of caught up. You know, he'd have to keep kind of caught up before they come back. So I did that, and I thought I pulled something in my chest.

Q. At what point did you think you pulled something in you [sic] chest?

A. When I went to throw it up on the table -- when I come up out of the basket to throw it up on the table.

Q. Throw what up on the table?

A. The carton.

Q. So you're lifting the cartons at the time?

A. Uh-huh.

Q. What did you experience?

A. Pain.

Q. Where?

A. In my chest and stomach, but I just thought I pulled a muscle, you know. And as I stood there for awhile it stayed with me, but I thought, well, it will pass. Because I've pulled muscles before. But when I went into break, I got sick in there; and I thought it was -- well, maybe I felt so dizzy and funny because it was hot in the canteen room. Then I come back out, and I continued to get sicker; and then Donna Reimers, my operator, kept having to take my place.

....

Q. When you say "sick," what do you mean by sick?

A. Well, I just felt real woozy, and the pain was there yet; and I felt like I could almost start to vomit, you know. And then I went back to work, and then Donna kept taking -- I had to get Donna to keep taking my place. And I worked from then until 7:30 until it kept getting worse and worse, and then I had Donna get Leonard Faber. And I told Leonard that I had pulled a muscle, or something. I didn't know if I'd pulled a muscle, or what; but I says, "I'm getting so sick now, and I'm getting so goofy feeling that" -- "that I feel I should go home. I'm getting so sick," and I says, "the pain is so bad right in there."

Q. When you say "right in there," you were pointing to a place on the body. Where were you pointing?

A. Like in my chest and top part of my stomach. And I got Colleen Broughton to call because I was so -- felt so bad. I got her to call my nephew, and he come and got me at work. And we were going home, and I kept getting sicker in the car. We were going back up the Bluff, and I told Steven -- I says, "Instead of taking me home just take me here to Jane Lamb Hospital." I says, "Steve, I wonder if I'm having a heart attack." You know, you get panicky, I think. And then they took cardiograms and stuff that night.

Q. Let's back up a little bit because you went through that very fast.

Who is Leonard Faber?

A. He's my foreman.

Q. He was your foreman that day?

A. Uh-huh.

Q. You did talk to him?

A. Uh-huh.

Q. You told us what you mentioned to him. Did he respond to your statement?

A. Well, he asked me -- he says, "Are you sure you're going to be all right?" I says, "I think so." And he just said, yeah, I could go home. I had to get permission to leave.

....

Q. When you were in the bathroom --

A. No; I just -- I would just go on like I was going to vomit, but nothing would come out. And just this bellering; just -- you know, like throwing up but nothing come up.

Claimant's condition continued to deteriorate. Conservative treatment was undertaken resulting in eventual surgery to repair the hiatal hernia.

Claimant concedes that post-surgery she has never returned to work. Claimant's physical activities have been limited post-surgery due in part to continuing chest and back pain, although some days are better than others.

Claimant noted:

Q. Originally, you told us here awhile ago that you thought when the incident first happened that you had a [sic] pulled a muscle.

A. Yea. Well, you know, you don't know when you do something like that. When you're just standing there working, you think it's anything, you know.

Q. And then after your doctor told you I assume, that -- well, you told us that at surgery time you knew it was a hiatal hernia --

A. Uh-huh.

Q. -- repair.

After that understanding from the doctor that it was a hiatal hernia repair, did you have -- did you know or did you understand or did you believe that that had been injured at work at that time?

A. No.

Q. When was the first time that you learned that the incident at work might have caused or aggravated your hiatal hernia?

A. When Dr. Rogers said that he thought that the lifting is what was causing --

Claimant does not believe there is any job at International Paper which she could perform.

The balance of the claimant's direct examination has been thoroughly reviewed and considered in the final disposition of this case.

On cross-examination, claimant admits that her gall bladder was removed in the late 1960's. She concedes that in the early 1970's surgery was performed to repair a hiatal hernia. At the time of this operation a vagotomy and pyloroplasty were also conducted. Prior to these surgeries claimant suffered from severe stomach pains. The claimant's testimony establishes that in 1977 she received treatment for an ulcer condition. In 1979 claimant underwent surgery for a carpal tunnel difficulty.

Regarding the specific work incident, claimant indicates:

Q. Approximately how many of those cartons would have been in this bundle that you lifted?

A. I have no idea.

Q. When you felt this pain in your chest and stomach, I gather your initial feeling was that this was a muscle pull or tear of some sort?

A. Yes.

Q. At that point did you go and tell any of your foremen that you had pulled a muscle?

A. No; because, see, I leaned over and brought it up, and I just felt that pain like from here right straight up. And I thought, well, I just pulled; and then I went on and worked. And as I worked it got worse.

Q. At the conclusion of your lunch break I gather you got sick and felt like vomiting, is that correct?

A. Uh-huh.

Q. At that point did you go and approach any of your foremen to report your illness?

A. I told my machine operator.

Q. Who was that?

A. Donna Reimers.

Q. What did you tell her?

A. I told her that I was sick, and she kept taking my place; and I kept going into the bathroom, and she had Charlene Cavanaugh come in once and check on me.

....

Q. Did you tell her you were feeling sick?

A. Yes. I told her I was feeling really bad, and I was having these terrible chest pains; and then she went out and told Donna. And I went back out and worked, then I went back in. Then I went back out and worked; and then Donna -- I told her, finally, she'd have to go get Leonard Faber.

Q. Is Mr. Faber kind of the foreman in that area?

A. Yes.

Q. What did you tell Mr. Faber?

A. I told him I felt sick and; that I had real bad chest pains and pains in my stomach; that I was throwing up and I felt like I was kind of woozy in my face. And I told him that I had Colleen Broughton go and call my nephew to bring me home.

Q. And he gave you permission to leave?

A. And he give me permission to leave.

Q. At any time during that conversation did you tell Leonard Faber that you thought you had hurt yourself at work?

A. I didn't know if I'd hurt myself or what I'd done.

Q. So the answer is you didn't tell him that you'd hurt yourself at work, is that true?

A. No. I told him I was sick, and I felt this way ever since I lifted those cartons out of the basket.

Q. But did you tell him that, ma'am? That's my question. Did you tell him your sickness came on after you lifted cartons --

A. No, I had --

Q. You have to wait, ma'am, until I'm done with my question.

A. I'm sorry.

Q. Did you tell Leonard Faber that your sickness came on or started after you lifted cartons from the basket?

A. I told him before -- just before we went to break when I was emptying out the thing. He asked me when I got sick. Is that what you mean?

Q. Did you tell Mr. Faber at any time that day that your sickness came on or started after you had lifted cartons from a basket?

A. I told him -- all I told him is I got sick.

....

Q. In the period of the first couple of months after January 16th, 1980, how soon did you know or were you told that you had a recurrent -- or a new hiatal hernia?

A. He took -- when I went back in the hospital the second time -- no. When I was in the hospital the first time, he took X rays; and he thought that's what it was. But then when I worked that night I had such terrific chest pains, and stuff, that he put me back in the hospital. And he had heart scans taken, because he thought maybe there was something wrong with my heart; but there was nothing wrong with my heart that -- it was all just the chest pains and the hernia in the stomach.

Q. Did Dr. Rogers tell you at that time -- that is, after he ruled out the heart problem -- that he thought you had a hernia in your chest?

A. Yeah.

Q. Did you have any discussion with the doctor in early 1980, about how or why that hernia would have recurred?

A. No.

Q. No discusson of any sort?

....

A. No, I don't -- he just said it had to be repaired, and I never questioned it.

Q. You never asked why it was there or why it had come back?

A. No.

Q. At that point in time, ma'am, the point of your surgery or shortly thereafter -- did you feel that the events of January 16th, 1980, were related at all to your hernia?

A. What?

Q. At the time of your surgery or within a month or so of the surgery in 1980, did you personally think or feel that your hernia was related to the incident you described on January 16th, 1980?

A. No, I personally didn't. I just figured it was just -- that within six weeks I'd be well, and I'd be going back to work again.

Q. So you didn't, at that time, think anything about what had caused your hernia?

A. No.

Q. did you just accept it as something that had just developed?

A. Yes.

In 1981 Dr. Rogers advised claimant not to return to any form of work requiring lifting. Later, according to the claimant, Dr. Rogers advised her that he felt lifting caused the recurrent herniation.

The record reveals it may have been as late as January 1982, after consultation with legal counsel, that claimant became aware of a potential compensation claim.

The balance of the examination of this witness both on cross-examination and redirect has been reviewed and considered in the final disposition of the case.

Leonard Faber, the finishing foreman for the employer, testified on their behalf. He was Mrs. Hudson's foreman in January 1980. Mr. Faber testified that prior to January 1980 claimant would, on numerous occasions, become sick to her stomach and requested and received permission to go home. On the date of the alleged injury claimant told Mr. Faber that she had stomach pains and had vomited. Mr. Faber insisted that claimant never told him she had strained herself lifting at work. Additionally, there was no indication that she was ill because of some work activity. Mr. Faber viewed her request to go home on January 16, 1980 as just another in a continuing sequence.

The balance of the examination of this witness, including the cross-examination, has been considered in the final disposition of this case.

Terry Gertson, the supervisor of employee relations at International Paper Company, testified on their behalf. He is charged with the responsibility of overseeing workers' compensation and group insurance claims. He confirmed that the employer received no notice of a work injury for claimant in January 1980. The employer did receive notice that claimant was applying for group benefits in January 1980. Several group claim forms were submitted into evidence and none indicates the condition is work related. The first notice the employer received of a potential claim was when the original notice and petition was served in this proceeding. The claimant stipulated that no notice was given prior to the original notice and petition.

The balance of the direct and cross-examination of this witness has been considered in the final disposition of this case.

Frank B. Rogers, M.D., testified in these proceedings by deposition. He specializes in the area of general surgery. He confirmed that he has treated the claimant for chest pain and a hiatal hernia for an extended period of time. He confirmed that a hiatal hernia can cause indigestion, peptic symptoms, vomiting and reflux of fluid up into the throat. He indicated that there can be reflux without a hiatal hernia. There is also belching and gas discomfort associated with reflux. This physician confirmed that in approximately 1972 he operated on claimant for a hiatal hernia problem. Dr. Roger's records reveal that between 1976 and January 1980 he had treated Mrs. Hudson for tenderness in the abdomen, bronchitis, dumping syndrome, dizziness, chest pain, shoulder pain and headaches.

Dr. Rogers confirmed that he examined Mrs. Hudson on January 16, 1980. He indicated her complaints began while she was at work and included vomiting, belching and numbness in her mouth. Medication was prescribed and administered. Mrs. Hudson was examined on a second occasion on January 18, 1980 with similar complaints. Medication was prescribed and claimant was instructed to return to work. Claimant's complaints continued so Dr. Rogers hospitalized her on January 22, 1980 for diagnostic studies. She was discharged on January 31st, at which time a diagnosis of abdominal pains secondary to recurrent hiatal hernia with reflux esophagitis was made. Conservative treatment including the drugs Tagamet, Gaviscon and Levsin with Phenobarbitol, was prescribed. Claimant was rehospitalized on February 12th for surgical repair of the hiatal hernia. Surgery was performed by Dr. Rogers and is described in detail in his testimony.

Dr. Rogers then testified:

Q. Can you tell me after the first surgical repair, doctor, knowing what you know of Mrs. Hudson's history, why she would have had a re current hernial problem?

A. Well, I can't give you exact statistics, but I would say following this type repair that there's 5 maybe 10 prcent possible recurrent of it over a period of time. They do rehappen; they do recur.

Q. Are those recurrences related in anyway to the type of activity that the person has performed?

A. Not necessarily.

Q. Could they be?

A. Sure it could be.

Q. Now, is there any medical significance to the fact that Mrs. Hudson was not complaining of these problems prior to working that particular day of January 16, but after that day -- after that day at work she began to have problems and has continued to have problems.

A. Well, you'd have to certainly associate the two things together with the onset; the time sequence of when it came on. Whether it's coincidental or whether it aggravated a previous condition, or not, I would have no statistics or no evidence that I can support that, but it is possible.

He further indicated:

Q. ....

Now, can you tell me what types of -- what might cause some of the sutures to -- I guess you wouldn't call it loosen -- pull away or -- I don't know what a good description would be.

A. Well, they do just that. The repeated swallowing, et cetera, going through this opening does disrupt some of the sutures there. The tightness that you have there improves over time. Initially following that surgery they're going to have a difficulty swallowing food, especially solid foods; and they usually -- in the early days following surgery that's due to the edema and the swelling that's around the repair, and as that resolves then food can again go through there like it's supposed to. So when they get recurrences these sutures do, we call it disrupt. They let loose. They stay tied. They don't untie, they just pull through the tissue because we're sewing muscle to muscle, and we don't have all that great solid things like suturing a fascia, or something like that.

Q. My question, doctor, then, after your description would -- would physical activities make it more plausible that these sutures would be pulled away from their original source?

A. Well, you know, when people lift or pull or strain or do anything they hold their breath, and they fix their diaphragm and make it solid; and then they lift against that. That does put some stress on that suture line area. How much I don't think has ever been documented, but it does put some kind of pull on that that's more than usual.

Q. Now, the day of January 16 -- Mrs. Hudson described for Mr. Shepler and myself the duties that she was performing at work, and she described

her duties as those of a lifting nature. She was lifting some cartons of boxes from a small stand on the floor, approximately nine to twelve inches off the floor, up to a waist high table and that she had been performing those duties for about four hours when she took a brake [sic]. And after coming back from the brake [sic] she began to perform those duties again. When she reached down to remove the basket and lift something, in the act of lifting she felt something sharp in her chest, and she believed that she had pulled a muscle. From that point on in time of day she became more sickened and eventually felt hot and nauseated and tried to vomit but could not regurgitate anything until the point where she actually went to the hospital with the pains and problems in her chest. I would ask whether or not you have a medical opinion, based upon reasonable medical certainty, whether or not this type of activity could have caused the sutures to become loose and to pull away from their original position and cause the re-current hiatal hernia in Mrs. Hudson?

A. Well, you're asking me a question that would be very hypothetically possible. You have no proof whatsoever to prove that that occurred. As I say, in surgery you don't actually see the previous sutures you just see one side of the resuture area that you're going to suture. But it may well be at that particular point -- and it seems a little bit more logical to me -- that in that lifting rather than a disruption -- the disruption had already recurred, and at that time, then, she pushed a little of her stomach through that new opening, through that hole, producing that pain, okay?

Q. Okay. That helps me understand the process a little bit better.

If I can clarify in my mind in terms of what probably happened, then, from your opinion the hernia had already recurred but in the process of lifting and putting pressure on the diaphragm some of the stomach would have pushed up and through the actual hiatal opening -- I guess that's redundant --

A. Yes.

Q. -- that you opened?

A. Yes; that's exactly what I was inferring.

Post-surgery claimant remained in pain and received no marked relief from the surgery. Claimant continues under Dr. Roger's care.

Dr. Rogers further testified:

Q. Now, doctor, you indicated that it was your, I guess that on January 16th when Mrs. Hudson was working doing this lifting exercise she already had the hernial hole and that as a result of the activity some of the stomach was, due to pressure on the diaphragm, pushed up through the hole?

A. That's correct.

Q. Which caused her to seek the medical attention?

A. That's correct.

Q. I guess that would -- would that be described as aggravation, actually, of the hernial condition?

A. Yes.

Q. Can you tell us, doctor, now -- and this might be an impossible or tremendously difficult question to answer -- what would be actually causing the chest pains and the reflux problem that she describes?

A. There is no way that you can repair these and get a perfect sphincter control -- valvular control; and I assume the valvular mechanism in the previous repair, the previous hernia repair, and then another repair that this valve was not working like it should and that this is what's causing her symptoms.

On cross-examination, Dr. Rogers testified that he treated claimant for an antral ulcer in 1977. This ulcer appeared in the lower portion of claimant's stomach near the small intestine. No cause for this ulcer was ever determined. X-ray examinations conducted in conjunction with this 1977 ulcer problem noted the presence of a hiatal hernia.

Dr. Rogers further reveals:

Q. Is a hiatus hernia the kind of condition that can, in fact, be seen or detected on X rays if you give the patient some type of barium, or something?

A. Well, yes, that's how you demonstrate it. If they're large enough, you can see them without it.

Q. If a hiatus hernia were present and detectable by X ray, as suggested by Dr. Holl's report, would that mean to laymen such as myself and the Industrial Commissioner that a portion of the stomach, at least on the X ray, appeared to be protruding through the diaphragm?

A. Well, that's what that indicates. That's what that says, but it does not say how he demonstrated it, that's my point.

Q. In other words, we're talking about the same thing?

A. Yes.

Q. This is, in fact, the hernia he's talking about? He's describing an eruption or a protrusion of a portion of the stomach through the diaphragm, is that correct?

A. That's correct.

Q. Now, you've told us you could not tell from his report whether he had produced this under pressure. What does that mean?

A. Well, they put their fingers right underneath here where the hiatus hernia is and make increased pressure on the abdomen, which, then, if something's got a place to go it will go up or out through that abnormal opening.

Q. In other words, if the stomach lining were not protruding through the diaphragm, the pressure might make it go through the opening, is that correct?

A. That's correct.

Q. Is the other possibility that the hernia would be through the diaphragm and be detected by X ray without the pressure being applied? Is that basically the two situations that we'd be considering?

A. Well, what you're saying is true. Most small hiatus hernias are shown with pressure -- most of them. Not every one of them, but most of them are.

Q. What does the descriptive term "sliding" hiatus hernia add to the basic description of hiatus hernia?

A. It really doesn't add anything but the description that this thing will slide in and out of that opening.

Q. So if a person has the abnormal opening, I gather the herniation of the stomach material can basically move back and forth between the opening in the diaphragm?

A. The larger openings, yes.

Q. From the inclusion of the term "sliding" when he describes the hernia -- in Dr. Holl's report -- would that at least raise the inference that he may have been able to move the hernia back and forth?

A. That's essentially what he would be describing. You'd have to, certainly, get that information from him; but I think that would be what he would be describing. That's what, at least --

....

Q. Now, moving back just slightly further in time, doctor, you indicated to Mr. Pillers that the first time this lady had her hernia repair you also did a vagotomy. What is that?

A. Cutting the vagus nerves.

Q. And that you did a pyloroplasty. What is that?

A. That's enlarging the outlet of the stomach. If you do a vagotomy without giving an increased outlet to the stomach, they have all kinds of troubles.

Q. Those are basically done at the same time that you do the hernia repair, is that correct?

A. If their acids are high.

....

Q. So at least by the point in time of 1980 Mrs. Hudson would have had a hernia repair and the associated surgery you mentioned; a removal of her gallbladder; a problem with her colon; and then, possibly, that antral ulcer that we've visited about, is that correct?

A. As I recall what I've reviewed here in speaking with you and speaking with Mr. Pillers, yes.

Dr. Rogers' testimony reveals that in 1976 claimant had complaints of chest wall tightness or a sensation of being squeezed. She also had complaints of vomiting and diarrhea.

He notes further:

Q. As you think back to 19-- late '76 and early 1977, would it appear from your notes that Mrs. Hudson had a recurring complaint or problem with chest wall pain and stomach imbalance?

A. Yes. She had dumping syndrome, as I told you was --

Q. All right.

A. -- following that vagotomy/pyloroplasty.

Q. Is dumping syndrome something, doctor, that would last as late as we're talking about here; that is, 1977?

A. Unfortunately, yes.

Q. Is it the kind of condition that can improve, then recur and then improve, then recur?

A. Yes.

In January 1978 the claimant was treated for chest pain. Dr. Rogers indicated that a hiatal hernia can cause chest pain which may radiate to the back.

Q. All right. Doctor, in the various notes that I've asked you to look at just now we see the terms appearing of stomach pain or nausea and vomiting or chest pain that is radiating into the back. Based on your knowledge of the mechanisms of a hiatus hernia, could those complaints of chest pain, vomiting and nausea be causally related to an active hiatus hernia?

A. They could be, yes; but, again, most of my notes are that I felt that this is chest wall pain. Only one that I tried -- that was on the 26th when I gave her Levsin with Phenobarbital, which was to treat peptic stomach.

Q. In other words, if the stomach lining were not protruding through the diaphragm, the pressure might make it go through the opening, is that correct?

....

Q. All right. You told Mr. Pillers on direct examination that at the present time Mrs. Hudson has two types of pain; chest wall pain and stomach-related pain, is that correct?

A. Yes.

Q. Do you feel at the present time that her chest wall pain is related to her hiatus hernia?

A. (No response.)

Q. Or can you tell?

A. Well, let's see, now. Again, I stated she has two types of pain; one is chest wall pain, one is pain induced from the symptoms from her hiatus hernia. The only objective evidence, meaning what can I see, what can I feel to differentiate that is tenderness of the chest wall itself or the muscles, et cetera, if that's tender to palpation, et cetera. Ordinarily -- most of the time; it's not 100 percent. Most of the time that's produced in the chest wall. If it's nontender and somebody has a hiatus hernia, then it's the hiatus hernia that's causing it.

....

Q. So from that standpoint, doctor, if Mrs. Hudson has chest wall pain at the present time is it your opinion that that is unrelated to her hiatus hernia?

A. Well, at times it is, yes; but when she has this chest wall pain and she comes in all bloated and gas, et cetera, then that's usually from the hiatus hernia.

....

Q. My basic concern, doctor, is I've seen this term "chest pain" -- "chest wall pain" numerous instances in the pre-January 1980 notes. Isn't there at least the very real medical possibility that this lady had an active hiatus hernia prior to January 16th, 1980?

A. You're asking if that's possible? Yes, it is.

Q. Well, the reason I ask if it's possible that it was work related. Is it not at least a reasonable possibility that this hiatus hernia that you treated her for in January of 1980 may have developed from some cause other than lifting?

A. I don't think so, because as I read back through my notes here and study that time period that you've given me, I wrote chest wall pain. That means it arose in the chest wall. Had I suspected a hiatus hernia I would have said hiatus hernia reflux, dumping syndrome or something similar.

Q. Okay. I appreciate that clarification for your earlier notes. My question was, can you say with a reasonable degree of medical probability that Mrs. Hudson's hiatus hernia in January of 1980 was caused by an accident at work lifting?

A. Well, I never did say that. I never did say --

Q. Or that -- all right.

A. I said an aggravation of a possible preexisting condition. That hiatus hernia may have been there. The lifting forced it up into a small opening and caused the pain.

Q. All right. And we know in Dr. Holl's note there's at least a very strong medical indication that a hiatus hernia was there as early as 1977, correct?

A. That's correct.

Q. Now, aside from lifting what are the other possible sources that would cause the hiatus hernia to pass through the diaphragm?

A. It can do it on its own.

Q. In other words, a spontaneous type --

A. Yes; vomiting, anything -- wretching.

Q. Did Mrs. Hudson describe to you, doctor, on your first visit with her on January 16th, that she had lifted something at work, or did she simply describe to you the symptomatology that was the indigestion?

A. Let me get that again. I don't want to say it just from what I remember here, but as I remember she said -- yes; she said it was all after lifting. Do you want me to read it to you?

Q. If I could just look at it, doctor. I don't have that document among the files that I have.

A. It's loose. Now, I'm just going to turn it and help you so we don't separate -- well, maybe I did lock that in. Yes, I did lock that in. Okay.

Q. Okay. For the record, can you indicate to the Industrial Commissioner what your history obtained at the hospital indicated?

A. She developed pressure in the sternal region of the chest approximately 5:30 p.m., at work accompanied by vomiting, frequent belching, numbness, tingling around the mouth and face; skin was warm and dry when she came.

Q. Did Mrs. Hudson, to your recollection or from that history, describe any specific lifting Accident?

A. She didn't describe it, no.

Q. But she did indicate that she got sick at work, is that correct?

A. That's what this says.

....

Q. In indicating that lifting could aggravate a hernia, is it also possible that a hernia of this nature could become symptomatic for reasons other than lifting?

A. Yes, that's possible.

Q. You told me a moment ago they can sometimes rupture, if that's a proper term, spontaneously. What are other possible causes for the actual development of the symptoms if you have a preexisting hiatal hernia?

A. The valvular mechanism quits working properly.

Q. All right. It was in that context that I was trying to use the word "rupture". My question is simply this: You've told me that a hernia can occur from lifting; it can occur spontaneously. Are there any other medically recognized causes for the actual development of the hernia?

A. Certainly. You're born with a potential weakness, that's what most of them are.

On redirect examination he indicated:

Q. Just very briefly, doctor, have any of the questions or review of your medical notes during Mr. Shepler's questioning changed your opinion that it is significant that Mrs. Hudson did not have the symptoms prior to her heavy lifting -- or her lifting at work on January 16, 1980, but that the onset of the symptoms came directly after that feeling of the chest being tight and she thought she pulled a muscle?

A. I think the two are associated, the same as I stated initially.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of evidence that she received an injury on January 16, 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 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 Iow 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 ar 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, discusse the definition of personal injury in workers' compensation case 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 e evidence that the injury of January 16, 1980 is causally lated to the disability on which she now bases her claim. dish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). ndahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A ssibility is insufficient; a probability is necessary. Burt v. hn Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 955). The question of causal connection is essentially within e domain of expert testimony. Bradshaw v. Iowa Methodist spital, 251 Iowa 375, 101 N.W.2d 167 (1960).

However, expert medical evidence must be considered with all her evidence introduced bearing on the causal connection. rt, 247 Iowa 691, 73 N.W.2d 732. The opinion of experts need t be couched in definite, positive or unequivocal language. ndag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). However, e expert opinion may be accepted or rejected, in whole or in rt, by the trier of fact. Id. at 907. Further, the weight to given to such an opinion is for the finder of fact, and that y be affected by the completeness of the premise given the pert and other surrounding circumstances. Bodish, 257 Iowa 6, 133 N.W.2d 867. See also Musselman, 261 Iowa 352, 154 N.W.2d 8.

Our supreme court has stated many times that a claimant may cover for a work connected aggravation of a preexisting ndition. Almquist, 218 Iowa 724, 254 N.W. 35 at 731-32. See so Auxier v. Woodward State Hosp. Sch., 266 N.W.2d 139 (Iowa 78); Gosek v. Garmer and Stiles Co., 158 N.W.2d 731 (Iowa 68); Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); son v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 963); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 9 (1961); Ziegler v. United States Gypsum Co., 252 Iowa 613, 5 N.W.2d 591 (1960).

The Iowa Supreme Court cites, apparently with approval, the J.S. statement that the aggravation should be material if it to be compensable. Yeager, 253 Iowa 369, 112 N.W.2d 299; 100 C.J.S. kmen's Compensation §555(17)a.

An employer takes an employee subject to any active or mant health impairments, and a work connected injury which e than slightly aggravates the condition is considered to be ersonal injury. Ziegler, 252 Iowa 613, 620, 106 N.W.2d 591, l cases cited.

An employee is not entitled to recover for the results of a existing injury or disease but can recover for an aggravation reof which resulted in the disability found to exist. Olson, Iowa 1112, 125 N.W.2d 251 (1963); Yeager, 253 Iowa 369, 112 N.W.2d ; Ziegler, 252 Iowa 613, 106 N.W.2d 591 (1960). See also z, 257 Iowa 508, 133 N.W.2d 704; Almquist, 218 Iowa 724, 254 N.W.

A claimant is not entitled to recover for the results of a existing injury or disease, but only for an aggravation reof which resulted in the disability found to exist. Olson, Iowa 1112, 125 N.W.2d 251. In Ziegler, 252 Iowa 613, 620, N.W.2d 591, The Iowa Supreme Court said:

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

Claimant need not prove that an employment accident be the e and proximate cause of the injury, but only that the injury directly traceable to an employment incident or activity. gford v. Keller Excavating and Grating, Inc., 191 N.W.2d 667 wa 1971).

In Becker v. D & E Distributing Co., 247 N.W.2d 727, the reme court noted:

An expert may express his opinion either as to the "possibility, probability, or actuality" of causation. Winter v. Honeggers' & Co., 215, N.W.2d 316, 321 (Iowa 1974).

Evidence indicating a probability or likelihood of the causal connection is necessary to generate a jury issue. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 379-380, 101 N.W.2d 167, 170 (1960).

However, this "probability" may be inferred by combining an expert's "possibility" testimony with nonexempt testimony that the described condition of which complaint is made did not exist before occurrence of those facts alleged to the cause thereof. (Citing authority.)

The Iowa Court in Gosek v. Garmer and Stiles Company, 158 N.W.2d 731, 737, pointed out:

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

Section 85.23 of the Code 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.

ANALYSIS

It is undisputed that on the date of injury, January 16, 1980, the claimant was an employee of the respondent International Paper Company.

The issue of notice under section 85.23 must be addressed next. In the 1980 case of Robinson v. Department of Transportation, 296 N.W.2d 809, the Iowa Supreme Court outlined the applicable test to be applied in notice question cases. They noted:

[T]he same statement of the discovery rule appears in in 3 A. Larson, supra, §78.41 at 15-65 to 15-66: "The time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease." This statement accurately delineates when the employee's duty to give notice arises. The reasonableness of the claimant's conduct is to be judged in the light of his own education and intelligence. He must know enough about the injury or disease to realize it is both serious and work-connected, but positive medical information is unnecessary if he has information from any source which puts him on notice of its probable compensability. (Citing authority.)

It becomes more difficult to judge the reasonableness of claimant's conduct with respect to notice, when the undersigned has never seen the claimant. All of her testimony was submitted by deposition. However, based on the record as a whole it is the opinion of the undersigned that claimant gave the employer timely notice in that she filed an original notice and petition within 90 days of when she recognized the seriousness and probable compensable nature of her problem.

As will be noted later, the discomfort noted on January 16, 1980 was just another in a continuing saga of distressful situations. It was not until some substantial period of time, when claimant contacted legal counsel and assistance provided her, that the time period for notice began to run.

From an analytical standpoint, the evidence supports a determination that on January 16, 1980 Mrs. Hudson was in the course of her employment. That is, she was at a location required by her employment and by her actions furthering the business purpose of International Paper.

The cutting issue is that of medical causation. The undersigned is of the opinion that the testimony of Dr. Rogers goes no farther than to demonstrate the possibility of a relationship between claimant's work and an aggravation of her hiatal hernia. It is noted that as Dr. Roger's deposition progressed, claimant's counsel may have slightly rephrased the phsyician's testimony.

This is not a situation contemplated in Becker v. D & E Distribution Co., because in this case it is clear that Mrs. Hudson had been operated on for a hiatal hernia prior to this incident. Additionally, the hernia was re-diagnosed in 1977. The record is also clear that she suffered from the numerous side effects of the hernia for an extended period of time pre January 1980.

In an aggravation case the law also requires that the aggravation be more than slight. The physician did not address the issue of the severity of the aggravation. The facts, as contained in the evidence, leads the undersigned to believe the aggravation, as such, was not more than slight.

FINDINGS OF FACT

That on January 16, 1980 the claimant was an employee of the defendant.

That claimant is 41 years old.

That in the late 1960's claimant's gall bladder was removed.

That in 1971 claimant was operated on and a hiatal hernia was repaired.

That during this 1971 procedure a vagotomy and pyloroplasty were performed.

That post 1971 claimant suffered from dumping syndrome.

That during the period 1973 to 1980 the claimant had several incidents of stomach and chest problems.

That in the mid 1970's claimant was diagnosed as having an irritable colon and an ulcer.

That in 1977 the hiatal hernia was again diagnosied and was on x-ray to be the moving variety.

That claimant had numerous bouts of nausea, stomach distress and vomiting at work and requested and received permission to go home.

That claimant underwent a second hiatal hernia repair in February 1980.

That claimant has only worked one day since January 16, 1980.

That claimant gave timely notice of her claim under section 85.23 by filing an original notice and petition.

That Dr. Rogers is of the opinion that the possibility of a relationship exists between the work incident and the aggravation of claimant's hernia.

That the actual work activity claimant alleges aggravated her condition was not substantial in nature.

CONCLUSIONS OF LAW

Claimant failed to sustain her burden of proof and has not established a causal relationship between her injury and the resulting disability.

ORDER

THEREFORE, IT IS ORDERED:

That the claimant shall take nothing further from these proceedings.

That the costs of this action are taxed to the defendant pursuant to Industrial Commissioner's Rule 500-4.33.

Signed and filed this 24th day of August, 1983.

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROCKFORD A. HURST,
Claimant,
vs.
JOHN DEERE DES MOINES WORKS,
Employer,
Self-Insured,
Defendant.

File No. 686145

A P P E A L

D E C I S I O N

Claimant appeals from a decision on 85.27 benefits in which he was denied recovery of benefits for treatment held to be unauthorized. The case was submitted on stipulated facts. On appeal both parties have filed briefs in support of their positions.

ISSUE

Claimant-appellant states the sole issue to be whether the claimant-appellant is entitled to payment of medical benefits under section 85.27, Code of Iowa, even though the benefits were unauthorized by the employer but were necessary and the amount charged was reasonable.

REVIEW OF EVIDENCE

The evidence was stipulated in an agreed statement of the case thusly:

> Claimant was employed by Respondent on October 27, 1981. On that day, claimant was injured when the thumb on his right hand was caught between a ram on a drop hammer and the ram's safety block. The thumb was traumatically amputated at the level of the middle first phalanx. Dr. Ala Daghestani of Des Moines determined that the thumb could not be reattached due to the "tremendous distortion" of the anatomical structure of the thumb. The stump was debrided and repaired. The emergency treatment was performed at Northwest Community Hospital in Des Moines where claimant remained overnight. He was discharged on October 28.
>
> Dr. Daghestani saw the claimant in his office on October 29, October 30, November 2, November 6, November 13, and November 30, 1981, and determined that the wound showed good progress and was healing nicely. Dr. Daghestani's records reflect that the claimant complained of pain in the stump on the November 6, 13 and 30 visits. On December 14, 1981, claimant saw Dr. Daghestani and was advised to resume his job. Claimant did not see any physician between December 14, 1981 and May 3, 1982.
>
> The pain did not subside, and the claimant consulted with Dr. Daniel J. Callan of Perry on May 3, 1982. Dr. Callan referred claimant to Dr. J. D. Bell of Des Moines, and Dr. Bell examined the claimant for the first time on May 11, 1982. Dr. Bell diagnosed the source of the pain as a "neuroma encased in scar tissue overlying the distal stump of the right thumb." According to Dr. Callan, there remained approximately 1.5 centimeters of the proximal phalanx remaining after the traumatic amputation. He was admitted into Des Moines General Hospital on May 20, 1982, and on May 21, Dr. Bell revised and completed the amputation. According to the hospital records, Dr. Bell discussed with the claimant the possibility of transposition of the neuroma and rebuilding of the thumb, but the claimant decided to proceed with the amputation.
>
> Dr. Bell noted during surgery a scar over the dorsal distal stump of the right thumb and curvilinear incision was carried out over the previous scar site. The previous suture was cut out of the area of the scar. Dr. Bell further noted that the scar was overlying the remnant of the bone and the bone "was very superficial." The remaining portion of the proximal phalanx was completed and the scar tissue removed. The flap tissue was repositioned so that the scar lay "more dorsally and proximal." The doctor noted a "good padding" at the end of the procedure.
>
> The claimant was discharged on May 22, the day following surgery. The pain in the stump has diminished, and claimant is no longer suffering from the pain which had existed prior to the surgery.
>
> The employer admitted that the injury arose out of and in the course of employment, and paid healing period and partial disability benefits as well as medical expenses incurred as a result of Dr. Daghestani's treatment of the claimant. Employer had, however, refused to pay for any of the expenses incurred as the result of the treatment of Dr. Callan or Dr. Bell, or arising out of the hospitalization and surgery performed by Dr. Bell. The expenses thus incurred are in the following amounts:
>
> | | |
> |---|---|
> | Des Moines General Hospital | $1,420.71 |
> | Dr. Daniel Callan | 180.67 |
> | Dr. J. D. Bell | 405.00 |
>
> The claimant did not obtain authorization from the employer for incurrence of the disputed medical expenses. Medical treatment was necessary to alleviate the pain, and the treatment rendered by Dr. Callan and by Dr. Bell, and the surgery performed to complete the amputation, were appropriate treatment and did alleviate the pain, and the expenses incurred were reasonable in amount.
>
> The employer authorized the claimant to receive medical care from Dr. Daghestani, and he did obtain care from Dr. Daghestani at the employer's expense through December 14, 1981. The employer did not and has not withdrawn authorization for claimant to obtain care from Dr. Daghestani. The employer did not authorize the claimant to receive care from Dr. Bell or Dr. Callan, and the claimant did not request that he be authorized to receive care from Dr. Callan or Dr. Bell. The claimant did not communicate any dissatisfaction with Dr. Daghestani to the employer either orally or in writing, and the employer did not know claimant was dissatisfied with Dr. Daghestani's care. The employer did not agree to alternate care and was not requested to agree to alternate care. The care provided by Dr. Bell and Dr. Callan was not in an emergency, and the employer could have been reached by the claimant to request approval before such care was rendered.
>
> The claimant did not communicate his dissatisfaction to Dr. Daghestani. Dr. Daghestani did not refer claimant to Drs. Bell or Callan or any other doctor, nor did claimant request that Dr. Daghestani make such a referral. Drs. Bell and Dr. Callan did not consult with Dr. Daghestani.
>
> The claimant did not make application to the Industrial Commissioner to allow or order alternate care, nor did the Industrial Commissioner allow or order alternate care.

APPLICABLE LAW

Iowa Code section 85.27 provides in pertinent part:

> For the 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.

Under section 85.27 the employer can choose the medical care as long as it is reasonable. The choice does not become unreasonable simply because the employee disagrees with it. An employee who is not satisfied with the type of care being provided by an employer may apply to the industrial commissioner for an order directing alternative care. Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983).

ANALYSIS

The facts are not in dispute. The claimant sought treatment of a nonemergency nature on his own without communicating any dissatisfaction with the employer provided physician.

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 statute obligates the employer to furnish medical care. Clearly, in the absence of one of the circumstances suggested by the statute the employer must be given the opportunity to provide that care. If claimant were dissatisfied with the treatment offered by defendant, there is provision for intervention by this agency to resolve a controversy which results. The employer will not be held accountable for the expenses incurred by claimant at Des Moines General Hospital nor for the bills of Dr. Callan or Dr. Bell. This was not an emergency.

The claimant raises the constitutionality of Iowa Code section 85.27. This agency must assume that the statutes which it enforces are constitutional. No constitutional issue will be addressed in this decision.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant suffered an injury arising out of and in the course of his employment on October 27, 1981.

That as a result of claimant's injury of October 27, 1981 claimant was paid healing period, permanent partial disability and medical expenses.

That claimant was treated for his injury by Dr. Daghestani.

That claimant was released to work on December 14, 1981.

That on May 3, 1982 claimant consulted with Dr. Callan who referred him to Dr. Bell who performed surgery.

That as a result of claimant's seeing Dr. Callan and Dr. Bell and having surgery he has incurred medical expenses.

That claimant did not seek authorization from defendant to see either Dr. Callan or Dr. Bell.

That claimant did not communicate dissatisfaction with Dr. Daghestani to defendant.

That no emergency existed at the time claimant sought treatment from Dr. Callan and Dr. Bell.

CONCLUSION OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant is not entitled under Iowa Code section 85.27 to reimbursement for expenses incurred in the care provided by Mrs. Callan and Bell and Des Moines General Hospital.

ORDER

THEREFORE, IT IS ORDERED:

That the decision of the deputy is affirmed.

That claimant take nothing from this proceeding.

That each party pay any costs incurred in the original proceeding. That claimant appellant pay any costs of this appeal.

Signed and filed this 30th day of September, 1983.

Appealed to District Court;
Affirmed

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT R. JAENNETTE,	:	
Claimant,	:	File No. 710934
vs.	:	R E V I E W -
VAN WYK & SONS, INC.,	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
FIREMAN'S FUND INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Robert R. Jaennette, the claimant, against his employer, Van Wyk & Sons, Inc., to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on January 7, 1981.

This case was submitted to the undersigned on a joint stipulation and briefs of counsel. The case was considered fully submitted on August 25, 1983.

An examination of the industrial commissioner's file indicates that a first report of injury was filed August 20, 1982. A memorandum of agreement and form 2A were filed August 20, 1982. The record in this case, in addition to briefs and arguments of counsel and attached documentation, consists of the following joint stipulation of facts entered into by counsel for the parties:

1. That Claimant, Robert Jeannette, sustained an injury on January 7, 1981, which arose out of and in the course of his employment with Defendant, Van Wyk & Sons, Inc.

2. That in connection with that injury of January 7, 1981, the claimant was authorized by the Defendants herein to see Dr. Kenneth Van Wyk, a chiropractor, whose office is located at 911 Washington, Pella, Iowa 50219.

3. That the Claimant was seen by Dr. Van Wyk on the following dates: February 11, 12, 14, 16, 17, 18, 19, 20, 23, and 25; March 2, 5, 7, 9, 11, and 13 of 1981.

4. That the total charges for the services rendered by Dr. Van Wyk were $662.00 of which $337.00 have already been paid by the Defendants herein.

5. That Dr. Van Wyk's diagnosis was "acute, severe hyperflexion-hyperextension injury to the cervical spine with deep superficial muscle spasm, myofascitis and radiculitis radiating the tragectory of the brachial plexus bilaterally with occipital neuralgia, acute thoracic sprain/strain with myfascitis and radiculitis.

6. That Claimant was discharged on March 13, 1981, with a full release to return to work.

ISSUE

The sole issue to be resolved is the appropriateness of Dr. Van Wyk's charge of $662.00 under the terms of section 85.27 of the Code.

EVIDENCE AND ARGUMENTS OF COUNSEL

Based upon the allegations in defense counsel's brief, the aforementioned bill of Dr. Van Wyk was submitted initially to Professional Evaluation Services, P.C. A copy of their report is attached to defense counsel's brief. That report notes in part:

> It was reasonable for the chiropractor to examine and treat this case. The filming done of the full spine cannot be substantiated as usual and customary relative to the treatment of a neck injury. Likewise the blood profile, vitamins, and lifts. The term of care and number of office visits are usual and customary.
>
> The doctor has the responsibility to send a readily readable itemized bill for services. Code sheets and numbers do not suffice.

This organization, then, has indicated that in their opinion the appropriate bill for services rendered should be $447.00.

Also attached to defense counsel's brief is a report from the Iowa Chiropractic Society, Peer Review Committee, which also had an opportunity to examine Dr. Van Wyk's bill. That organization questions the use of "orthopedic lifts" in the treatment of this case. The committee also raises a question of why this small item would be such a source of contention, as the cost related to these devices is minimal. It appears clear that the sacroiliac structural support was prescribed for a subsequent low back injury not related to the work injury in question. It is unclear as to whether the bills in question contain a charge for low back support or for professional services related to providing this device. In substance, the committee, in the final analysis, indicates that Dr. Van Wyk should be reimbursed for all services rendered in this case with the possible exception of the low back support.

APPLICABLE LAW

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 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.

ANALYSIS

Based upon the stipulation of the parties, $337.00 of the $662.00 bill has been paid, leaving an unpaid balance of $325.00. Counsel for the defense has indicated a willingness to pay the figure recited by the Professional Evaluation Services, P.C., which reduces down the total balance due Dr. Van Wyk to $225.00.

After reviewing the arguments of counsel, and after reviewing the reports in question, the undersigned is left with two distinct impressions, the first being that the claimant has, according to the stipulation of the parties, been discharged with a full release to return to work. From this it appears that claimant has received a good result via the intervention of Dr. Van Wyk.

The second impression is that the low back support and treatment related thereto appear not to be involved from a causation standpoint in this work-related injury. There was also some question in the undersigned's mind with respect to the prescription for orthopedic lifts. However, based upon the Iowa Chiropractic Society analysis of this situation and abstaining from a position of second guessing the treating physician, it is the opinion of the undersigned that those orthopedic devices and charges related thereto were fair and reasonable.

It is the opinion of the undersigned that the employer-insurance carrier shall not be responsible for payment of the low back support and treatment related thereto, but shall be responsible for payment of the balance of Dr. Van Wyk's bill. Counsel is directed to make specific inquiry of the physician as to the cost of the back support and the charges for treatment related thereto, and shall deduct same from the total of $662.00.

FINDINGS OF FACT

That Dr. Van Wyk is the authorized treating physician in this case.

That he has submitted a bill for $662.00 for services rendered to the claimant.

That the defense has paid $337.00 of that bill.

That the claimant was discharged on March 13, 1981 with a full release to return to work.

That the physician prescribed low back support and may have administered treatment related thereto, which in the opinion of the undersigned are not reasonably calculated to treat the injury in question.

That the balance of Dr. Van Wyk's treatments and the charges related thereto are fair and reasonable, and were reasonably calculated to treat the injury in question.

CONCLUSIONS OF LAW

That the claimant has sustained his burden of proof and has established that the charges of Dr. Van Wyk, except those for the low back support and treatment related to low back, are fair and reasonable and reasonably calculated to treat the work-related injury in question.

ORDER

THEREFORE, IT IS ORDERED that the defendants shall pay unto claimant the amount of Dr. Van Wyk's bill in the amount of six hundred sixty-two dollars ($662.00) less the low back support and such treatment as was required for that low back, post injury problem.

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

Defendants shall file a final report upon payment of this award.

Signed and filed this 9th day of September, 1983.

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ED JANSEN,	:	
Claimant,	:	File No. 719119
vs.	:	A R B I T R A T I O N
JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Ed Jansen, the claimant, against his employer, John Deere Dubuque Works, a self-insured employer, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained in August 1982.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Dubuque Building in Dubuque, Iowa on August 29, 1983. The record was considered fully submitted on that date.

An examination of the industrial commissioner's file indicates that a first report of injury was filed on December 14, 1982. There are no other official filings.

The record in this case consists of the testimony of the claimant, Mervin L. McClenahan, M.D.; Michael K. McGee; claimant's exhibits 1 through 3 inclusive; and defendant's exhibits 4 through 12 inclusive.

ISSUES

The issues to be resolved in this proceeding include whether claimant sustained an injury which both arose out of and in the course of his employment; the existence of a causal connection between the injury and the resulting disability; and the applicabili of section 85.B, The Code. There is no issue of healing period.

REVIEW OF THE EVIDENCE

This is a claim involving an alleged hearing loss as contemplate under section 85.B, The Code. At the time of hearing the parties stipulated that the applicable rate in the event of an award is $319.90. There is no claim for unpaid medical bills.

The claimant, Ed Jansen, testified that he is 38 years of age, married, and the father of two children. He is presently employed as a trucker. Claimant was laid off from John Deere in February 1982. This witness began his employment relationship with John Deere in December 1972.

From the record it appears that Mr. Jansen performed a variety of tasks for his employer. It appears, however, from the record that his primary function centered around running a mill. This mill would grind surfaces of metal into a finished state. It appears that there was a certain amount of noise generated from the mill. The claimant indicates that out of the work environment he did some commercial fishing and deer hunting but indicates that these were non-noisy undertakings. He also has some farm background where he ran machinery which he indicates produced no noise. Claimant concedes that he did some truck driving prior to working for the employer. The majority of his truck driving, however, was done after he was laid off.

Claimant admits that one time he was employed by Adams & Company as a grinding machine operator. He describes this work as "fairly noisy." He indicates, however, that the John Deere factory in which he was employed is a much noisier environment due to its size.

Claimant acknowledges that when he began his employment relationship with John Deere he was not aware that he had a hearing problem. The hearing deficiency has been acquired over a period of time. He has noticed a gradual loss or diminution in his hearing.

Once the difficulty was noted, claimant was examind by Dr. McClenahan, the company physician. He was subsequently examined by James E. Spoden, M.D., an otolaryngologist, at the request of Dr. McClenahan. It appears that in late 1981 certain hearing tests may have been conducted by Dr. McClenahan. The claimant confirms that he became involved with Dr. Spoden before the layoff.

Claimant indicates that Dr. Spoden advised him to wear ear plugs or ear protection. This advice was given in early 1982. John Deere complied with this request and provided the claimant with ear protection. Claimant concedes that on certain occasions prior to the actual date of injury in this case he would wear ear protection on particularly noisy jobs. Once Dr. Spoden had recommended that the claimant wear protection, he continued to do so until he was laid off. Claimant indicates that he has noticed no difference in his hearing since the layoff.

On cross-examination, it was established that the claimant is 38 years of age. Claimant indicated that he worked six years at Adams & Company. He reiterates that he ran an internal grinder at that facility grinding gear and machine parts. He confirms that he wore no protection at Adams & Company and did not notice any hearing deficiencies.

The claimant received three audiological examinations while in the employ of John Deere. One occurred in November 1972, the second in 1975 and the third in December 1981.

The claimant acknowledges that he has seen individuals taking noise level readings around the John Deere plant. He is not aware that his area was posted with a warning directing employees to wear ear protection.

The claimant reiterates that his hearing has deteriorated over a period of time. The problem appears worse on the right side.

Mervin L. McClenahan, M.D., testified on behalf of the defense. He is the medical director at the John Deere Dubuque Works plant. Dr. McClenahan is a 1960 graduate of the University of Iowa. He was involved in general practice for a period of ten years and has some experience as a psychiatrist. He is a board certified family practitioner. He began his employment relationship with John Deere in April 1980. He became medical director in April 1982.

This witness confirms that he is charged with the responsibility of overseeing the medical records at the employer's place of business. He brought with him the various audiometric readouts for examinations conducted of the claimant. Many of these tests were physically conducted by nurses trained in the use of audiometric equipment. These nurses are under the direction and control of this physician. This witness' first contact with the claimant was in December 1981. He indicates an audiogram was taken in December 1981, the results of which were brought to the attention of Dr. McClenahan. Based on these results, claimant was brought in for an interview and examination. The physician notes that the hearing on the right side had gotten worse between 1972 and 1981.

This physician indicates that the claimant did not give him indication of any extremely noisy area which might cause this loss. The physician was at loss to explain why there was a hearing loss on the right side. Dr. McClenahan concedes that he did not have the expertise or experience to delve further in this problem so he referred the claimant to Dr. Spoden. Dr. Spoden's initial report is marked claimant's exhibit 3. This report is dated December 10, 1981. On that date Dr. Spoden reports that claimant's hearing loss was moderate. He recommended that claimant be given sound protection and that follow-up audiograms must be performed. It appears from this record that Dr. Spoden's recommendations were followed. Audiograms were continued but ceased at the time of layoff. The last audiogram was given in March 1983.

This witness testified at length concerning the various audiograms and interpretations thereof. In summation, this physician is of the opinion that claimant has a 0% hearing loss. He disagrees with Dr. Spoden's finding of 1% hearing loss, which in actuality is a finding of 0.655%, which Dr. Spoden rounded to 1%.

On cross-examination, this witness concedes that he is not a board certified otolaryngologist. He also concedes that he does not have the training or expertise that Dr. Spoden has in this area.

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

Michael McGee, age 29, testified on behalf of the employer in this case. He is employed by the John Deere Dubuque Works as an industrial hygienist. He is a graduate of the University of Iowa and has a masters degree in occupational health and industrial hygiene. One of his functions at the plant is to evaluate occupational healthrisks, which includes measurement, noise, and various points in the factory.

This witness indicates that the noise survey is an ongoing activity at the John Deere Dubuque Works. Various mechanical devices are used to take readings in the plant. This witness indicates that the entire plant has been tested at various times for noise levels, all of which tests have been done under this witness' direction. Exhibit 4 is a listing of the various jobs that claimant performed and the days upon which the work was performed. This witness then put the information seen on exhibit 4 and examined the various noise readings for the job classification in question. Employer's exhibit 11 is a graphic reproduction of the noise level the claimant experienced in the location and during the time set out on employer's exhibit 4. There are three areas where the noise exposure was greater than 90 dBA and those exposures are illustrated on employer's exhibit 11. The time that claimant spent in that environment is also set out on the exhibit. The balance of the areas in which claimant worked were subject to a noise level of 90 dBA or less.

On cross-examination, this witness concedes that many of his readings are averages. He concedes that the measurements in question are valid for the times that the areas were tested.

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

James E. Spoden, M.D., reports in a letter dated June 21, 1983, marked claimant's exhibit 1, that in his opinion the claimant has a hearing loss of 0.655%. The physician then rounds this to a 1% figure.

APPLICABLE LAW

Section 85B.4(1) provides:

> "Occupational hearing loss" means a permanent sensorineural loss of hearing in one or both ears in excess of twenty-five decibels if measured from international standards organization or American national standards institute zero reference level, which arises out of and in the course of employment caused by prolonged exposure to excessive noise levels.

Section 85B.5 provides a definition of "excessive noise level."

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 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).

ANALYSIS

Under the terms of the aforementioned section 85B.4, an applicable case law, the claimant has the burden of establishing by a preponderance of the evidence a permanent sensorineural loss of hearing which arises out of and in the course of employment caused by prolonged exposure to excessive noise levels.

According to section 85B.5, the minimum exposure which is considered excessive noise level is 90 dBA over an eight hour period.

It appears from the testimony of the employer's witnesses that noise level exposure readings are taken on a continuous basis in the plant. Employer's exhibit 4 is a recapitulation of the jobs that claimant performed and the dates performed in the plant in question. Employer's exhibit 11 is a graphic illustration of the sound levels claimant was exposed to in the various jobs on employer's exhibit 4. The undersigned's review of exhibit 11 indicates that claimant was exposed to a noise level of greater than 90 dBA on the following occasions: 20 days during the period November 11, 1972 to January 14, 1973; two days from August 19, 1975 to August 21, 1975; and eight days from September 26, 1975 to October 5, 1975. There is one 21 day period from May 3, 1976 to June 1, 1976 where the claimant was exposed to precisely 90 dBA. According to employer's exhibit 11, at all other times when readings are available, which covers the majority of the periods the claimant was working, he was exposed to noise levels less than 90 dBA. The undersigned is aware of the fact that there are two periods of time totaling 61 days wherein there are no exposure readings available. This information has been taken into consideration in the final disposition of this case.

According to the testimony, the claimant was employed by the employer herein from December 11, 1972 until February 14, 1982 when he was laid off. According to the evidence, it is true that claimant, during a portion of those years of service, was exposed to "excessive noise levels" as defined under section 85B.5. However, section 85B.4 indicates that the exposure to excessive noise levels must be prolonged. Section 85B.4 also provides that a causal relationship must be established between the prolonged exposure and the occupational hearing loss.

After taking into consideration all of the evidence in this record, the undersigned is of the opinion that claimant has not demonstrated that during the period December 11, 1972 through February 14, 1982 he was exposed to "prolonged" exposure to excessive noise levels. It is also the undersigned's opinion that the claimant has not demonstrated through medical testimony that his present hearing deficiency is in any way causally related to "prolonged" exposure to excessive noise levels. As a consequence, no award will be made in this case.

FINDINGS OF FACT

That in August 1982 the claimant was an employee of John Deere Dubuque Works.

That the claimant had been employed by John Deere Dubuque Works for the period December 11, 1972 through February 14, 1982.

That during the period of employment the claimant was exposed to noise levels greater than or equal to 90 dBA on the following occasions: 20 days during December 11, 1972 through January 14, 1973; two days during August 19, 1975 through August 21, 1975; eight days during September 26, 1975 to October 5, 1975; and 21 days during May 3, 1976 to June 1, 1976.

That at all other times during claimant's employment he was exposed to noise levels less than 90 dBA.

That the claimant's exposure to excessive noise levels was not prolonged under the terms of section 85B.4.

CONCLUSIONS OF LAW

That claimant has failed to sustain his burden of proof and has not established a causal relationship between the exposure to excessive noise levels and his occupational hearing loss.

That claimant has failed his burden of proof and has not established that he was experiencing "prolonged" exposure to excessive noise level.

ORDER

THEREFORE, IT IS ORDERED that the claimant shall take nothing further from these proceedings.

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

Signed and filed this ____ day of October, 1983.

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CARL JOHNSON, Administrator, CARL JOHNSON, and AVIS I. JOHNSON, Claimant, vs. BROWN CONSTRUCTION COMPANY, and MELVIN BROWN, and GRINNELL MUTUAL REINSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 603725 A P P E A L D E C I S I O N

By order of the industrial commissioner filed December 15, 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 and claimant cross-appeals from a review-reopening decision.

The record consists of the transcript; claimant's exhibit 1; and defendants' exhibits A through J, inclusive, all of which evidence was considered in reaching this final agency decision.

The outcome of this appeal decision will be the same as that reached by the review-reopening decision.

ISSUES

The review-reopening decision found that the parents of the decedent, Dan Eugene Johnson, age 18, were partially dependent upon his earnings to the extent of 50 percent of the employee's income.

Defendants state the issue on appeal thus: "Whether the claimants have established a partial dependency upon the decedent Dan Johnson, in the amount of fifty percent (50%) of his earnings."

Claimants state the issues thus: "A. Question of Claimants' dependency on the decedent. B. Constitutionality of Worker's [sic] Compensation Statute."

STATEMENT OF THE CASE

The statement of the case in the review-reopening decision is adequate and under the circumstances is adopted herein.

APPLICABLE LAW

The applicable law recited in the review-reopening decision is adequate and is adopted herein. However, certain portions of the case of Murphy v. Franklin County, 259 Iowa 703, 145 N.W.2d 465 (1966) should be emphasized. That case involved the death of an unemancipated minor and set out the guideline for proving dependency of the parents of a minor. It holds that a showing of actual dependency does not require evidence that, without the employee's contributions, the parent would have lacked the necessaries of life. At p. 707, the court says "The test is whether his contributions were relied on by claimant to maintain claimant's accustomed mode of living." The court further states that contributions for decedent's own necessities may nevertheless show the parents' dependency in that the parents were relieved of those items of expense and that services by a decedent would also indicate a contribution.

ANALYSIS

First, claimants argue that the hearing deputy's findings of fact have the force of jury verdict; however, this appeal decision is de novo, and the entire record has been reviewed.

Basically, the record shows that the decedent provided for his own personal needs with the money he earned from the employer and that he provided some items for the family with the money earned from the employer. He also did household chores and at one time assisted his father in the installation of a bathroom in the family home. Finally, he assisted his father in the latter's part-time work as a water superintendent.

The hearing deputy rightly excluded the household chores as a part of the decedent's contributions to the family. Also, defendants argue that the decedent's helping of the father in the installation of a bathroom should be excluded from consideration because it goes beyond being "in accordance with the facts as of the date of the injury." Section 85.44, Code of Iowa. It is true, of course, that the construction of the bathroom took place about one year prior to the employee's death; nevertheless, it shows the nature of the continuing operation of the Johnson household.

Comparing this case to the Murphy case the main differences here are that the decedent was an emancipated minor and the Johnsons were better off than the Murphys. (1) The fact that decedent had turned 18 a few months prior to the injury which caused his death did not alter the status quo of the operation of the Johnson household. Indeed, that status quo was to have lasted until the fall of that year when decedent was to further his schooling. (2) Also, the fact that the Johnsons were less than needy does not lessen the fact that decedent contributed to their standard of living and that those contributions obviously had some impact.

Considering the entire record in the light of the Murphy case, it does appear that the Johnsons were somewhat dependent upon the deceased employee. His earnings were not great, but they were used to an extent to help his parents. Defendants do not complain of the holding that 50 percent of the decedent's income went toward that contribution, and the undersigned believes that figure to be correct.

Finally, with respect to the issue of constitutionality raised by claimants, this agency is not impowered to rule on such issue and, again, no such ruling will be made.

The findings of fact, conclusions of law and order in the review-reopening decision will be adopted herein, except that a change has been made in the order to pay interest.

FINDINGS OF FACT

That Carl and Avis Johnson are the parents of Dan Johnson, decedent.

That Dan Johnson was an employee of Brown Construction Company and that his death arose out of and in the course of his employment with them.

That Dan Johnson, during his life, provided through his own earnings many personal items which his parents, Carl and Avis Johnson, would otherwise have to provide him.

That Dan Johnson, during his life, provided certain services to Carl and Avis Johnson, either at home or in conjunction with Carl's employment as water superintendent for Coulter, Iowa, all of which would have necessitated the parents spending money to duplicate.

That Carl and Avis Johnson were partially dependent upon the decedent, Dan Johnson.

That Carl and Avis Johnson were partially dependent upon the decedent, Dan Johnson, to the extent of fifty percent (50%) of his earnings.

CONCLUSIONS OF LAW

The claimants have sustained their burden of proof and have established a partial dependency upon the decedent, Dan Johnson.

That claimants have sustained their burden of proof and have established their dependency upon their decedent son in the amount of fifty percent (50%) of his earnings.

THEREFORE, IT IS ORDERED that the employer-insurance carrier shall pay unto the claimants, jointly, the amount of twenty-six and 50/100 dollars ($26.50) per week during their lifetime.

That the employer-insurance carrier shall pay unto claimants one thousand dollars ($1,000.00) for burial expenses.

That the employer-insurance carrier shall pay unto claimants the sum of twenty-five dollars ($25.00) in medical expenses.

That the employer/insurance carrier is given credit for any benefits benefits previously paid.

That the costs of this action are taxed to the employer-insurance carrier pursuant to the Industrial Commissioner Rule 500-4.33.

That interest shall accrue from eleven (11) days after the injury on July 11, 1979 pursuant to section 85.30.

That the employer-insurance carrier shall file a final report upon payment of this award.

Signed and filed at Des Moines, Iowa this 30th day of April, 1984.

Appealed to District Court;
Reversed

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHELBY JOHNSON, JR.,	:	
Claimant,	:	
vs.	:	
DEPARTMENT OF PUBLIC DEFENSE,	:	File No. 541867
Employer,	:	A P P E A L
and	:	D E C I S I O N
STATE OF IOWA,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Defendants appeal from a proposed review-reopening decision wherein claimant was awarded permanent total disability benefits based upon the terms of section 85.34(3), The Code. The record on appeal consists of the transcript of the proceeding which contains the testimony of claimant, claimant's exhibits 1 through 25, and defendants' exhibit A.

ISSUES

Defendants state the issues as:

1. The deputy industrial commissioner erred in finding that claimant was totally and permanently disabled, where as here the record shows that the claimant could do some light sedentary work which would be compatible with the claimant's physical limitations, work experience and education.

2. The deputy industrial commissioner erred in disregarding material testimony of Doctor Boulden, who, in essence, testified that claimant should avoid any work involving being on his feet for long periods of time because of a deteriorating hip problem which was not work related.

REVIEW OF THE EVIDENCE

The parties stipulate that the applicable rate of compensation is $131.48 per week. (Transcript, page 3) The parties further agree that specific medical bills at issue are reasonable. (Tr., p. 3)

Claimant is married, has four children, and was 59 years old at the time of the hearing. (Tr., p. 7) He has a GED and approximately eight years of formal schooling. (Tr., pp. 16, 30) Claimant's previous work experience includes three years in the navy. He has worked in farming, truck driving and construction. Claimant also worked in line assembly and as a painter. (Tr., pp. 16-34) Claimant has been an attendant at Woodward State Hospital and a gardener for Iowa State University. (Tr., pp. 23-26) Most of claimant's work duties prior to his employment with defendant involved prolonged standing, climbing and lifting heavy weights. (Tr., pp. 26-35) In January of 1979 claimant began working at Camp Dodge for the Department of Public Defense. (Tr., pp. 7, 36) His duties as a Grade I painter involved painting with a spray gun, roller, and brushes. He also replaced glass, sanded, and hung wallpaper. (Claimant's Exhibit 25) Claimant climbed ladders, unloaded trucks, and carried five gallon paint cans. (Tr., pp. 37-38) On March 20, 1979 claimant missed a step coming down a ladder and twisted his back. (Tr., pp. 7-9) He continued working and finished out the work week. (Tr., pp. 8-9) The following week he sought medical treatment from Rodney Carlson, M.D., for numbness in his left leg and difficulty walking. (Tr., p. 9; Cl. Ex. 14) Dr. Carlson placed claimant in traction at Iowa Lutheran Hospital with a diagnosis of "acute lumbosacral pain with radiculitis into the left leg, possible herniated disc." (Cl. Ex. 14) Following discharge from the hospital in April, claimant continued to have pain symptoms, and on June 29, 1979 underwent a laminectomy at L4-5 left. (Cl. Ex. 1) William Boulden, M.D., orthopaedic surgeon, treated claimant during the post-surgery period. Dr. Boulden testified that claimant continued to experience lower back pain through the fall of 1979 and appeared to reach maximum recovery from his surgery in January of 1980. (Defendants' Ex. A, p. 6) At that time, Dr. Boulden determined a permanent partial disability of 10 percent of the back as a result of the lumbar laminectomy. (Cl. Ex. 8) In February claimant began developing increased low back pain and pain in his hips. He was treated with a low frequency TENS unit and steroid injection. In March of 1980 claimant was readmitted to the hospital for neuroprobe treatment. Following his discharge, he continued to use the TENS unit and showed improvement. (Cl. Ex. 1) Dr. Boulden restricted claimant from any bending, lifting or stooping activities in May of 1980 and noted in August:

> He does get some improvement with the TENS unit but he still has problems with bending, stooping or lifting and can sit for very limited periods of time. The pain is located over the right sacroiliac joint area, diffuse in nature. He has no left leg pain anymore. He has no left leg sciatica type symptoms and negative straight leg raising. The right straight leg raising causes some pain in the right SI joint area. There is no radiating pain.
>
> Impression: Chronic sacroiliac joint irritation. (Cl. Ex. 1)

Dr. Boulden continued to treat claimant on a three month follow-up basis. In May of 1981 claimant was still experiencing pain. The doctor noted: "Follow-up of laminectomy with right sacroiliac joint irritation and degenerative arthritis of the left hip. The patient now has retired. He has occasional spells of real severe back pain and just TENS unit and bed rest seems to relieve it in a matter of two to three days." (Cl. Ex. 1)

In August of 1982, claimant was evaluated by Martin Rosenfeld, D.O., orthopaedic surgeon.

> Because of the physical demands placed on the gentleman in the type of occupation he was doing prior to the trauma, I doubt he would be able to return to the same occupation, especially having to climb ladders and work above head level. He has restrictions on limited bending, stooping, squatting and a weight lifting limitation of approximately 15 pounds. It is my opinion he has sustained a permanent partial impairment to the body as a whole in the amount of twenty-five (25) percent as the result of the trauma. This impairment is markedly increased with consideration of the hip joint disease that was present prior to his trauma. I would feel a total impairment considering the hip in the range of 50 to 60 percent to the body as a whole. (Cl. Ex. 4)

In November 1982, Dr. Boulden determined a permanent partial impairment of 20 percent of the body as a whole based on the reptured disc and ensuing degenerative disc disease. (Cl. Ex. 2) Dr. Boulden did not view claimant as a likely candidate for surgical correction due to his age and the nature of the disc problem. (Def. Ex. A, pp. 9-11) He attributed the arthritic condition to the ruptured disc and subsequent surgery. Dr. Boulden noted the presence of a mild form of arthritis in claimant's left hip which he predicted would worsen in the future and would be subject to aggravation by prolonged standing or climbing. Dr. Boulden did not believe the hip condition was related to claimant's present problem. (Def. Ex. A, pp. 8-9) With regard to claimant's physical activity, Dr. Boulden recommended restrictions from repetitive bending and lifting, with no prolonged standing or sitting.

> He could sit for a while, he could stand for a while; but he'd have to be in a position where he could change his back position at will.
>
> Q. What about climbing ladders with his back; would you recommend against that on a regular basis?
>
> A. Yes.
>
> Q. Assuming, Doctor, that Shelby's profession prior to his back injury was a painter where he would have to use a spray gun at times and have to climb up and down ladders, would you recommend that he find some other type of work, given his back injury?
>
> A. Yes, I would.
> (Def. Ex. A., pp. 15-16)

Claimant's medical history includes two injuries to fingers and a hernia. In 1944 while claimant was in the navy, he fell down two flights of steps and later received chiropractic treatment. (Tr., pp. 13-15) Claimant stated he had not seen a chiropractor for seven or eight years prior to his March 20, 1979 injury. (Tr., p. 14) Claimant testified he has not worked since the date of injury. The state has not offered him a new position and he has not sought other employment. (Tr., pp. 39-40) He has pain in his back and legs and takes Synalgos, Ascriptin and Dolophine on a daily basis. He wears a TENS unit for pain relief and, when the numbness wears off, relies on pills, heat and bedrest. (Tr., pp. 10-11) Claimant stated that his sleep at night was often interrupted by pain. (Tr., p. 42) He does some woodworking and gardening and can drive for short distances. (Tr., p. 43) Most of his physical activity is limited to 20-30 minutes duration. (Tr., p. 44)

APPLICABLE LAW

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

Since the claimant has a disability to the body as a whole, he is entitled to have his disability evaluated industrially and not merely functionally.

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, 257 (1963).

ANALYSIS

Defendants contend on appeal that claimant is not totally and permanently disabled because he would be able to do sedentary work. It is suggested claimant could work as a watchman, parking lot attendant or in small appliance repair.

The record contains sufficient evidence that claimant is unable to engage in any but the mildest of activities and must change the position of his back frequently, alternating between standing, sitting and laying down. When claimant exceeds his physical limitations, he is subject to periods of pain which he treats with medication, heat application and bedrest. Most of his activities, such as gardening, he limits to 20 minutes duration. Claimant, whom the deputy found credible, appears to have been a steady worker all of his life, engaging in a variety of general labor tasks which demanded mobility and lifting strength. His testimony reflects the frustration of no longer being able to lead an active life. His age and formal education, completed at eighth grade level some forty years ago, make successful vocational rehabilitation unlikely, and his physical

restrictions weigh heavily against competing in the job market for even the minimum wage, sedentary employment that defendants suggest as possibilities. Few employers are interested in hiring a worker who has difficulty getting to his feet and must take frequent breaks from any standing or sitting duties to rest and possibly lay down. The fact that defendant employer has not attempted to offer claimant new work duties within his capabilities speaks strongly to the present unemployability of claimant.

With regard to defendants' second issue, the deputy was correct in finding that claimant's physical restrictions which establish a total and permanent disability are based on the injury to his back. Before the March 20, 1979 injury, claimant was able to perform the lifting, reaching and climbing duties necessary to his work as a painter. Following the injury and subsequent surgery, Dr. Boulden noted claimant's difficulties with bending, stooping and lifting. Although claimant did have a preexisting arthritic condition in his hip, there is no indication in the record that this condition in any way hampered claimant's job performance prior to the injury. Dr. Boulden classifies the hip condition as mild and bases his determination of impairment and physical restrictions solely on the ruptured disc, laminectomy and the attending disc degenerative disease.

FINDINGS OF FACT

1. Claimant was 59 years old at the time of the hearing and has a GED.

2. Claimant is married and has four children.

3. Claimant's previous work experience has been in the general labor field.

4. On March 20, 1979 claimant was employed by defendant as a painter at Camp Dodge.

5. Claimant stepped from a ladder and twisted his back.

6. Claimant was treated with traction and had a subsequent laminectomy in June 1979.

7. Claimant had a previous back injury in 1944 from whcih he had recovered.

8. Claimant's treating physician determined a 20 percent impairment of the body as a whole in November 1982.

9. Claimant is restricted from bending and lifting.

10. Claimant can stand and sit for limited periods of time without changing his back position.

11. Claimant experiences recurring pain and treats it with medication, heat and bedrest.

12. Claimant wears a TENS unit to relieve pain.

13. Claimant is unable to perform the climbing and lifting tasks necessary to his work as a painter.

14. Claimant has few skills from his prior work experience that will transfer to sedentary employment.

15. Defendant employer has not offered claimant new employnent.

16. Claimant has a mild arthritic condition of the hip which is unrelated to claimant's present disability.

17. Claimant has a permanent, total disability.

18. The applicable rate of compensation is $131.48 per week.

CONCLUSION OF LAW

Claimant has sustained the burden of proving a permanent total disability as a result of his work related injury of March 20, 1979.

WHEREFORE, the deputy's proposed decision filed November 3, 1983 is affirmed in part and modified as to medical costs charged to defendants. The deputy's order contains repetitive charges of one hundred forty-one dollars ($141.00) and five dollars ($5.00) which are costs included in the Iowa Lutheran Hospital charges of two hundred seventy-five and 95/100 dollars ($275.95).

ORDER

THEREFORE, it is ordered:

That the employer shall pay claimant disability benefits at the stipulated rate of one hundred forty-one and 38/100 dollars ($141.38) for the period of his disability as contemplated in section 85.34(3).

That the employer is given credit for all benefits previously paid.

That the employer shall pay unto claimant the following medical bills:

Iowa Lutheran Hospital	$275.95
Laboratory of Clinical Medicine	16.20

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

That interest shall accrue as of the date of this decision pursuant to section 85.30, The Code.

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

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

Signed and filed this 29th day of May, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

THOMAS C. JOHNSON, Claimant, vs. YOUNKERS DEPARTMENT STORE, Employer, and AETNA LIFE & CASUALTY, Insurance Carrier, Defendants.	File No. 684104 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 wherein claimant was found to have an industrial disability of 33 1/3 percent and was awarded 166 66/100 weeks of permanent partial disability benefits.

The record on appeal consists of the hearing transcript which contains the testimony of Richard McCluhan, John McGill, and claimant; the deposition of claimant taken August 19, 1982; claimant's exhibits 1 through 4; defendants' exhibits A through C; and the briefs and filing of all parties on appeal.

ISSUES

1. Whether claimant is permanently and totally disabled under the meaning of section 85.34(3), Code of Iowa.

2. Whether the proposed decision fails to set forth in sufficient detail how the elements of industrial disability, along with the elements of claimant's actual reduction in earnings, were relied upon to arrive at the percentage of industrial disability.

3. Whether the deputy's failure to rule on objections by claimant's counsel resulted in an incomplete and incoherent record.

REVIEW OF THE EVIDENCE

Claimant had completed the sixth grade in school and was 58 years old at the time of the hearing. He began working at Younkers Department Store in September of 1975 as a housekeeper, his duties consisting of cleaning floors and carpets, emptying wastebaskets, and setting up conference rooms. Claimant lists his previous work experience as a farm worker, railroad worker, trash collector, filling station attendant, dishwasher, fry cook, laundry worker, and janitor. (Johnson Deposition, pp. 7-14)

Claimant injured his back on June 27, 1979 while setting up folding tables in one of the Younkers conference rooms. He was seen by the company nurse that same morning, and an appointment was made for him to visit Donald J. Schissel, M.D., that afternoon. Claimant testified that Dr. Schissel prescribed medication and told him to go home for the remainder of the day. He returned to work on the following day and continued to work throughout the following two or three months despite continuing pain in his back. (Transcript, pp. 60-62)

Claimant testified that Dr. Schissel eventually referred him to Ronald K. Bunten, M.D., who performed surgery on claimant's back. He recalled that he spent two weeks in the hospital with the pain in his lower back gradually subsiding, but that it returned "like bumblebees stinging me back there" approximately six or seven months after the surgery. Claimant testified that in addition to the pain returning to his lower back it also began to extend into his left leg for the first time. Dr. Bunten prescribed medication for the pain and told claimant that he wanted to give the back a couple of more months to show improvement. (Tr., pp. 63-67)

Claimant testified that Dr. Bunten released him to return to light duty work in July of 1980. Claimant reported to his supervisor at Younkers, but was informed that he, along with several other housekeepers, had been layed off. (Tr., pp. 69-71) John McGill, supervisor of the non-selling departments at the Younkers where claimant had been employed, testified that seven to nine other houseworkers had been layed off during the six month periods before and after July of 1981. McGill cited staff reductions due to the economy and productivity problems as the reason for the layoffs, and denied that claimant was layed off because of his disability. He testified that claimant had been earning the minimum wage, and would have been earning $.20 to $.

per hour above minimum wage had he not been layed off. McGill also testified with regard to claimant being placed on a 30 day probationary period during June of 1979 for falsifying time cards. (Tr., pp. 43-53)

Richard McCluhan, who operates a vocational rehabilitation placement firm, met with claimant on a number of occasions at the request of defendant insurance carrier. McCluhan had access to claimant's medical records which were supplied by the insurance carrier and Dr. Bunten, but did not speak directly with any physicians. It was his understanding that claimant was not to do any prolonged stooping, bending, standing, or sitting, and was not to lift over ten to fifteen pounds. McCluhan testified that he contacted over 100 potential employers who he believed may have had work suitable for claimant. He felt that claimant would be able to work as a custodian, telephone solicitor, or parking lot attendant. (Tr., pp. 7-13)

The first position which McCluhan helped claimant find was delivering the morning newspaper. The job was expected to take about 20 hours per week and pay $60 to $70 per week. Claimant delivered the newspaper for two weeks before quiting because his son would not help with the routes and because of the low pay. He testified that one of the two checks he received was for $21. McCluhan explained that at the time claimant was hired, discussion was held with one circulation manager, but problems arose with a second circulation manager as to how much claimant was to earn. (Tr., pp. 13-14, 76)

The only other position McCluhan was able to help claimant obtain was with National Handicapped Workers where claimant was to sell light bulbs by phone. The sales job paid $4.00 per hour and was originally to be a 40 hour per week position, but claimant cut his hours in half because he could not tolerate confinement in one room. It was claimant's understanding that he was terminated because he failed to sell enough light bulbs. (Tr., pp. 15-17)

Ronald K. Bunten, M.D., saw claimant on January 21, 1980 at which time he suspected degenerative disc disease with some spondylolisthesis associated and mild to moderate root irritation on the left. Claimant was admitted to the hospital on January 27, 1980 at which time electrical studies showed no evidence of significant nerve root compression, but myelography demonstrated bilateral anterior deformity of the subarachnoid space affecting the 4th lumbar interspace and enlargement of the lateral posterior zone ligamentus structures. Claimant returned to the hospital on February 13, 1980 at which time a decompressive laminectomy at L4-5 was performed. (Claimant's Ex. 1)

Claimant was last seen by Dr. Bunten on October 23, 1981, at which time he reported:

> Examination shows easy transfer and walking. Posture seems good. There is moderate stiffness in the low back with flexion/extension which produces some discomfort in the low back. Straight leg raising seems positive at 70 degrees with low back pain at that point. Similar straight leg raising on the right is more comfortable. There is painless hip and knee motion. Reflexes seem present and symmetric. No motor weakness is defined. There is some mild tenderness over the 4th and 5th lumbar spinous processes in the area of his well healed laminectomy scar.
>
> I think he is suited for sedentary work activity, but is likely to find difficulty with stooping, bending, and lifting activities as might be recorded in most manual labor work. I would regard him as having a 20% permanent partial impairment of his total body function based on the condition of his low back. I think he plans to apply for social security disability. (Cl. Ex. 1)

In March of 1982 Dr. Bunten responded to an inquiry from the insurance carrier as to whether the 20 percent permanent impairment rating included a percentage for the degenerative disc disease in writing: "I feel the patient had a 10% preexisting condition in his back and 10% is due to the injury of June 27, 1979." (Cl. Ex. 1)

Thomas A. Carlstrom, M.D., examined claimant on December 8, 1981 because of back pain. After tracing claimant's history in a December 14, 1981 letter to Aetna Insurance, Dr. Carlstrom wrote:

> On examination, he has moderate to moderately severe paravertebral muscle spasms bilaterally, with significantly decreased range of motion of his back; forward bending to approximately 45°. Straight-leg raising exam is negative bilaterally and his sciatic notch is tender bilaterally. His motor and sensory exams are normal, and his deep tendon reflexes are normal, although the ankle jerks are some what asymmetrical, the right being greater than the left.
>
> Although I have not followed Mr. Johnson since the beginning, he appears to be essentially unchanged from his initial postoperative status, with continued pain in his low back and somewhat also in his legs. I am sure if any improvement were to occur, it would have done so by now and therefore he should be considered maximally healed. I would rate him at a 15% disability of the body as a whole; I would think he should be able to do light work, but wonder if he is a good candidate for a job change rehabilitation. (Def. Ex. C)

APPLICABLE LAW

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).

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, II Iowa Industrial Commissioner Report 39 (1981); Enstrom v. Iowa Public Services Company, II Iowa Industrial Commissioner Report 142 (1981); Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981).

In McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) the court identified additional factors not related to functional disability which need be considered in determining industrial disability: "For example, a defendant-employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. Similarly, a claimant's inability to find other suitable work after making bonafide efforts to find such work may indicate that relief should be granted."

If one has a serious disability, their earning capacity is much lower in relation to the work force as a whole. If one has a poor education, their earning potential is also lower than the mainstream. But if the local economic situation is temporarily depressed, the earning capacity of the entire work force is decreased. The earning capacity of an industrially disabled worker because of an economic down turn has then been decreased regardless of the fact that he has been injured. It stands to reason, therefore, that a claimant should not be entitled to additional compensation benefits because the employment opportunities are temporarily restricted for one reason or another. Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981).

Administrative findings of fact must be sufficiently certain to enable a reviewing court to ascertain with reasonable certainty the factual basis on which the administrative officer or body acted. Catalfo v. Firestone Tire and Rubber Co., 213 N.W.2d 506 (Iowa 1973).

In Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1974) the Iowa Supreme Court stated:

> Regarding the evidence he relied on, the agency made particular note of claimant's age, his inability to continue in his present job, and his limited employment opportunities available by virtue of his pain and inability to walk or ride in a vehicle for any appreciable length of time. We do not require the findings to contain greater specificity. The findings must be specific enough to enable the reviewing court to determine with reasonable certainty the factual basis on which the commissioner acted, Catalfo, 213 N.W.2d at 509, and these findings fulfill the purpose.

ANALYSIS

The first issue on appeal is whether claimant is permanently and totally disabled under the meaning of section 85.43(3), Code of Iowa. As noted in the applicable law section of this decision, it is the collective consideration of claimant's functional impairment, age, education, qualifications, work experience, and prospects for rehabilitation which ultimately goes into determining the degree of industrial disability. Additionally, consideration should be given to the employer's refusal to provide any sort of work to claimant following his injury and claimant's inability to find other work.

The medical evidence in this case indicates that the degree of claimant's functional impairment resulting from his June 27, 1979 injury is 10 to 15 percent. Claimant is 58 years old and completed only the sixth grade. His work experience consists of an assortment of of odd-jobs, most of which would be considered light labor and all of which paid close to minimum wage. While it appears that claimant is an unlikely candidate for any sort of job training, the evidence does suggest that he is adaptable to several jobs which are of a sedentary nature. Richard McCluhan testified that he felt claimant would be able to work in areas such as custodial, telephone solicitation, and security. The collective consideration of the forementioned criteria supports the deputy's finding that claimant has sustained an industrial disability or reduction of earning capacity because of the injury of 33 1/3 percent.

The further considerations of the employer's refusal to provide claimant with work and claimant's inability to acutally find other work do little to provoke modification of the deputy's findings in this particular case. The record reveals that Younkers was reducing its work force both before and after claimant was layed off in order to improve its economic efficiency and productivity. Claimant's former supervisor testified that a number of the housekeeper positions at Younkers had been eliminated during the six month period prior to claimant's medical release to return to work. The fact that claimant has been unable to find any other employment appears not to stem as much from his inability to perform jobs as it does from the unavailability of such jobs due to the temporarily depressed economy. As such, the deputy's finding that claimant has suffered an industrial disability of 33 1/3 percent is affirmed.

The second issue on appeal is whether the review-reopening decision fails to set forth in sufficient detail how the elements of industrial disability along with the elements of claimant's actual reduction in earnings were relied upon to arrive at the percentage of industrial disability. With regard to evidence concerning claimant's actual reduction in earnings, the record indicates that claimant earned approximately the minimum wage while he worked for Younkers. One job performed thereafter paid $4.00 per hour. The record further indicates that claimant is not presently employed. The findings in the review-reopening decision made particular note of claimant's functional impairment, age, education, work experience, and inability to find other work. Under Catalfo the findings of fact are not required to contain greater specificity. The findings must simply be specific enough to enable the reviewing court to determine the factual basis on which the deputy acted. The findings of fact in the review-reopening decision have met the requisite standard.

The final issue on appeal is whether the deputy's failure to rule on objections by claimant's counsel resulted in an incomplete and incoherent record. Claimant specifically points to 13 objections, five of which were either sustained or overruled and 8 of which were noted by the deputy. Examination of the record reveals that the deputy's decision was not based upon the testimony received into evidence after objection by claimant's counsel. It is wholly within the discretion of the deputy to withhold ruling upon an objection at the time it is made. The failure of the deputy to either rule promptly on each objection did not cause the record to be incomplete or incoherent in any manner. No reversible error is found.

FINDINGS OF FACT

1. Claimant began working as a housekeeper at Younkers in 1975.

2. Claimant suffered an injury to his back which arose out of and in the course of his employment on June 27, 1979.

3. On February 13, 1980 a laminectomy was performed on claimant.

4. The resulting functional impairment from claimant's injury was 10 to 15 percent.

5. Claimant was released to return to work in July of 1980.

6. Claimant was layed off his job in June of 1980 due to the economy and productivity problems.

7. Claimant is 58 years old.

8. Claimant has a sixth grade education.

9. Claimant has been provided with a vocational counselor by the insurance carrier to assist him in finding employment.

10. Claimant's work experience has been limited to light labor jobs which pay approximately minimum wage.

11. Claimant is capable of working at a variety of light work jobs.

CONCLUSION OF LAW

Claimant has an industrial disability to the extent of 33 1/3 percent of the body as a whole as a result of his June 27, 1979 injury.

WHEREFORE, the deputy's decision filed November 10, 1982 is affirmed.

THEREFORE it is ordered:

That defendants pay unto claimant permanent partial disability benefits for one hundred sixty-six and sixty-six hundreds (166 66/100) weeks at a rate of one hundred two and 07/100 dollars ($102.07).

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

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

Signed and filed this 29th day of July, 1983.

Appealed to District Court:
Affirmed

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH JOHNSTON,	:	
	:	File No. 445873
Claimant,	:	
	:	A P P E A L
vs.	:	
	:	D E C I S I O N
WILSON FOODS CORPORATION,	:	
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

By order of the industrial commissioner filed August 24, 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. Defendant appeals from an adverse review-reopening decision.

The record on appeal consists of the transcript; claimant's exhibits 1, 2 and 3; and defendant's exhibits A, B, C, D, E, F, G, H, I, J, K and L, all of which evidence was considered in reaching this final agency decision.

The result of this appeal decision will be the same as that reached by the hearing deputy.

EVIDENCE

A prior arbitration decision of January 6, 1977 found that claimant sustained an injury which arose out of and in the course of his employment on August 28, 1975 and awarded a certain amount of healing period and permanent partial disability to the body as a whole for 125 weeks at the rate of $137.05 per week which constitutes payment for 25 percent permanent partial disability for industrial purposes. The rating of permanent impairment at the time of the prior hearing was 15 percent of the body as a whole.

Claimant eventually went into the silk flower business and was able to function for about two years. However, he developed Parkinsonism (either Parkinson's disease or a disease with similar symptoms) and, he testified at the hearing, he had steady back pain, numbness in the lower extremities and continous falling, as well as tremors and other symptoms of Parkinsonism. (Tr., p. 13). He also testified that the pain was getting more severe: "At first it was a dull, aching pain and now it is becoming more severe." (Tr., p. 17)

The medical evidence shows that claimant's poor health goes back at least some ten years. He has had abdominal cramping pain, chest pain of uncertain etiology and a multiple hiatal hernia as well as multiple contraction headaches. All these complaints predate the injury of 1975. After that injury, apparently in the late 1970's, claimant developed the Parkinsonism. That problem is characterized in a report of March 9, 1982 by Quentin Dickins, M.D., Department of Neurology, University Hospitals, Iowa City, Iowa: "1) falling spells, cause unknown, 2) resting tremor, 3) impotence, 4) alimentary hypoglycemia, 5) muscle contraction headaches, and 6) history of low serum folate level resolved on folate supplements."

A report by Thomas J. Schroeder, M.D., a family practitioner, of February 4, 1983 states that the symptoms of Parkinsonism are not "due to a recent or past specific injury." A report by L. C. Strathman, M.D., a qualified orthopedic surgeon, states that he reviewed the records of Dr. Robb (the treating physician for the laminectomy) and examined claimant. Dr. Strathman concluded that claimant's multiple medical problems (other than the low back) are unrelated to the 1975 injury and that claimant's permanent partial impairment of 15 percent would have remained unchanged.

As stated above, claimant's treating physician for the low back difficulty was W. J. Robb, M.D., a qualified orthopedic surgeon. He stated in a report of January 4, 1983 and restated in a report of February 25, 1983 that claimant had a 15 percent permanent impairment of the body as a whole as a result of his injury and that there was no change of function since a report of November 17, 1978. However, he stated in his February 25, 1983 report that claimant achieved his maximum medical improvement in November 1980 which was some two years after an assessment of permament disability had been made.

Finally, claimant was examined by John R. Walker, M.D., a ualified orthopedic surgeon, who rated claimant's permanent mpairment at 35 percent permanent partial disability of the ody as a whole as a result of the low back lesion. Dr. Walker ent on to say that the impairment was "in the form of undoubtedly ome further scarring in the lower caudal canal postoperatively ith constriction and undoubtedly some tieing down of the nerve oots in this area and the cauda equina by scar tissue." (Report, anuary 3, 1983)

ISSUES

The hearing deputy awarded an additional 150 weeks of ermanent partial disability, equalling 30 percent disability to he body as a whole for industrial purposes and making a total f 55 percent permanent partial disability for industrial urposes.

Defendant states the issues:

1. The Review Reopening Decision failed to recognize and consider relevant material evidence.

2. The Review Reopening Decision failed to explain the basis for rejecting the material relevant evidence from Dr. John Robb, the University of Iowa, and Dr. Dickins, Dr. L. C. Strathman and Dr. Thomas Schroeder.

3. The Review Reopening Decision fails to recognize causal relationship, one of the central issues and an essential element of Claimant's case at the review reopening.

4. The Review Reopening Decision fails to provide analysis, explanation and basis for the industrial disability found to exist.

APPLICABLE LAW

A prior award may be modified in claimant's favor if he ows a change of condition for the worse. Stice v. Consolidated dependent Coal Co., 228 Iowa 1031, 291 N.W. 452 (1940); Gosek Garmer and Stiles Co., 158 N.W.2d 731 (Iowa 1968). Claimant st show that the health impairment was probably caused by his rk; possible cause is not sufficient. Burt v. John Deere terloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955); Ford Goode Produce Co., 240 Iowa 1219, 38 N.W.2d 158 (1949); mquist v. Shenadoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 934). Claimant's disability is industrial which is reduction earning capacity and not mere functional impairment. Such sability includes such considerations of functional impairment, e, education, qualifications, experience and his inability, cause of the injury, to engage in employment for which he is tted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 1 (1963); Martin v. Skelly Oil Co., 252 Iowa 128, 106 N.W.2d (1960). See also Blacksmith v. All-American, Inc., 290 N.W.2d 8 (Iowa 1980) and McSpadden v. Big Ben Coal Co., 288 N.W.2d 1 (Iowa 1980).

ANALYSIS

It is clear that claimant's Parkinsonism is a serious oblem for him. It is equally clear that, as stated by Doctors rathman and Schroeder, there is no causal relationship proved tween the work injury and the Parkinsonism.

The questions raised by defendant with respect to the oposed agency decision really all concern whether or not aimant has shown a change of condition subsequent to his prior ard. The most important evidence in that respect is by Dr. ob and by Dr. Walker.

It is troublesome that Dr. Robb performed surgery in 1975 d rates claimant at 15 percent permanent partial impairment in 76 but then says that claimant reached his maximum improvement November 1980. One questions how a back case can improve for ve years. One thing is certain from the evidence: claimant's ndition, whether improving or deteriorating, has changed since e hearing in 1976.

Accordingly, the opinion of Dr. Walker, who is not a treating ysician, must be accorded more weight than might be given a n-treating physician. That opinion states claimant has a 35 rcent permanent partial impairment, far more than the rating Dr. Robb, and it relates the cause to scarring as a result of surgery.

Putting the evidence together, one may reasonably conclude at claimant has a rather severe impairment caused by residuals om the surgery. Claimant himself states that his back condition getting worse, which carries some weight.

From all the evidence, therefore, one can infer that claimant's ndition has changed since the first hearing: despite the fact t Dr. Robb did not raise the rating, his report shows that he ve a rating before claimant achieved his "maximum improvement." Report, February 25, 1983) That evidence, along with that of aimant and Dr. Walker strongly suggests that claimant's ndition deteriorated after the first hearing. Such being the se, he is entitled to a modification of the prior award.

Claimant's background includes employment as an orderly, a ll press operator, a tire salesman, a handyman, an encyclopedia esman and a laborer at the employer's plant. And, of course, ce the first hearing he has had experience in his own business. was 47 years old at the time of the latest hearing. Considering se factors along with his permanent impairment, and not luding the Parkinsonism, one would not disagree with the ring deputy's assessment of a further 30 percent permanent tial disability of the body as a whole for industrial purposes.

FINDINGS OF FACT

1. Claimant hurt his back at work on August 25, 1975.

2. On October 27, 1975, claimant had a laminectomy for a trusion at the L3-4 level.

3. The arbitration hearing was held July 14, 1976, and the ring in the present case was held February 23, 1983.

4. Claimant suffers from Parkinsonism which is not related to the injury.

5. Claimant's falling spells are not related to the injury.

6. Claimant obtained maximum medical improvement from his 1975 laminectomy in November 1980.

7. Claimant has had postoperative scarring which has increased his pain since July 14, 1976.

8. Claimant has difficulty sitting from more than one hour and in standing for more than five to ten minutes.

9. Claimant is age 47, has been employed as an orderly, a drill press operator, a tire salesman, a handyman, an encyclopedia salesman and a laborer for the defendant employer as well as operating his own artificial flower business.

CONCLUSION OF LAW

Claimant sustained an injury which arose out of and in the course of his employment on August 25, 1975 which resulted in fifty-five (55) percent permanent partial disability to the body as a whole for industrial purposes of which twenty-five (25) percent has heretofor been paid.

ORDER

THEREFORE, defendant is hereby ordered to pay additional weekly compensation benefits for a period of one hundred fifty (150) weeks at the rate of one hundred thirty-seven and 05/100 dollars ($137.05) per week beginning February 23, 1983, accrued payments to be made in a lump sum together with interest at the rate of ten (10) percent per year from February 23, 1983.

Defendant is further ordered to pay the bill of Dr. Walker in the amount of two hundred eight-seven dollars ($287).

Costs of this action are taxed against defendant.

Defendant is ordered to file a final report within two (2) weeks after complying with this order.

Signed and filed at Des Moines, Iowa this 30thday of November, 1983.

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

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHIRLEY C. JONES,	:	
Claimant,	:	
vs.	:	File Nos. 702601/702602
OSCAR MAYER & COMPANY,	:	A P P E A L
Employer, Self-Insured, Defendant.	:	D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision wherein she was awarded temporary total disability benefits as a result of work-related injuries occurring on June 24, 1980 and December 11, 1980, but was denied permanent total and permanent partial disability benefits as a result of either injury.

The record on appeal consists of the hearing transcript which contains the testimony of claimant and Vernon Keller; the depositions of claimant, Harold J. Jersild, M.D.; and John H. Sunderbruch, M.D.; claimant's exhibit 1; defendant's exhibit A; and the briefs and filings of all parties on appeal.

ISSUES

The issues presented on appeal by claimant are:

1. Whether claimant is entitled to temporary total disability benefits from October 1980 through December 7, 1980.

2. Whether claimant is entitled to permanent total or permanent partial disability benefits beginning July 1981.

REVIEW OF THE EVIDENCE

Claimant, who was 42 years old at the time of the hearing, began working for Oscar Mayer & Company in 1968. On June 24, 1980 claimant was performing her duties as a service person in Oscar Mayer's glue room when she injured her back while attempting to move a pallet. Claimant recalled feeling a pulling sensation in her lower back and not being able to walk one-half hour later. She left her shift early and was sent to visit John H. Sunderbruch, M.D., the company physician, the following morning. (Transcript, pp. 5-15)

Dr. Sunderbruch testified by deposition that x-rays of claimant's back taken on June 25, 1980 revealed no fracture of the lumbar spine, no spondylolysis and normal interspace. The doctor recalled that he prescribed Motran and instructed claimant to return to see him if she could not work on the following day. He testified that he did not see claimant again relative to the June 24, 1980 injury. (Sunderbruch Deposition, pp. 5-6) Claimant testified that she missed work on Thursday and Friday, but returned to work the following Monday. (Tr., p. 15)

Claimant testified that after returning to her job on June 30, 1980 she experienced a constant ache in her back. She described a grinding sensation in her back about three inches below the waistline on movement, and stated that the pain continued even while she was at home. (Tr., pp. 24-27) She worked continuously from June 29, 1980 until October 24, 1980 when she was unable to get out of bed. Claimant testified that she visited Thomas J. Durkin, M.D., believing that she had a kidney problem, but was informed by the doctor that her back was the cause of her problems. (Tr., pp. 16-17) Illness and accident disability reports prepared by Dr. Durkin state that claimant suffered from acute lumbosacral strain which was not of occupational origin. Claimant was hospitalized for her back strain from October 28, 1980 through November 4, 1980. (Claimant's Exhibit 1)

Claimant was referred by Dr. Durkin to Harold J. Jersild, M.D., who examined claimant on November 26, 1980. Dr. Jersild testified that he had treated claimant for back problems previously and had discovered a degenerative disc condition while performing back surgery on claimant in June 1977. (Jersild Dep., pp. 7-8) Dr. Jersild prescribed cortesone injections and released claimant to return to work on December 8, 1980. (Jersild Dep., pp. 10-11)

Claimant returned to work on December 8, 1980, but injured her left wrist on December 11, 1980 while trying to make adjustments on a piece of machinery. Claimant visited Dr. Sunderbruch who put her arm in a sling and prescribed a one-handed job. She testified that after returning to work she was assigned to a one-handed job for two weeks before returning to her regular job. (Tr., pp. 18-21) Defendant's records indicate that claimant was paid sick leave from December 12, 1980 through December 15, 1980. (Defendant's Ex. A)

Claimant testified that she returned to work through July 17, 1981. (Tr., p. 10) Records prepared by Dr. Durkin indicate that claimant was hospitalized on July 20, 1981 because of persistent lumbosacral and sacroiliac pain on the left side radiating into the lower left extremity. Dr. Durkin again indicated that claimant's problems were not occupational in origin. (Cl. Ex. 1)

Claimant continued to be treated by Dr. Jersild who referred her to Robert W. Milas, M.D., for an examination taking place on October 27, 1981. Dr. Milas arranged for claimant to be hospitalized from November 2, 1981 through November 4, 1981. A three-level myelogram and computer tomography were conducted, both of which were interpreted as normal. (Cl. Ex. 1) Claimant has not returned to work after July 17, 1981. (Tr., p. 10)

Dr. Jersild testified that he last saw claimant on August 31, 1982. He indicated that throughout 1981 and 1982 he had continually diagnosed claimant as suffering from degenerative disc syndrome. Dr. Jersild testified:

> Q. Doctor, I'm going to hand you these Exhibits, "B," "C" and "D," which are medical reports you prepared for Oscar Mayer and Company in 1981 and 1982 and which we've already referred to the visits in detail.
>
> May I see those, doctor. And on the check mark there you're asked in all three of these, "B," "C" and "D": "Was disability due to an accident?" and you checked "No;" and then it says, quotes: "Occupational injury" meaning was the disability due to an occupational injury, and you state "No." That also is the tenor of your Exhibit "A," which is the narrative report dated August 5 1982 to Attorney Scovil. Was that your opinion when you prepared these reports?
>
> A. Well, yes. I -- her problem, this lumbar degenerative disk syndrome, is a degenerative process and these symptoms can be aggravated, of course, by specific motions or movements, but the problem is not produced by it; and this is essentially what I am referring to.
>
> Q. In other words, anything can -- if you have this degenerative disk disease, any type of movement can aggravate it?
>
> A. Yes.
>
> ....
>
> Q. And the profession does not know what causes it and there's no real easy cure for it, is there?
>
> A. No, it's -- the degeneration begins in everybody at about the age of 20 or so, and about 85 percent of us at one time or another will have some symptoms as a result of it, but some people obviously are far more affected than others.
>
> Q. This is a fairly young lady to have this bad a condition, isn't that right, doctor?
>
> A. She's in the -- they usually begin about the time in the 30s when they begin to have some, most often.
> (Jersild Dep., pp. 20-22)

Dr. Sunderbruch testified that he last examined claimant on October 15, 1982. With regard to claimant's back, Dr. Sunderbruch testified:

> Q. But to sum up your testimony, as I understand it, you cannot relate any of her present condition to her employment in the past except for the pallet incident which healed; is that right? I am not trying to put words in your mouth.
>
> A. My feeling is that she had a process in her body that was part of living, namely degenerative disc disease, that occurs regardless of trauma or anything you do, but just occurs. But, certain things can aggravate the condition so that you have pain lasting for periods and then you are relieved of pain. But you learn to live with pain. I do it every day in my surgery and everything else.
>
> Q. To put it another way, Doctor, is it your opinion that considering her degenerative disc disease, that her condition as you observed it on October 15, 1982, would have been the same whether she had had employment incidents or not?
>
> A. I think so.
>
> ....
>
> Q. Can you say with a reasonable degree of medical certainty, Doctor, whether or not her employment at Oscar Mayer aggravated the condition?
>
> A. I think any activity, any employment at Oscar's would aggravate the condition temporarily, but then it would clear up. It is a condition that comes and goes. That's the hard thing for a lay person to understand, is that degenerative disc disease is there. If you work or if you don't work, if you sneeze, if you cough, if you strain at stool, do any of those things, you hurt your back and your back hurts for a while, and then it will clear up.
> (Sunderbruch Dep., pp. 18-20)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injuries 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).

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).

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

Iowa Code section 85.33 states: "The employer shall pay to the employee for injury producing temporary disability and beginning upon the fourth day thereof, weekly compensation benefit payments for the period of his disability, including the periodical increase in cases to which section 85.32 applies."

ANALYSIS

The two issues set forth by claimant on appeal appear to be solely in regard to her back injury which occurred on June 24, 1980. Claimant's first contention is that she is entitled to temporary total disability benefits for the period that she was off work from October 1980 through December 1980. Dr. Jersild and Dr. Sunderbruch each testified that claimant's back problems arising on June 24, 1980 resulted from an aggravation of her degenerative disc disease. Both doctors indicated that claimant had recovered from the incident of June 24, 1980 by the time that she returned to her job in the following week. No medical evidence what-so-ever has been introduced tending to causally relate the back problems claimant began having in October 1980

with the traumatic incident of June 24, 1980. Dr. Durkin's records indicate that claimant's back problems in October 1980 were not related to her occupation. Dr. Sunderbruch testified that the back problems claimant began to experience in October 1980 were destined to have occurred simply due to the nature of her degenerative disc disease. When the lack of medical evidence demonstrating a causal connection between the June 24, 1980 aggravation and claimant's later back problems is coupled with her history of back problems, including back surgery in June of 1977, it becomes apparent that the deputy's conclusion denying claimant any benefits from October 1980 to December 1980 must be affirmed.

Claimant's second contention, that she is entitled to permanent total or permanent partial disability benefits beginning in July 1981, is not well taken for those same reasons as stated above. No medical evidence has been presented to indicate a causal connection between the June 24, 1980 aggravation of claimant's degenerative disc disease and the back problems which she experienced beginning in July 1981.

FINDINGS OF FACT

1. Claimant began working for Oscar Mayer & Company in 1968.

2. Claimant has a history of back problems relating back to 1977.

3. Claimant underwent back surgery in June 1977.

4. Claimant suffers from degenerative disc disease.

5. On June 24, 1980 claimant's disc disease was temporarily aggravated in a work-related incident.

6. Claimant was off work from June 25, 1980 through June 29, 1980 as a result of the aggravation of her disc disease.

7. Claimant did not work from October 24, 1980 until December 8, 1980 because of back problems.

8. Claimant's back problems in October, November, and December of 1980 were not causally related to the June 24, 1980 aggravation of claimant's degenerative disc disease.

9. Claimant injured her left wrist in a work-related incident occurring on December 11, 1980.

10. Claimant was off work from December 12, 1980 through December 15, 1980 as a result of her wrist injury.

11. Claimant suffered no permanent impairment as a result of her December 11, 1980 wrist injury.

12. Claimant last worked on July 17, 1981.

13. Claimant is presently unable to work due to back problems caused by degenerative disc disease.

14. No causal relationship exists between the June 24, 1980 or December 11, 1980 incidents and claimant's back problems which began in July 1981.

15. The rate of compensation found in the arbitration decision is adopted.

CONCLUSIONS OF LAW

Claimant has sustained the burden of proving a temporary work-related aggravation of a preexisting back condition on June 4, 1980 resulting in five days of temporary total disability.

Claimant has sustained the burden of proving a work-related injury to her left wrist on December 11, 1980 resulting in four days of temporary total disability.

Claimant is entitled to temporary total disability benefits for time off work less waiting periods due to both incidents.

WHEREFORE, the deputy's decision filed May 10, 1983 is affirmed.

THEREFORE, it is ordered:

That defendant pay unto claimant two-sevenths (2/7) weeks of temporary total disability compensation at the rate of two hundred twenty-four and 18/100 ($224.18) per week.

That defendant pay unto claimant one-seventh (1/7) week of temporary total disability compensation at the rate of two hundred forty-one and 10/100 dollars ($241.10) per week.

Defendant is to file a final report.

Costs of the arbitration proceedings are charged to defendant. Costs of the appeal are charged to claimant.

Signed and filed this 22nd day of December, 1983.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DARLENE JUNGE, Claimant,	:	
vs.	:	
CENTURY ENGINEERING CORP., Employer,	:	File Nos. 618141/662314
and	:	A P P E A L
EMPLOYERS INSURANCE OF WAUSAU AND FIREMAN'S FUND INSURANCE COMPANY, Insurance Carrier, Defendants.	:	D E C I S I O N

STATEMENT OF THE CASE AND REVIEW OF THE EVIDENCE

On May 16, 1983 defendants filed a motion for protective order and motion regarding discovery. Attached to defendants' motion was the following affidavit of Albert R. Coates, M.D.:

> I, Dr. Albert R. Coates, first being duly sworn on oath depose and state that I am an Orthopedic Surgeon practicing in Linn County, Iowa. In this regard I have had the opportunity to provide care and treatment to Claimant Darlene Junge, which care and treatment involves Darlene Junge's lower extremities. It is my understanding and information that Darlene Junge is making a claim for workers' compensation benefits before the Iowa Industrial Commission as a result of the condition relating to her lower extremities and for which I have provided care and treatment.
>
> Wednesday, March 16, 1983, at 4:00 p.m., I was scheduled to meet with Attorney John M. Bickel and Attorney Steven L. Udelhofen, both of whom were representing workers' compensation insurance carriers, Employers Insurance of Wausau and Fireman's Fund Insurance Co. in this pending action.
>
> Prior to any communication with these attorneys, I was advised by Claimant's attorney, Robert R. Rush, on that date and at approximately 4:00 p.m., that I was not to communicate with nor provide any information to Attorney John M. Bickel nor Attorney Steven L. Udelfhofen.
>
> I am willing to provide information to and discuss Claimant's care and treatment with Attorney John M. Bickel and Attorney Steven L. Udelhofen except for the fact that I have been directed by Claimant's attorney Robert R. Rush that I am to have no communication nor provide information to either of these attorneys.
>
> Employers Insurance of Wausau on behalf of Century Engineering has paid for certain care and treatment which I have in the past provided to the Claimant Darlene Junge relating to her lower extremities.

Claimant thereafter filed a resistance to the motion wherein she stated:

> 1. The allegations contained in Respondents' Motion are false as to any suggestion that Dr. Coates has been instructed not to communicate with Respondents' counsel.
>
> 2. Claimant's attorney has advised Dr. Coates that communication with Respondents' counsel in an ex parte fashion is objected to. However, counsel has also advised Dr. Coates and Respondents' attorney, John Bickel, that he has no objection to any communication with Dr. Coates provided Claimant's attorney is present.
>
> 3. Claimant's counsel's position is based upon the apparent pattern and practice of Respondents' attorney to make ex parte, private and secret communications with Dr. Coates notwithstanding the fact that this case is in litigation.

Oral arguments were heard July 28, 1983. In an order filed August 31, 1983 the deputy concluded claimant's counsel violated Iowa Code section 85.27 when he instructed Dr. Coates not to talk to defendants out of his presence. Claimant now appeals from the order of August 31, 1983.

The record on appeal consists of the August 31, 1983 order as well as the briefs, filings, and exhibits contained in the industrial commissioner's file numbers 618141/662314.

ISSUES

The issues on appeal as stated by claimant are:

1. Whether section 85.27 constitutes an unlimited waiver of an individual's entire health history from birth to death.

2. Whether in a contested case the release of information referred to in section 85.27 included private, ex parte communication with claimant's physician by the employer's attorney.

3. Whether the deputy erred in concluding that claimant violated section 85.27 by instructing Dr. Coates not to meet privately with defendants' attorney.

APPLICABLE LAW

The second full paragraph of Iowa Code section 85.27 states:

> Any employee, employer or insurance carrier making or defending a claim for benefits agrees to the release of all information to which the employee, employer, or carrier has access concerning the employee's physical or mental condition relative to the claim and further waives any privilege for the release of the information. The information shall be made available to any party or the party's representative upon request. Any institution or person releasing the information to a party or the party's representative shall not be liable criminally or for civil damages by reason of the release of the information. If release of information is refused the party requesting the 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.

ANALYSIS

Iowa Code section 85.27 contemplates the free flow of medical information during contested case proceedings. By filing her action claimant agreed to the release of information concerning her physical condition. While section 85.27 does not provide for an unlimited waiver of an individual's health history from birth to death, it does prescribe open access to information concerning an individual's physical or mental condition relative to a claim for benefits. The affidavit of Dr. Coates clearly indicates that his treatment of claimant relates to the condition for which a claim for workers' compensation benefits has been initiated. As such, claimant shall be considered to have agreed to the release of medical information held by Dr. Coates.

Claimant's contention that defendants are precluded from communicating with Dr. Coates in an ex parte fashion is unfounded. Nowhere in section 85.27 does the legislature indicate an intent to proscribe such communications, nor would such a rule promote expediency of discovery and settlement of claims. Moreover, it would seem inconsistent to permit claimant to conduct ex parte communication with a practitioner while at the same time denying defendants a similar opportunity. The deputy's conclusion that claimant violated section 85.27 by instructing Dr. Coates not to meet privately with defendants' counsel shall be affirmed.

FINDINGS OF FACT

1. On March 16, 1983 Dr. Coates was scheduled to meet with defendants' attorneys to discuss with them his treatment of claimant.

2. The treatment rendered by Dr. Coates relates to claimant's claim for disability benefits.

3. Prior to the scheduled meeting Dr. Coates was instructed by claimant's attorney not to meet or speak privately with defendants' attorneys.

4. Dr. Coates was willing to meet with defendants' attorneys, however will not do so after claimant's attorney's instructions.

CONCLUSION OF LAW

Claimant violated Iowa Code section 85.27 by instructing Dr. Coates not to talk to defendants' attorneys out of her or her attorney's presence.

WHEREFORE, the deputy's order filed August 31, 1983 is affirmed.

THEREFORE, it is ordered:

That claimant contact Dr. Coates within ten (10) days of this decision to advise him that he is authorized to talk with defendants' attorneys outside of her or her attorney's presence.

That Dr. Coates' deposition be rescheduled.

Signed and filed this 13th day of March, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

NORM JUST, Claimant, vs. HYGRADE FOOD PRODUCTS CORP., Employer, and NATIONAL UNION FIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 656372 A P P E A L D E C I S I O N

By order of the industrial commissioner filed October 20, 1983 the undersigned deputy industrial commissioner has been appointed under provisions of §86.3, Code of Iowa, to issue the final agency decision on appeal in this matter. Defendants appeal and claimant cross appeals from a review-reopening decision.

The record on appeal consists of the transcript of the testimony; claimant's exhibit 1; defendants' exhibits A and B; the deposition of John J. Dougherty, M.D.; and claimant's answer to interrogatory No. 2, all of which evidence was considered in reaching this final agency decision.

The industrial commissioner's file shows a memorandum of agreement was filed on January 28, 1981 for an injury of December 1, 1980; that the hearing was held July 14, 1983 and the review-reopening decision was filed August 26, 1983.

The outcome of this appeal decision will be the same as that reached by the hearing deputy.

STATEMENT OF THE CASE

The recitation of the evidence in the review-reopening decision is sufficient and under the circumstances adopted and will not be set out herein.

ISSUES

The review-reopening decision awarded six weeks of healing period at $366.18 and 100 weeks permanent partial disability at the same rate.

Defendants state the issues thus:

> The Deputy Industrial Commissioner erred in his determination of functional disability which resulted from the alleged work injuries in December of 1980. The Deputy's findings were not supported by the substantial evidence contained in the record and constitutes [sic] conclusions and findings based upon inadequate and improper findings of fact and conclusions of law. The Deputy also failed to enter sufficient specific factual findings and rulings to justify the award granted for functional disability.
>
> The Deputy Industrial Commissioner erred in his determination of industrial disability which allegedly resulted from the work injuries of December of 1980. The Deputy Industrial Commissioner's findings on the question of industrial disability were not supported by the substantial evidence contained in the record and constitute conclusions and findings based upon inadequate and improper findings of fact and conclusions of law. The Deputy also failed to enter sufficient specific factual findings and rulings to justify the award granted for industrial disability.

In his cross appeal, claimant states two additional issues: "I. Claimant is entitled to rehabiliation benefits. II. The defendants lacked reasonable or probable cause or excuse to delay the commencement of payments and benefits to the claimant entitling the claimant to additional compensation within the provisions of section 86.13 of the Code of Iowa."

APPLICABLE LAW

The applicable law in the review-reopening decision is adopted and expanded to include the following:

"The incident or activity need not be the sole proximate cause, if the injury is directly traceable to it." Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974); Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971). "A cause is proximate if it is a substantial factor in bringing about the result." Blacksmith v. All-American, Inc., 219 N.W.2d 348, 354 (Iowa 1980).

Section 85.70, The Code, states:

> An employee who has sustained an injury resulting in permament partial or permanent total disability, for which compensation is payable under this chapter, and who cannot return to gainful employment because of such disability, shall upon application to and approval by the industrial commissioner be entitled to a twenty-dollar weekly payment from the employer in addition to any other benefit payments, during each full week in which he is actively participating in a vocational rehabilitation program recognized by the state board of vocational education. (Emphasis supplied)

ANALYSIS

The analysis set out in the review-reopening decision is adopted and expanded as follows:

Defendants claim that Dr. Dougherty's estimate of three rcent permanent partial impairment should be taken over that R. H. Miller, M.D., because the former is an orthopedic rgeon and the latter is a general practitioner. The hearing puty chose Dr. Miller's opinion because he was the treating ysician. The difference between the opinions of the doctors, ke the permanent impairment itself, appears to be minimal and e hearing deputy's conclusion will not be changed.

Defendants also complain that Dr. Miller's diagnosis of a mbar disc syndrome was not substantiated by Dr. Dougherty, ich is correct. However, the diagnosis was agreed to by Walter Eckman, M.D., who is a neurosurgeon. (Consultation report ly 2, 1981) The opinions of Drs. Miller and Eckman, the eating and the consulting physicians, are taken over those of . Dougherty, who was an examining physician, because the rmer doctors have a greater familiarity with the entire case.

Defendants also complain that claimant did not show causal lationship between the injury and the resulting disability, guing that an incident of August 8, 1982 was an intervening use. At that time, claimant who weighed some 280 pounds, rained his back while getting out of a chair. The only doctor give evidence on the issue was Dr. Miller who noted it in his spital admission history of August 10, 1982. Contrary to fendants' argument, however, Dr. Miller on Februry 16, 1983 ates his opinion of causation as follows: "It is my impression at this gentleman definitely does suffer from a lumbar disc ndrome which resulted from his injury in November [sic] 1980." nce Dr. Miller seemed fully appraised of the facts, there ems to be no reason to doubt his opinion on causation.

As for the issue of industrial disability, the analysis of hearing deputy is accepted as to the type of work claimant ll be able to do in the future and as to his ultimate earning pacity.

Claimant argues that defendants should pay for vocational nabilitation benefits under §85.70, The Code; however, there no showing that claimant underwent a rehabilitation program at was "recognized by the state board for vocational education." thout that requirement being met, no award can be made.

Claimant also claims a penalty should be awarded pursuant to applicable paragraph of §86.13 (Code of Iowa, 1982):

> If a delay in commencment 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.

ther or not that provision applies to injuries which occurred ore July 1, 1982, the effective date of the statute, will not decided because the record itself shows that a bona fide pute existed as to the benefits owed in this case. Therefore, delay in payments was reasonable.

The review-reopening decision did not state from what date interest on the healing period would be paid. Therefore, it l begin six weeks prior to the time the permanent partial ability was to begin.

The findings of fact and conclusions of law of the review-pening decision are adopted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ding 1. In December of 1980 claimant received two (2) uries while working for defendant employer.

ding 2. As a result of those injuries claimant has a back blem.

ding 3. As a result of his injuries claimant's back locked on him while at a picnic.

ding 4. As a result of his injuries claimant has a permanent airment to the body as a whole of five percent (5%).

ding 5. Claimant was born in 1956, is a high school graduate has completed one (1) year of college.

ding 6. Claimant has a history of driving trucks and working areas of heavy manual labor.

ding 7. Claimant has also worked in a library.

ding 8. The job claimant performed at the time of his injury sisted largely of heavy labor.

ding 9. Claimant cannot return to the job he had at the time his injury because of his permanent impairment.

ding 10. Claimant could not perform most truck driving jobs ause of his permament impairment.

ding 11. Claimant even has problems doing moderately heavy s.

ding 12. Claimant is intelligent.

ding 13. Claimant has an industrial disability of twenty cent (20%) as a result of his injury with defendant employer.

clusion A. Claimant has met his burden in proving he is tled to one hundred (100) weeks of permanent partial disability efits.

ding 14. Claimant has missed six (6) weeks of work as a lt of his injury which defendants have failed to pay benefits

clusion B. Claimant has met his burden in proving he is tled to six (6) more weeks of healing period benefits.

ORDER

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant for a period of six (6) weeks beginning August 10, 1982, at the rate of three hundred sixty-six and 18/100 dollars ($366.18) for the healing period, accrued payments to be made in a lump sum together with statutory interest from August 10, 1982, and to pay claimant one hundred (100) weeks of compensation at the same rate for the permanent partial disability, accrued payments to be made in a lump sum with interest beginning September 20, 1982.

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 at Des Moines, Iowa this 31st day of January, 1984.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES KALKAS,	:	
Claimant,	:	File No. 720419
vs.	:	A R B I T R A T I O N
UNIROYAL, INC.,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by James Kalkas, claimant, aginast Uniroyal, Inc., self-insured employer, defendant, to recover additional benefits under the Iowa Workers' Compensation Act for an alleged injury arising out of and in the course of his employment on April 10, 1982. It came on for hearing on June 1, 1983 at the Pottawattamie County Courthouse in Council Bluffs, Iowa. It was considered fully submitted on June 21, 1983.

A first report of injury was filed March 18, 1983. No other filings were made with the industrial commissioner.

At the time of hearing the parties stipulated to a rate of $174.74, a healing period from April 12, 1982 to September 7, 1982 and to the fairness of the medical expenses.

The record in this matter consists of the testimony of claimant, Judith Marie Kalkas, Mark Jospeh Benda, and Robert Dean Woods; exhibit 1, a series of medical reports; exhibit 2, the deposition of Maurice P. Margules, M.D.; and exhibit 3, a work release dated September 5, 1982.

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 any disability he now suffers; whether or not claimant is entitled to healing period and permanent partial disability benefits; and whether or not claimant should receive benefits under Iowa Code section 85.27.

STATEMENT OF THE CASE

Six-foot-three-inch married claimant, father of one son, testified to being a high school graduate with no further training. Except for a brief period as a production worker his work other than that for defendant employer has been as an over-the-road truck driver with trips primarily from Omaha to the east coast.

Right-handed claimant commenced work for defendant on January 8, 1979 with a starting hourly rate of $6.70. He had an employment physical which he passed. He asserted that he had no parasthesia or problems with his cervical or lower spine. He admitted being involved in a motorcycle accident in 1975 at which time he injured his collar bone and shoulder blade. He claimed complete recovery from the injury which had no affect on his employment. He denied any other injuries or claims for compensation.

He described the jobs he did as follows: For four months he worked -- pushing, pulling and lifting -- on the lead press putting a lead coating on hoses. He had no trouble with his cervical spine. He moved to strip and test which involves stripping the hose and then testing it with water. He was at this job for four to six months. Physical requirements were pulling, exerting constant pressure to the left and lifting hoses weighing a pound a foot.

At the time of his alleged injury he was working on a braider -- a machine which puts either wire or cotton braid around the hose. He said this work necessitated pulling. Spools of cotton or wire braid, which he first said weighed from 20 to 45 pounds and later said weighed at least 20 pounds although he had not weighed one, were picked out of a cart and

then set up on 24 or 36 spool decks on one to four braiders. He estimated it would take 40 minutes to an hour to complete a deck. First he said that because he is tall he was working with his arms above his head. Later he stated that the machine was about as high as his head, that he worked with his hands above shoulder level, that his hands were even with the top of his head and that he never fully extended his arms.

He testified that he first noticed a problem in March of 1982 when his fingers grew numb. He did not tell anyone at the company of the trouble until his hand went numb at which point he told the shift manager. He then had aching in his elbow and he observed that he was unable to tell how much pressure he was exerting. He said that he dropped things when he raised his hands.

He saw William G. Artherhold, D.O., the company doctor at the plant. He was referred to Dr. Miller who took his history and x-rays and then sent him to Dr. Margules. Claimant recalled that Dr. Margules had questioned him about his job and that he had shown the doctor what he had been doing. A myelogram was done and claimant was told he had a herniated disc. He testified that while he was waiting for surgery he spoke with Woods, the industrial relations manager.

Claimant reported that post surgery, although he no longer drops things, his left side is weaker and he continues to have some pain in his left shoulder. He also remains under the care of Dr. Margules.

Claimant said that he bid to a less physically demanding job when he was returned to work without restriction. He asserted that he began to notice hostility on the part of his employer after he filed his claim for workers' compensation. He first said that he was called to the office after the first of the year regarding concentricity of the hose he was producing as a coverline operator. Later he acknowledged that his first warning had come in October. He agreed that at the time of each write-up he had been given an opportunity to comment. He did not attribute the quality problems he had to his injury. He complained that the usual training period on the coverline job is two to three weeks, but that he received only eight hours with an additional four provided when another worker stayed to watch his work. That co-worker offered no suggestions regarding claimant's running of the machine. Claimant said that other coverline operators also have trouble with concentricity and it is viewed as a common problem. He admitted knowing that further quality problems could result in his being fired as there was stress on quality at that time.

Claimant recounted his termination thusly: On February 7, 1983 he was called at home and told that the plant manager wished to speak with him. He was informed he was being terminated because of the poor quality of his work after an incident involving striping on a hose. It was his opinion that striping errors were common in that the company employed someone to remove the wrong stripe and put on the right one. Claimant testified that after his firing he called the company and offered to drop his law suit if he could have his job back, but the company refused.

Claimant claimed that he was unaware of any one else's being fired by defendant for poor quality work. However, he admitted that as early as 1979 he had been written up. Specifically at that time the write-up involved an attitude problem which claimant denied having. Other incidents revolved around horseplay. Claimant conceded to being the second best sponge thrower in the plant. He thought his write-up when he was classified as a strip and test operator was a fair one as he had misunderstood what he was supposed to be doing, but he did not remember being told that any further deviations from procedure would be grounds for termination.

Claimant collected unemployment.

Late in February he got a job driving a school bus. He did that work and continued to look for something else. On May 19, 1983 he started work for his present employer as a truck driver in the central states. His current gross pay is $230 weekly as compared with $298 at defendant at the time he was let go. Although his job requires little loading or unloading, he complained that he tires and that his shoulder becomes sore.

Judith Marie Kalkas, claimant's spouse, who has worked for defendant for five years and who inspects and packs, testified pursuant to a subpoena as she stated she was worried about losing her job because of her testimony. She described her work as doing a thorough inspection of a completed hose and then doing it up as the customer had requested.

Kalkas reported that she had inspected claimant's work and her scrap reports were responsible for write-ups he received. She claimed that a report is made any time there is an excess of 100 feet of damage. Her testimony indicated that over the last week there had been a number of problems with both concentricity and striping. The witness was unaware of any other worker's being fired for poor quality, mismarking or lack of concentricity. She thought the damage to the hose that lead to her spouse's firing was to 2,200 feet.

She remembered taking an insurance paper to Woods which concluded that her husband's problem was job related. Woods' response was to tell her to sue.

Twenty-eight year old Mark Joseph Benda, shift manager for the 3:00 to 11:00 shift who has direct responsibility for the production people and others as well, commenced work for defendant in August 1981. He testlfied that as claimant's supervisor he was familiar with the operation of the braiders. He stated that there are 27 braiders in the plant. Of those four are larger 36 spool machines, one is a 20 spool machine, and the rest are 24 spool machines. He listed activities of the braider operator as watching the machines, fixing broken wires, and doing deck, stock or reel changes. At least half the time would be devoted to machine watching as once the machine is set up the rest of the time would be spent monitoring what he termed a highly automated process. Reel changes would be few in number with more required when large diameter hose was being run. Approximately a minute would be needed to fix a broken wire. A full wire spool would weigh 17 pounds; a cottone one, five. Benda denied that the operator is in constant motion. He proposed that 24 spool deck changes would take a half hour while a 36 spool change would take 40 minutes. The five foot nine inch Benda stated that if he were to put in a deck he would be working in the waist to shoulder level. He asserted that he had not seen claimant doing work over his head and that any work done overhead would not continue for a long period of time. He admitted, however, that he had not stood around watching claimant and that he had not operated a braider for an eight hour shift.

Regarding the event that allegedly led to claimant's terminatic Benda recalled: Claimant's spouse came to the production area and reported 22,000 feet of hose was faulty. The stripe was right, but the cover was wrong. He was sure the damaged amount was 22,000 feet as the order was for 20,000 feet and ten percent was added for damage. The incident was reported to the plant manager.

Benda indicated that not all scrap work reports would lead to write-ups as there was a threshold level of damages.

It was the opinion of the witness that claimant was a good physical worker who was reliable and available for overtime, but he was difficult to get along with and had quality problems. The witness denied that claimant was treated any differently from any other employee. He responded "no" to the question of whether anyone else had been terminated for poor quality.

Benda testified that he knew of no policy to discourage compensation claims and of no plan to run claimant out of the plant. He recalled no complaints by claimant that cervical trouble was leading to quality problems. He said he was present when claimant was offered help with the coverline job. He asserted that claimant's limited training as a coverline extruder was due to claimant's feeling he had mastered the job. He stated that the usual training period would be eight weeks.

Benda said that the procedure for handling situations in which the cover was correct and the stripe was wrong was to restripe. If the stripe was right and the hose was made to the wrong diameter, the hose was placed in a warehouse to wait for a buyer.

Thirty-five year old Robert Dean Woods, who has been at the plant since prior to its opening in positions as unit manager in production, shift manager and industrial relations manager, testified that he initially trained the braider operators. He characterized the technology of the braiders as unchanged although some modifications had been made. He viewed claimant's description of work on the braiders as inaccurate. He felt more time would be spent in fixing broken threads or wires than in changing spools -- an activity which he estimated would take 20-30 minutes and total less than two hours in an eight hour shift. Fifty to sixty percent of the operator's time, by his estimate, would be devoted to watching the automated machines. He had not watched claimant at the braiders, but he said that workers were trained to work in the stomach to chin area and rarely would change a spool above their heads. Standard procedure would be to change from two to six or seven empty spools and then jog the empty spools around and change some more. The witness thought claimant would be working above his head only if he were not following proper procedure.

Woods admitted that claimant is the first worker to be fired for poor quality work. In claimant's case there had been an increased number of incidents after October. He denied that claimant's filing a workers' compensation claim had anything to do with his firing and he noted that several write-ups occurred prior to claimant's filing. While he acknowledged other isolated incidents of poor quality, he claimed that those incidents were not repetitive. He, too, said "no" when he was asked if claimant complained of work problems related to health.

Woods agreed that at one time he was concerned about the potential work relatedness of claimant's condition and had claimant seek a second opinion from John F. Aita, M.D.

He concurred with Benda that claimant was a good physical worker.

Maurice P. Margules, M.D., first saw claimant on April 7, 1982 on referral from Dr. Artherhold and Dr. Miller. Claimant complained of pain and paresthesia, a tingling sensation or partial numbness in the C-6 distribution of the left upper extremity as well as in the cervical spine and shoulder.

Claimant was hospitalized on April 11, 1982 and a history of pain or problems beginning approximately two months earlier was recorded. That history also includes:

> The patient states the only change that he could think of was that he did do a different job at the Uniroyal factory for a period of time which required him to use his left hand and arm a great deal in pulling, pushing, and feeding large pieces of hydraulic hose on and off of reels. Because this job appeared to aggravate the problem, the patient changed jobs approximately four to six weeks ago; but the problem has persisted without relief.

The history continues:

> The problem is aggravated by hyperextension of the neck as well as right and lateral rotation. Sneezing has also increased his difficulty as well as sitting for long periods of time. The patient states that if he works in a stooped position for a period of time that he has difficulty standing erect because of the pain in the area of the cervical spine.

Dr. Margules was aware of claimant's work, but not aware in detail. He believed claimant was "handling hoses and doing some pushing, pulling and rotation movement with his arms and with his shoulders" and was involved in "continuous movement." He assumed weights in the 30-50 pound range, but he said it is repetitiousness of movement that is more important than weight.

At the time of the admission claimant denied any previous similar problems.

On examination, the neurological was normal. There was evidence of some loss of tone in the musculature of the thenar eminence of the left hand and some loss of sensation either in the C6 distribution or the median nerve. X-rays were normal. Electromyography and nerve conduction studies were also normal. A myelogram evidenced a defect at C6-7.

Claimant was discharged with the assessment of "evidence of articular disease, possibly due to the type of movement performed during his work at the plant, involving both his shoulders. The patient also shows evidence of degenerative cervical disc disease, maximum at the level of C6-C7, and it is felt that the patient should be treated conservatively at this time." Final diagnoses were "[c]hronic sprain of both shoulder joints due to repeated trauma sustained during work (Occupational disease)" and "[d]egenerated cervical disc disease, C6-C7 interspace."

Dr. Margules explained degenerative disc disease:

> It's a physical change of the--of the disc. The disc is an anatomical structure, as you know, and it is comprised of two separate portions and it's the same anatomy for the disc whether it's in the cervical spine or lumbar spine, it's just a difference in size. Degenerative disc disease is a physical change in the consistency of the disc that usually becomes more soft and more friable and that can be the result of many things. Degenerative disease can be the result of trauma, it can be the result of infection, it can be the result of arthritic syndrome, it has more than one etiology. So it's a basic term really. When we see somebody with changes in a disc, we say he has degenerative disease, we just mean that there's a physical change in the disc. (Margules dep., p. 22 ll. 15-25 and p.23 ll. 1-4).

An insurance claim carries the same diagnoses.

On May 12, 1982 John F. Aita, M.D., saw claimant for a neurological evaluation and suggested nerve conduction studies. He did not feel the defect at C7 would account for complaints involving claimant's first through third digits.

Claimant was hospitalized on May 23, 1982. An excision of a herniated disc at the C6-C7 interspace was performed as well as a fusion by an anterior approach. The operative report states a fragment of disc was found on the right. The discharge summary makes reference to the left. Following the surgery claimant was released to return to work on September 7, 1982. The doctor did not know if claimant had returned to work; however, Dr. Margules said his usual practice would be to limit the patient from working at a job requiring continuous flexion or extension of the neck, cranking his neck sideways, or pushing a heavy load with his head.

Dr. Margules was asked about the lack of a specific incident in claimant's case. He stated:

> I think that based on past experience with occupational injuries, or occupational illnesses that we see and mainly in the past years in those patients who have sustained injuries or what we call microtrauma from repetitive movement, we know that there's a definite correlation between repetitive movement and changes in the physical structures of the body and this is well known to Orthopedists and Neurosurgeons because we see lots of people with this type of thing. That's why we make this conclusion in fairness to the patient. (Dep., p. 22 ll. 1-11)

Under further interrogation he testified:

> Q. Could you please explain for me, Doctor, microtrauma as it relates to occupational injuries?
>
> A. Well, most occupational injuries are repetitive movements done so many times a minute, so many times an hour, involving some joints and those are what we call microtrauma versus the obvious trauma from a fall or from an object falling on somebody's body. And this is a new concept--not a new concept, a concept of the industrial age, but it is becoming more common as we see people using their joints for movements so many times a minute or so many times an hour. And this we feel causes a small trauma, that's why we call it microtrauma to the joints or certain parts of the body.
>
> Q. And Doctor, as this microtrauma occurs hourly or daily or by the minute, over a period of time is it your opinion based upon the patients that you've seen and this patient in particular, that the ultimate result can be, say for example, a cervical disc herniation or an aggravation, lighting up or acceleration of, say for example, a disc herniation with the ultimate result being the same as if a major accident occurred?
>
> A. I think it can cause an aggravation, yes, or a lighting up or change which will cause then severe radicular compression we were discussing before and causes then the acute syndrome of root compression, yes.
>
> Q. And Doctor, based upon the history and your treatment of this patient, James Kalkas, is then--can you state to a reasonable degree of medical certainty, meaning more probably than not, that this in fact happened in this case?
>
> A. Yes. (Dep., pp. 28-29 ll. 1-25 and 1-11)

The doctor found claimant's condition aggravated by repetitive trauma. In reaching a diagnosis of microtrauma the doctor had stated questions important to be asked of the employee as what type of movement is done, what material is worked with, in what position the job is done, how many repetitions occur in a minute, how many hours are worked without stopping and how much time off is taken.

As to the rating given to claimant's disability, the doctor stated: "That as a result of this microtrauma or injury that we mentioned before and the ensuing fusion that was performed to correct this problem, that Mr. Kalkas has partial permanent physical disability of 10 percent of the body as a whole." (Dep., p. 29 ll. 18-22).

APPLICABLE LAW AND ANALYSIS

The first issue to be determined is whether or not claimant's injury arose out of and in the course of his employment. In order to receive compensation for an injury, an employee must establish that 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 employment, the claimant must also establish the injury arose out of 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).

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 the medical expert may be rejected when the opinion is based upon an incomplete and inaccurate history. Musselman, 261 Iowa 352, 154 N.W.2d 128. The weight to be given to expert opinion is for the finder of fact and that weight 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). The opinions of experts need not be couched in definite, positive, or unequivocal language. Dickinson v. Mailliard, 175 N.W.2d 588 (Iowa 1970).

Expert testimony coupled with non-expert 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).

The problem aspect of the arising out of and in the course issue in this case is whether claimant's injury arose out of his employment. Claimant has not had a specific traumatic event. None is required by Iowa law. Olson v. Goodyear Service Stores, 255 Iowa 1112, 1116, 125 N.W.2d 251, 254 (1963). An employer's liability is not avoided because an employee has sustained no wound or bruise or other hurt of a traumatic character. See Hughes v. Cudahy Packing Co., 192 Iowa 947, 956, 185 N.W. 614, 618 (1921). Claimant's injury process was described by Dr. Margules as microtrauma. Cases involving repetitive injury has long been recognized by this agency. Johnson v. Franklin Manufacturing Co., 34 Biennial Report of the Industrial Commissioner 153 (Appeal Decision 1978) (Dist. Ct. Aff'd); Hemmer v. John Deere Waterloo Tractor Works, 33 Biennial Report of the Industrial Commissioner 207 (1977); Boyd v. American Athletic Equipment Co., 33 Biennial Report of the Industrial Commissioner 199 (1976).

With further refining the issue becomes whether or not Dr. Margules had adequate, accurate information on which to base his opinion.

Dr. Margules' assistant took a history of claimant's troubles developing when he was doing the strip and test job. Claimant said this job necessitated pulling, exerting constant pressure to the left and lifting hoses. Claimant told Dr. Margules his condition was aggravated by hyperextension of the neck and right and lateral rotation and persisted in spite of changing to another job. Dr. Margules depended on claimant for a description of his work and he was certain that he had discussed claimant's work with him and that he had claimant demonstrate movement. He made no notes in his file, however.

Claimant's testimony regarding his work on the braider varied and was inconsistent with that provided by defendants' witnesses. He estimated the weight of the items he lifted at at least twenty pounds. He said both that he worked above his head and that he never fully extended his arms. He thought deck changes would take 40 to 60 minutes. He described the development of the symptoms beginning in March 1982 with numbness in his fingers which eventually went to his hand. Then he had aching in his elbow and dropped things when he raised his hands. Benda, the shift manager, gave the weight of the wire spool lifted as 17 pounds and the cotton one at five. Deck changes by his estimate would take 30 to 40 minutes and would be done from the waist to shoulder level. According to Benda more than half of the worker's time would be spent on monitoring. Woods, industrial relations manager, who initially trained the braider operators, thought that spool changes of 20 to 30 minutes each would require less than two hours of an eight hour shift. Fifty to sixty percent of the operator's time would be spent monitoring. Woods stated that claimant would be working above his head only if he were not following proper procedure.

Benda acknowledged that he had not watched claimant to see precisely how he performed the job. Discrepancies regarding weight are viewed as insignificant in terms of influence on the doctor's opinion in that Dr. Margules said movement not weight was his greater concern. No matter how claimant did the work with the braider, he had to raise his arms to move his neck. Clearly there would be rotational movement. Probably there would be lateral movement. Seemingly there would be either extension or flexion. It is interesting to note that Benda's description of time spent performing various tasks is closer to that given by claimant. Woods' involvement with the braiders happened early on at the time the plant was established. Benda has a more recent closer association with actual performances of the operator's function.

This is a close case. No medical evidence was presented by defendants which rebuts Dr. Margules' opinion, but the undersigned cannot find that the basis for that opinion so deficient as to defeat claimant's claim. Marts v. Firestone Tire & Rubber Co., II Iowa Industrial Commissioner Report 253 (Appeal Decision 1982) (Dist Ct. Aff'd). The record viewed as a whole allows claimant to preponderate.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 10, 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).

The testimony of Dr. Margules makes a causal connection between claimant's injury and his disability.

The parties stipulated to a healing period of April 12, 1982 to September 7, 1982 and that time will be awarded.

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 industrial commissioner has said on many occasions:

> 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 Company, II Iowa Industrial Commissioner Report 39 (1981); Enstrom v. Iowa Public Services Company, II Iowa Industrial Commissioner Report 142 (1981; Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981).

Dr. Margules arbitrarily assigned claimant a ten percent functional impairment. He explained:

> Well, I'll tell you the history of this per cent of disability is the first cervical disc herniation treated by the anterior approach was done in Iowa, it was done in this town by myself. This was in 1959 and none had been done before in the middle west except in Iowa City and we decided with the Professor of Neurosurgery in Iowa City that if we fused two levels of the cervical spine, it would be a fair per cent of disability if you give it 10 per cent partial of the body as a whole. And that's what we arrived to and what we've stuck with since. That hasn't changed really since '59.

No range of motion studies are included in the record. Claimant has complaints in his shoulder, but not in his neck. Dr. Margules diagnosed a shoulder problem, but nothing in the medical evidence places permanent impairment in the shoulders. Claimant's surgery appears to have been successful, but the fact remains he has had surgery. Dr. Margules indicated claimant should not engage in continuous extension or flexion, crank his neck sideways or push a heavy load with his head.

Claimant is a younger worker with a high school education. He appears capable of further training if he wants it. He was able to return to production work in a different position post-surgery without apparent difficulty. Claimant experienced some loss in actual earnings when he was terminated by defendant and took a new job as a truck driver. It is important to remember, however, that industrial disability is loss of earning capacity rather than the amount of salary. Claimant seems motivated to work. He claimed some trouble with soreness in his shoulders. He did not make specific reference to his neck. A side issue presented herein is whether claimant was terminated because of his filing his workers' compensation claim. This deputy commissioner cannot so find. Hostility has developed between claimant and defendant, but overall claimant's job performance gave his employer cause for termination, particularly when his error resulted in excess of four miles of unusable hose. This was not claimant's sole occasion for reprimand. Reprimands occurred prior to his filing a claim for compensation.

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 15 percent industrial disability attributable to claimant's injury in April 1982.

Iowa Code 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, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services.

Payment of the charges of Maurice P. Margules, M.D., will be allowed.

FINDINGS OF FACT

That claimant is in his early 40's.

That claimant is right-handed.

That claimant is a high school graduate with no further training.

That claimant's work experience has been as a production worker and as an over-the-road truck driver.

That in April of 1982 claimant was working on a braider having transferred to that job from work on strip and test.

That claimant had an excision of a herniated disc at C6-7 and a fusion by an anterior approach.

That claimant was released to return to work on September 7, 1982.

That claimant transferred to work as a coverline operator post-surgery.

That claimant currently complains of left-sided weakness and pain in his left shoulder.

That claimant was first warned about the quality of his work post-surgery in October 1982.

That claimant had write-ups prior to his injury.

That claimant does not attribute quality problems to his injury or surgery.

That claimant's petition in arbitration was filed on January 3, 1983.

That claimant was terminated from his employment.

That claimant's gross pay at the time of his termination was $298.00 weekly.

That claimant, at the time of hearing, was working as a truck driver with wages of $230.00 per week.

That claimant notices that he becomes sore in his shoulders and tires as he drives a truck.

That claimant has some permanent functional impairment as a result of his neck surgery.

That claimant is restricted from continuous flexion or extension, cranking his neck sideways or pushing a heavy load with his head.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has established by a preponderance of the evidence an injury arising out of and in the course of his employment in April of 1982.

That claimant has established by a preponderance of the evidence that his injury in April 1982 is a cause of the disability on which he now bases his claim.

That claimant has established entitlement to healing period nefits from April 12, 1982 to September 7, 1982.

That claimant has established a permanent partial industrial sability resulting from his injury in April 1982 of fifteen rcent (15%).

That claimant has established entitlement to benefits under wa Code section 85.27.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay unto claimant healing period benefits om April 12, 1982 to September 7, 1982 at a rate of one ndred seventy-four and 74/100 dollars ($174.74) per week.

That defendant pay unto claimant permanent partial disabil- y benefits for seventy-five (75) weeks at a rate of one ndred seventy-four and 74/100 dollars ($174.74) commencing on ptember 7, 1982.

That defendant pay charges of Marice P. Margules, M.D., taling two thousand four hundred five dollars ($2,405.00).

That defendant pay interest pursuant to Iowa Code section .30 as amended.

Signed and filed this 12th day of January, 1984.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DIS KECK and THE WEBSTER NTY CLERK OF COURT AS STEE FOR ALL MINORS,	:	File No. 731016
Claimant,	:	O R D E R F O R
	:	E Q U I T A B L E
SS TRUCK LINE,	:	A P P O R T I O N M E N T
Employer,	:	
T WEST CASUALTY COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This matter came on for hearing at the offices of the Iowa Industrial Commissioner in Des Moines, Iowa on April 30, 1984 at which time the record was closed.

The record consists of the testimony of Kandis Keck, Richard Jones and Deborah Keck; claimant's exhibits 1 and 2; claimant's exhibits A, B, C and D; and defendants' exhibit 1.

ISSUE

The issues for resolution are:

1. The rate of compensation; and

2. Apportionment of benefits among the survivors.

STATEMENT OF THE EVIDENCE

Claimant's decedent, David Keck, was employed by Jones Trucking Company on April 14, 1983 when he sustained an injury arising out of and in the course of employment which resulted in death. Decedent was survived by his wife, Kandis Keck. One child was born of this marriage, Rhianna Raye Keck, born November 21, 1983. Claimant's decedent had been married before. He married Deborah Keck on July 17, 1971. The marriage was dissolved November 17, 1978. Michael Keck was born of this marriage on May 15, 1974.

Kandis Keck testified that she has not remarried. She is employed and lives with her daughter. She testified that she gets social security survivor's benefits. The witness testified that decedent became employed by defendant employer shortly before his death. Prior to the employment decedent was employed by another trucking company, Thede. Claimant's decedent averaged $377 a week when he was employed by Thede.

Richard Jones is proprieter of Jones Trucking. He testified that decedent became employed shortly before the injury which caused decedent's death. Decedent was paid $.17 per mile gross and it was anticipated that the gross per mile would be raised after two months. Although decedent was expected to drive 2,000 miles per week, claimant's decedent drove less than 2,000 miles a week in each of the three weeks he was employed. The average earnings were $356.80, a figure arrived at by averaging the earnings of a number of employees over a six month period. The record fairly indicates that decedent drove about 1,690 miles per week during each of the prior weeks. This would average a $293.80 wage since eight weeks would be paid at $.17 and five weeks at $.18 per mile.

Deborah Keck, age 32, is the former wife of decedent and mother of their child, Michael. She has not remarried. She is employed by the United States Postal Service. She testified that the marriage between herself and decedent was terminated in 1978. The witness obtained custody and a judgment for child support of $125 per month. Exhibit D shows that decedent did make some payments to the Clerk of Court. Decedent was in arrears, but was able to make at least some payment of the ordered support. The witness indicated that in addition to her salary as a postal worker, she receives social security survivor's benefits.

The documentary evidence submitted indicates that the average driver could be expected to make $356.80 per week during his first six months of hire. The record indicates that the sampling may have been random, but not representative.

APPLICABLE LAW

1. Sections 85.2 and 85.30, Code of Iowa, confer jurisdiction upon this agency in workers' compensation cases.

2. 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).

3. Section 85.31(1), Code of Iowa, provides in pertinent part:

> 1. When death results from the injury, the employer shall pay the dependents who were wholly dependent on the earnings of the employee for support at the time of his injury, during their lifetime, compensation upon the basis of eighty percent per week of the employee's average weekly spendable earnings, commencing from the date of his death as follows:
>
> a. To the widow or widower for life or until remarriage, provided that upon remarriage two years' benefits shall be paid to the widow or widower in a lump sum, if there are no children entitled to benefits.
>
> b. To any child of the deceased until the child shall reach the age of eighteen, provided that a child beyond eighteen years of age shall receive benefits to the age of twenty-five if actually dependent, and the fact that a child is under twenty-five years of age and is enrolled as a full-time student in any accredited educational institution shall be a prima facie showing of actual dependency.
>
> c. To any child who was physically or mentally incapacitated from earning at the time of the injury causing death for the duration of the incapacity from earning.
>
> d. To all other dependents as defined in section 85.44 for the duration of the incapacity from earning.

4. Section 85.42, Code of Iowa, provides:

> 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.

5. Section 85.36(7) and (8) provide:

> 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 customany 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:
>
> ....
>
> 7. In the case of an employee who has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, his weekly

earnings shall be computed under subsection 6, taking the earnings, not including overtime or premium pay, for such purpose to be the amount he would have earned had he been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.

8. If at the time of the injury the hourly earnings have not been fixed or cannot be ascertained, the earnings for the purpose of calculating compensation shall be taken to be the usual earnings for similar services where such services are rendered by paid employees.

ANALYSIS

Based on the principle enunciated, it is found that claimant's decedent died of injuries which arose out of and in the course of employment. The chief issues in this case revolve around to whom the compensation is to be paid and the amount of the weekly compensation.

Insofar as the dependency issue is concerned, the law indicates that a natural child is conclusively presumed dependent. The prehearing pleadings in this case indicate that there may have been some question as to whether Rhianna was decedent's daughter. The law presumes the legitimacy of a child born in wedlock. The presumption is by clear strong and satisfactory evidence. In re Marriage of Schneckloth, 320 Iowa 535 (Iowa 1982). This presumption has not been overcome and Rhianna has hereby been found to be decedent's natural child. As a practical matter, Rhianna's legitimacy only is of issue if her mother, as surviving spouse, remarries or dies. Be this as it may, the evidence of record still indicates that Rhianna is the natural child of decedent. In fact, the record also indicates that Rhianna was totally dependent upon claimant at the time of his death. In support of this finding is the fact that Kandi was unemployed and decedent was providing sole support for his family at the time he passed away.

The rate of compensation is the next issue to be discussed. If decedent had lived and driven 1,690 miles per week, the decedent's pay would have been $293.80. The increased per mile payment is taken into account.

The average driver, however, could be expected to make $356.80 during his first six months' employment. Whatever one may say about the figure representativeness, the testimony of Mr. Jones indicates that the sample is random. The Code incicates that decedent, having been in his employ for less than thirteen weeks, should have his gross weekly wage computed by considering the amount he would have earned had he been so employed. The employer's records in this regard are the most reliable index as to what decedent's wages would be had he been employed. Subsection 7 of section 85.36 seeks to find a basis of compensation which is fair and based upon a realistic notion of reasonable expectation. Although a projection of what claimant might have made can be garnered and projected by the use of 1,690 miles per week as a base, the testimonial evidence indicates that claimant was anticipated to have driven 2,000 miles per week. The average for the 1,690 miles yields a gross weekly wage of $293.80.

The fairest of all rates presented includes ten weeks at the rate of $356.80 and three weeks at the rate for which decedent was paid for his short employment with this defendant. The rate of compensation is based then upon a $333.96 gross weekly wage and a rate of $214.94, which is based upon the fact that decedent was married and entitled to four exemptions. It is noted that claimant's prior employment earnings were $377.75.

The proceeds shall be divided into thirds. One-third shall be paid to Michael Keck through the Webster County Clerk of District Court in Fort Dodge. Another third shall be paid to Kandis Keck as surviving spouse. Another third shall be paid to Rhianna Keck through the Woodbury County Clerk of District Court in Sioux City. Upon the disqualification for benefits by any recipient, the remaining recipient shall share the total compensation due equally. If another recipient becomes disqualified, the remaining recipient shall receive the total compensation due.

FINDINGS OF FACT

1. Claimant's decedent, David L. Keck, was employed by Jones Truck Line on April 14, 1983.

2. Decedent sustained an injury while working for his employer on April 14, 1983.

3. Claimant's decedent died as a result of the injury of April 14, 1983. The death occurred April 15, 1983.

4. David LeRoy Keck was legally married to Kandis Keck at the time of his death.

5. David LeRoy Keck was the father of Rhianna Keck.

6. Rhianna Keck was totally dependent upon David LeRoy Keck April 14 and 15, 1983.

7. David LeRoy Keck was the natural father of Michael Keck.

8. David LeRoy Keck's gross weekly wage was three hundred thirty-three and ninety-six dollars ($333.96).

9. The rate of compensation is two hundred fourteen and 94/100 dollars ($214.94)..

CONCLUSIONS OF LAW

1. This agency has jurisdiction over the parties and the subject matter.

2. Claimant's decedent was employed by defendant employer on April 14, 1983.

3. Claimant's decedent sustained an injury arising out of and in the course of his employment on April 14, 1983.

4. Claimant's decedent died as a result of the injury arising out of and in the course of employment.

5. Michael Keck and Rhianna Keck are conclusively presumed dependent.

6. Defendants will be ordered to pay two hundred fourteen and 94/100 dollars ($214.94) per week to the dependents of David LeRoy Keck according to the following fair and equitable appotionment:

One-third of the death benefits shall be paid to the Clerk of District Court of Woodbury County on behalf of Rhianna Keck, conclusively presumed dependent.

One-third of the death benefits shall be paid to Kandis Keck as surviving spouse.

One-third of the death benefits shall be paid to the Clerk of District Court of Webster County on behalf of Michael Keck, conclusively presumed dependent.

If any recipient becomes disqualified for benefits, the other two recipients shall share equally in the weekly compensation. When two recipients become disqualified, the remaining benefits shall be paid entirely to the remaining recipient.

ORDER

IT IS THEREFORE ORDERED that defendants pay the dependents of David LeRoy Keck death benefits at the rate of two hundred fourteen and 94/100 dollars ($214.94) per week in the above indicated manner.

Defendants are further ordered to pay the one thousand dollar ($1,000.00) funeral benefit and the assessment to the Second Injury Fund.

Defendants are further ordered to pay the following medical expenses:

Community Memorial Hospital and Nursing Home	$ 367.10
St. Mary's Hospital	855.73
Mayo Clinic	2,028.50
Osland Ambulance	181.80

Accrued amounts are to be paid in a lump sum together with statutory interest pursuant to section 85.30, Code of Iowa, from the date said payments become due.

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

Defendants are to file interim status reports as required.

Costs of this proceeding are taxed to defendants pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this _____ day of May, 1984.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLINTON KELLY,	:	
Claimant,	:	
	:	File No. 689852
vs.	:	
	:	A P P E A L
WILSON FOODS CORPORATION,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

Claimant appeals from a proposed review-reopening decision in which he was denied further benefits as a result of a work related injury of December 1, 1981. The record consists of the pleadings of the review-reopening proceeding; transcript of the hearing together with claimant's exhibit 1 and defendant's exhibit A; and the appeal briefs of the parties.

ISSUES

Claimant states the issues on appeal thus:

1. The Hearing Officer errored [sic] in failing to penalize the company for failure to issue an Auxier letter.

2. In the face of unanimity by all doctors that Claimant's physical problems were either "work related" or "work aggravated", and, in the face of undisputed constant pain since such work related aggravation, the Hearing Officer errored [sic] in failing to find that Claimant had met his burden of proof in showing causal connection of his work with his medical problems.

3. In the face of uncontradicted testimony as to the Claimant's substantial degree of disability, both functional and industrial, the Hearing Officer errored [sic] in failing to award Claimant substantial industrial disability.

REVIEW OF THE EVIDENCE

The evidence was well summarized by the deputy in the review-reopening decision and will not be repeated herein.

APPLICABLE LAW

In Auxier v. Woodard State Hosp.-Sch., 266 N.W.2d 139, 142-143 (Iowa 1978), the court stated:

> We hold, on the basis of fundamental fairness, due process demands that, prior to termination of workers [sic] compensation benefits, except where the claimant has demonstrated recovery by returning to work, he or she is entitled to a notice which, as a minimum, requires the following:
>
> [1] the contemplated termination,
>
> [2] that the termination of benefits was to occur at a specified time not less that 30 days after notice,
>
> [3] the reason or reasons for the termination,
>
> [4] that the recipient had the opportunity to submit any evidence or documents disputing or contradicting the reasons given for termination, and, if such evidence or documents are submitted, to be advised whether termination is still contemplated,
>
> [5] that the recipient had the right to petition for review-reopening under §86.34.

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 1, 1981 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).

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

The burden of persuasion on the issue of causation is on the claimant and does not shift. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976).

ANALYSIS

Regarding the first issue claimant was receiving workers' compensation benefits until he return to work on January 17, 1982. Claimant was unable to perform the assigned work after the first day. He was then placed on sick leave which he drew until August 1982. Claimant's action was served February 12, 1982. The form 2 filed in this case indicates the last payment of workers' compensation benefits was made February 14, 1982.

Due to the fact that claimant was aware of his rights and exercised those rights as well as the fact that claimant was not put loose with no payments at all but received some six months of sick leave benefits the fundamental fairness-due process provisions of the Auxier decision would appear to have been satisfied.

On the second issue claimant did indeed sustain a work related aggravation of a preexisting condition. Such aggravation, however, resulted in only temporary disability. Claimant has a preexisting internal condition that predisposes him to painful symptoms when he performs work that requires him to do repetitive bending, stooping lifting or prolonged standing. This type of situation does not result in work related disability except for the period of time the work induced symptoms prevent employment. The disabling symptoms related to claimant's employment terminated January 17, 1982. Although claimant was unable to return to his prior employment this was due to the preexisting condition rather than the symptoms caused by the temporary aggravation.

Claimant contends the burden of proof shifts to the defendant once the claimant establishes a prima facie case for compensation. No authority is cited in favor of such proposition. Authority to the contrary is readily available. As the court stated in McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976) at page 908:

> The words "burden of proof" may refer to the burden of producing evidence or the burden of persuading the fact finder. See McCormick, Evidence (2d ed.) §336 at 783-785. Apparently the district court in reversing the Commissioner's decision was not thinking of the burden of producing evidence, for the employer did produce evidence. The district court must have been of the view that the other burden of proof, the burden of persuasion, passed to the employer when claimant made a prima facie case, and that the Commissioner erred in thinking claimant continued to have the burden of persuasion.
>
> The burden of persuasion, however, does not shift. McCormick, Evidence (2d ed.) §336 at 784. If the proponent of a proposition generates a fact issue and his adversary adduces no proof, the adversary simply takes the risk of having the fact finder find that the proponent of the proposition sustained his burden of persuasion. Id. §338 at 791-792 ("the proponent will not be entitled to the direction of a verdict in his favor on the issue, but rather the court will leave the issue to the decision of the jury. . . . If [the proponent] had remained silent at the outset he would irrevocably have lost the case on this issue, but the only penalty now applied to his adversary is the risk, if he remains silent, of the jury's finding against him, though it may find for him.")
>
> ....
>
> Applying these principles to the present case, claimant had the burden of persuasion on the issue of causation, and that burden did not shift. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa); Bodish v. Fischer, Inc., 257 Iowa 516, 520, 133 N.W.2d 867, 869 ("claimant's burden does not shift").

As indicated in the discussion regarding the second issue the disability related to claimant's injury with defendant employer was temporary in nature. That claimant has an industrial disability is not disputed. He had one when he first went to work for defendant. That claimant has an industrial disability related to an injury while employed with defendant is substantially disputed and as found by the deputy, with concurrence herein, not established by a preponderance of the evidence.

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

WHEREFORE, the proposed decision is adopted as the final agency decision with the further findings and conclusions contained herein.

FINDINGS OF FACT

Claimant was not denied due process by any alleged failure of notice regarding termination of benefits.

That on or about December 1, 1981 the claimant sustained a personal injury which both arose out of and in the course of his employment.

That on March 5, 1963 a diagnosis of "possible injury to disc at L3-L4" was reached.

That on April 27, 1977 a diagnosis of "marked narrowing of the L5 intervertebral disc based with moderate degenerative changes" was made.

That in 1977 a diagnosis of "back pain" was made by Dr. Bradley Berman, M.D.

That the claimant sustained a work related injury in 1977 while employed by this employer, that injury being to the claimant's low back. The claimant has continued to have residual problems in that area of his body since the date of that 1977 injury.

That the claimant has not demonstrated by a preponderance of the evidence that his present complaints were caused or aggravated by a work incident in December 1981.

CONCLUSIONS OF LAW

Claimant has failed to sustain his burden of proof and has not established a causal relationship between the injury of December 1, 1981 and his present disability.

Claimant is not entitled to any additional benefits for alleged denial of due process.

ORDER

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

The costs of the review-reopening hearing are taxed to defendant and the costs of the appeal are taxed to claimant.

Signed and filed this 29th day of December, 1983.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL KELLY,	:	
Claimant,	:	File No. 700314
vs.	:	R E V I E W -
KEOKUK STEEL CASTING,	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
CONTINENTAL INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Michael Kelly, the claimant, against his employer, Keokuk Steel Casting, and the insurance carrier, Continental Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on March 4, 1982. This matter came on for hearing before the undersigned at the Henry County Courthouse in Mount Pleasant, Iowa on October 13, 1982. The record was considered fully submitted on November 29, 1982.

On May 13, 1982 defendants filed a first report of injury concerning the March 4, 1982 injury. On May 27, 1982 defendants filed both a memorandum of agreement indicating that the weekly rate for compensation benefits was $157.97 and a final report indicating that 8 3/7 weeks of temporary total disability (March 5, 1982 through May 2, 1982) had been paid pursuant to the memorandum of agreement.

The record consists of the transcribed testimony of the claimant, of Dr. Marc Joseph Williams, and of George Michael Adams; claimant's exhibit 1, a packet of varied medical reports; defendants' exhibits A through S, varied medical reports; defendants' exhibit T, memorandum of agreement for May 17, 1977 injury; defendants' exhibit U, claimant's employment history with defendant employer; defendants' exhibit V, minutes for May 2, 1980 meeting; defendants' exhibits W and X, interoffice correspondence dated June 25, 1980 and June 27, 1980; and defendants' exhibit Y, request for action by payroll department dated June 27, 1980. Claimant's exhibits 2-8, x-rays, were marked but not offered.

ISSUE

The issue to be determined is whether the claimant is entitled to permanent partial disability benefits.

REVIEW OF THE RECORD

Claimant testified that while he was performing his work as a grinder on March 4, 1982, a 700 pound casting struck him in the back, throwing him into a table, and then slid down his leg and ankle. He recalled jerking his neck when the casting pushed him. Claimant was taken to first aid where an air bag was applied to his leg to prevent swelling and was next transported to the Keokuk Area Hospital by ambulance. X-rays of the lumbar spine and right ankle yielded normal findings. The hospital records document that claimant was complaining about both ankle and back pain at that time. Likewise, in office notes for March 5, 1982, Robert R. Kemp, M.D., noted that the claimant had swelling of the ankle and calf and that the lumbosacral area was traumatized.

Since claimant's leg symptoms persisted, an x-ray of the tibia and fibula was taken on March 9, 1982. The diagnostic tool revealed a non-displaced fracture through the midshaft of the fibula. Accordingly, Dr. Kemp applied a plaster splint to the lower right extremity. A follow-up x-ray on April 16, 1982 indicated that the fracture was healing and was in good alignment. Claimant began to complain of neck pain on March 17, 1982 and on subsequent dates. A cervical spine x-ray conducted on April 22, 1982 showed normal cervical lordosis, well aligned cervical vertebral bodies, well maintained intervertebral disc spaces, no encroachment upon the neural foramina and normal pre-cervical soft tissues. (Claimant explained that he waited awhile to report the neck complaint because he wanted to be sure it was more than just a passing ache or pain.)

Apparently claimant also complained about passing blood sometime in March of 1982. Dr. Kemp ordered tests run at Keokuk Area Hospital on March 19, 1982. Dr. Kemp's diagnosis was that claimant suffered from old inflammatory changes of the duodenal bulb and that no active prosias was identified. Dr. Kemp subsequently referred the claimant to Wilson L. Davis, M.D., who reported to Dr. Kemp in a letter dated July 30, 1982:

> I saw your patient, Mr. Mike Kelly in the office today. You are well aware of his history and I will not repeat it here. In brief, he was injured in an industrial accident on March 4th, 1982 and since the day after the accident has complained of abdominal bloating and fullness, particularly while sitting and not related to meals. He had an upper GI on March 19th showing old inflammation in the duodenum and he had a normal barium enema. He has passed bright red blood per rectum on two occasions, three days after his accident and about one week ago. The remainder of his history is negative. His examination is remarkable for very mild tenderness in the epigastrium and right upper quadrant. There is no tympani, masses or organomegaly by my examination today.
>
> My impression is that the patient has abdominal bloating and discomfort of unknown etiology. I am unable to relate this to his accident. I would consider gastritis, duodenitis, or peptic ulcer disease, gallbladder disease or colitis. I think much less likely is chronic pancreatitis. He may also have food intolerance such as milk products or caffeine.
>
> My recommendation was that if the discomfort is sufficient enough he should undergo further diagnostic testing, which might include serum amylase, chem profile, upper GI, panendoscopy and proctoscopy. Ultrasonography of the gallbladder could be done if these tests were all normal. The patient expressed a desire to think about this and said that he would be discussing them with you.
>
> (Defendants' exhibit Q.)

On April 29, 1982 Dr. Kemp released the claimant to return to work on May 3, 1982. In office notes for May 14, 1982, Dr. Kemp remarks that claimant's fracture had healed at least 75% and was of minimal significance since the location of the break was not a weight bearing area. Dr. Kemp further commented that he found it difficult to relate the claimant's complaints of back, neck and stomach pain to the work injury. His opinion remained unchanged after he saw the claimant on September 8, 1982. However, he did acknowledge that claimant's back complaints were ongoing and therefore recommended claimant consult with a specialist.

Jerry L. Jochims, M.D., evaluated the claimant on July 27, 1982 at the request of the defendants. He received a description of the injury from the claimant which was essentially consistent with the record. Dr. Joachims set forth his examination findings and impresson in a report prepared on the date of the examination.

> (I) performed range of motion evaluation of his cervical, dorsal and lumbar spine, all of which demonstrated findings totally within normal limits. There was no evidence of local tenderness on palpation and percussion over the posterior spinous processes of any of these vertebra and flexion, extension and rotatory motions and lateral bending were all within normal limits. Straight leg raising was totally within normal limits. Gross motor testing of the lower extremities demonstrated 5+ motor strengths in all major motor groups as well as a normal evaluation of 5+ motor strengths in the uppers. Reflexes in the biceps, triceps, patellar and ankle areas were all within normal limits and symmetrical in their intensity. No evidence of asymmetry of muscle masses of the quads or thighs on circumferential measurement. Similarly, no changes of muscle mass in the upper extremities in arm or forearm evaluation. Ranges of motion of the shoulders, elbows and wrists were within normal limits.
>
> Of special note is that while examining the patient's lower extremities in his recumbent position, he semi-sat up and held his head and neck up, chatting freely throughout the exam. Later, I did a rectal examination which was entirely within normal limits and while he was waiting for me to write notes, he seemed to lay comfortably on the examining table, semi-twisted, resting his head on his elbow.
>
> Xrays of his dorsal and lumbar spine were entirely within normal limits with no evidence of disc space narrowing. There certainly is no "vertebra" out of place in any of these areas. I did not obtain cervical spine xrays since I felt his motion and neurological examination were so normal that they were not indicated as well as my having the impression that he previously had had cervical spine films done elsewhere. The report of those films comes from Keokuk Area Hospital, dated 4/22/82, demonstrating normal findings.
>
> Examination of the right lower leg demonstrates a little induration in the muscle mass of the posterolateral calf area. I reviewed xrays of that area done here in the office which demonstrate a healed nondisplaced fracture of the mid-shaft of the right fibula. This was not a displaced fracture.
>
> Ranges of motion again in the knees and ankles are within normal limits. Plantar callosities are not present with the skin smooth and symmetrical, comparing the two feet.
>
> It is my impression that this gentleman has no permanent partial impairment as a consequence of the alleged injury of March 4, 1982. The mid-shaft fibular fracture is healing nicely and is not a fracture which I would consider to be unstable. There is no evidence of change in the ankle joint radiographically in that the joint and mortise are well perserved [sic]. The exam is totally normal. The patient's subjective complaints far outweight [sic] any objective findings whatsoever and I find that he is a normal, well-developed, Caucasian male who is ready and fit at this time to return to any and all types of labor.
>
> (Defendants' exhibit P.)

In a letter dated August 2, 1982 and addressed to defense counsel, Dr. Jochims repeated his conviction that claimant had no permanent disability:

> In essence, my summary would indicate that he did not sustain a permanently disabling type of injury and my suspicion is that he has been guided into this atrocious parade through chiropractic offices in an attempt to perpetrate a secondary gain. I found him to be the most healthly [sic] 33

year old male I have examined in many months. As I review your file of notes which you forwarded to me, I have no hesitancy in rendering an excellent prognosis if this gentleman is returned to gainful employment as soon as possible. The longer he is allowed to perpetrate the disability profile and extend his medical benefits or work comp benefits in the light of layoff, the more refractory he will be to total rehabilitative efforts.

(Defendants' exhibit R.)

Dr. John L. Barakat, a chiropractor, saw the claimant on April 28, 1982 for complaints of pain between the shoulders referrable to the work injury. Dr. Barakat set forth his findings and recommendations in a report dated July 1, 1982 and addressed to defense counsel:

Musculoskeletal Examination:

Palpation of cervical and thoracic spine revealed tenderness of paravetebral muscles bilaterally from C7 to T2.

Cervical range of motion revealed the following: Lateral flexion - Pain and limit (Rt.). Muscle weakness with right lateral flexion.
Brachioradialis, biceps, and tricep reflexs [sic] were active and equal, bilaterally.

All orthopedic and neurologic tests were essentially negative.

Roentgenological Findings:

Radiographs of cervical and upper thoracics were taken at this clinic on April 28, 1982. The following views were taken: A-P Cervical, Thoracic, and Lateral Cervical.

The Lateral study revealed a reversal in the normal curvature of the cervical spine.

The A-P and Lateral studies revealed normal bone trabeculae with no apparent fracture or osseous pathology.

Diagnosis:

Acute cervico-thoracic strain with myalgia.

Treatment:

Spinal manipulation of cervical and thoracic vertebrae. The patient also received hydroculator hot pack treatments to the paravetebral musculature of cervical and thoracic spine.

Prognosis:

I am unable to give an accurate prognosis, since patient was only seen once at this clinic. The patient has been released from my care, and he was advised for his own convenience to seek chiropractic care from a practitioner close to his residence.

(Defendants' exhibit O, page 2.)

Marc J. Williams, D.C., who has been in practice twelve years, testified that he first examined the claimant on April 30, 1982 at the request of claimant's counsel. He received a history from the claimant that was essentially consistent with the record. His initial examination revealed findings of limited range of motion upon flexion, extension, left lateral flexion and right lateral flexion of the cervical spine and upon all but flexion of the dorso-lumbar spine. Dr. Williams treated the claimant with manual manipulations throughout the month of May of 1982.

Dr. Williams last evaluated the claimant on October 10, 1982, at which time he found the only abnormal range of motion studies to be those of right lateral flexion of the cervical spine (20 degrees instead of 40--the same finding as on April 30, 1982) and of dorso-lumbar extension (10 degrees instead of 30 degrees--a loss of ten degrees since the April examination). X-rays taken on that date and compared to those taken at the time of the first examination revealed narrowing of disc spaces and some swelling in the alignment area of the cervical spine, loss of mobility at L4/L5 and signs of stress at L3. Dr. Williams acknowledged that he had not seen any other x-rays, except those taken by Dr. Jochims. He speculated that Dr. Jochims' x-rays were taken in a lying down position and noted that his x-rays were taken with the patient standing in what he called a stress position. Dr. Williams also related that the only medical report he had reviewed was that of Dr. Barakat.

Dr. Williams opined that claimant suffered a hyperflexion hyperextension injury at work on March 4, 1980, which resulted in a 20% functional impairment based on the AMA Guides. Dr. Williams acknowledged to the defense counsel that he had no medical training, was not a member of the AMA and had not received instruction in the use of the Guides by any medical doctors. However, Dr. Williams countered by stating that he had used the Guides on prior occasions, had received training in reading the Guides from other chiropractors and previously has been qualified to testify regarding such ratings in Iowa District Courts.

At the time of the hearing, claimant testified that he had not returned to work since the date of the injury. A company layoff, which began prior to his release to return to work, was in existence. Claimant indicated that he generally does less than before the injury because all activity he has attempted is painful. Claimant concluded that despite the fact he has not returned to work, he would not be able to maintain his previously high level of production.

Claimant, who is in his early 30's, has a high school education and received electrical training while in the marine corps. Claimant testified that he was employed at the Iowa Army Ammunition Plant until being fired for missing work. He was a production worker for both Fruehauf and for Sheller Globe; he was fired by the former for tardiness and by the latter for fighting with another employee. Claimant acknowledged that he has been fired by defendant employer on two occasions and rehired with time off as the penalty. (Defendants' exhibit V.) He received an oral warning regarding low production on June 25, 1980 and was suspended for poor workmanship on June 27, 1980. (Defendants' exhibits W, X and Y.) Claimant had no recollection of receiving time loss benefits for a May 17, 1977 injury to his right little finger, which was documented under Industrial Commissioner File No. 470497.

George Michael Adams, personnel director for defendant employer's Keokuk operation, verified that claimant has not been recalled to work because of a reduction in the work force and his respective seniority date. Mr. Adams acknowledged that a poor record and impairment rating would lessen one's employability and that claimant's recall would be by operation of the collective bargaining agreement.

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, 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.

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). 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

The weight of the medical evidence fails to support finding that claimant sustained any permanent impairment as a result of the March 4, 1982 injury. The opinions of Dr. Kemp and Dr. Jochims are entitled to more credence than the opinion of Dr. Williams (Dr. Barakat did not render a conclusive opinion on permanency) not merely because of their superior credentials and mutual corroboration, but because the record as a whole is more compatible with their conclusions.

While the injury as described by the claimant appears to have been severe, x-rays of his lumbar spine (taken at the time of the injury) and of his cervical spine (taken on April 22, 1982 after he complained of neck discomfort) were normal. Dr. Barakat took x-rays on April 28, 1982 and reported that claimant had a reversal of the cervical spine. However, that he apparently examined only the cervical and upper dorsal spine (probably because claimant's complaints were limited on that date to pain between the shoulders) and found restricted motion only upon right lateral flexion is of importance because two days later Dr. Williams found limitation of cervical motion in all directions as well as limitation of all but flexion of the dorsal-lumbar spine (claimant's complaints were more extensive on April 30, 1982). That claimant was released to return to work by Dr. Kemp on the intervening day cannot be overlooked. Finally, examination and x-ray of the dorsal and lumbar spine taken by Dr. Jochims on July 27, 1982 supported Dr. Kemp's earlier conclusions. Dr. Jochims' explanation that additional cervical x-rays were not necessary in light of his examination findings appears rea sonable.

Claimant implies that Dr. Kemp and Dr. Jochims did not take his complaints seriously nor examine him as thoroughly as Dr. Williams. Such allegation, even if accepted as true, would not enhance Dr. Williams' opinion which was based on claimant's complaints, on a review of only Dr. Jochims' x-rays and Dr. Barakat's report and on his own examinations and x-rays. Clearly his findings and conclusions were contradicted by those of Dr. Kemp and Dr. Jochims and were minimally consistent with those of Dr. Barakat.

It should also be noted that the record did not contain evidence of permanency resulting from the leg fracture or from the abdominal complaints. The latter were not even related to the injury by the evidence. Likewise, the record would not support an award of industrial disability under the McSpadden-Blacksmith rationale since claimant's inability to return to work is related to a general reduction in defendant employer's work force.

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 right ankle sprain, a non-displaced fracture through the midshaft of his right fibula and contusion of the lumbosacral area on March 4, 1982, when a 700 pound casting struck him in the back, pushing him into a table before sliding down his leg; claimant complained of neck pain two weeks after the injury.

FINDING 2. Claimant was released to return to work on May 3, 1982 but has been on layoff status since due to a general reduction in defendant employer's work force.

FINDING 3. Claimant has not sustained permanent impairment as a result of the March 4, 1982 injury.

CONCLUSION A. Claimant is not entitled to an award of industrial disability.

ORDER

THEREFORE, IT IS 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 _____ day of September, 1983.

LEE M. JACKWIG
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LORAS J. KEMP, Claimant, vs. FLEXSTEEL INDUSTRIES, INC., Employer, and EMPLOYERS INSURANCE OF WAUSAU, Insurance Carrier, Defendants.	File No. 622022 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 Loras J. Kemp, claimant, against Flexsteel Industries, Inc., employer, and Employers Insurance of Wausau, insurance carrier, for the recovery of further benefits as the result of an injury on December 21, 1979. A hearing was held before the undersigned on February 24, 1983. The case was considered fully submitted upon receipt of claimant's brief on March 11, 1983.

The record consists of the testimony of claimant, Dennis Heidenrich, Constance Kemp, Catherine Jean Kriebs, and James Schiltz; claimant's exhibits 1 throught 23, and 26 through 28; and defendants' exhibits 1 through 19.

ISSUES

The issues presented by the parties at the time of the pre-hearing and hearing are whether there is a causal relationship between the alleged injury and the disability on which claimant is now basing his claim; the extent of healing period and permanent partial disability benefits he is entitled to; and a question as to claimant's rate.

FACTS PRESENTED

Claimant received an injury arising out of and in the course of his employment with defendant employer on December 21, 1979 when, while driving back from a trip to California he was involved in an accident with a car near Reno, Nevada. Claimant testified he bounced around behind the steering wheel and opined he was in a state of shock. Claimant stayed in a motel room in Reno and then flew home. Claimant indicated that when he got home he went to sleep but became sore and stiff. On December 26 claimant reported to work and was seen by L. C. Faber, M.D. Claimant revealed that Dr. Faber took x-rays, and gave claimant physical therapy and medication three times a week for a month. Claimant disclosed that he did not return to work and stated that he continued to have low back pain with radiation down his left leg. In February, claimant was hospitalized and a myelogram was performed. Claimant stated that when he was released to go back to work on March 24, 1980 he received a layoff notice.

Claimant testified that shortly after being released to return to work he started working for another truck company as an over-the-road driver. Claimant indicated this job required lifting and his back did not improve. Claimant disclosed he was terminated in September 1980 when he refused to hire someone else to unload the truck of frozen meat and did not feel he could do it himself. Claimant revealed that he has not driven since.

Claimant testified he has tried to get employment. Claimant did not work in 1981 and worked for two months in 1982 at a minimum wage position making popcorn and change. Claimant stated he has looked for jobs as a dispatcher and has been instructed by doctors not to drive a truck. Claimant does not feel he could drive a truck at this time without pain. Claimant testified he still has low back and leg pain and that he has not experienced a change in his condition. Claimant stated he uses a TENS unit sixteen to eighteen hours a day.

Claimant became employed as a trainee dispatcher for A. G. Truc and presently is dispatcher and manager and presently receives a salary of $20,000.00 per year.

On cross-examination, claimant revealed that doctors have not operated on his back and are not contemplating on doing so.

Dennis Heidenrich testified he is an over-the-road truck driver and once drove for defendant employer. Mr. Heidenrich stated that the job of over-the-road truck driving requires a lot of lifting.

Tyrone Freese, who testified by way of deposition, stated he is a truck driver for defendant employer and drove with claimant. Mr. Freese revealed that he was with claimant at the time of the accident on December 21, 1979. Mr. Freese stated that the accident bounced him around a lot. Mr. Freese indicated that drivers were paid by the mile when driving and by the hour when unloading. Mr. Freese described the job requirements.

On cross-examination, Mr. Freese disclosed that he did not recall that claimant ever complained about his back prior to the injury. On redirect examination, Mr. Freese indicated that claimant complained of a bump on his back the Monday following the accident.

Constance Kemp testified that she is claimant's wife and stated she noticed claimant had a mark on his back when he came home after the accident. Mrs. Kemp indicated that the injury affected claimant's sleeping and the chores he did around the house.

Scott C. McCuskey, M.D., who testified by way of deposition, indicated he is an orthopedic surgeon and first examined claimant on February 29, 1980. Dr. McCuskey stated:

> Q. What was your diagnosis?
>
> A. My diagnosis during the first visit after examining him, and I also had his X rays from Finley Hospital, including the myelogram to look at at that state, was I thought he had a strain of the sacroiliac joint on the left side and also I raised the question of some extra-articular irritation of the lower back area with some muscle sprain in that same area. I did not feel that he had either a pinched nerve or herniated disk or any fractured bones.

Dr. McCuskey revealed that claimant's pain did not respond to rest and heat. Dr. McCuskey disclosed that he originally felt claimant could continue being a truck driver but changed his mind over time. Dr. McCuskey opined that claimant's condition has improved and is stabilized at this time. Dr. McCuskey stated:

> Q. Have you advised him or have you placed some limitations on what type of work and what amount of work he should do?
>
> A. Yes, I have.
>
> Q. Can you tell us what those are, Doctor?
>
> A. Yes. I advised him that activities that would put a large strain on his back, primarily lifting, lifting heavy weights, roughly thirty-five pounds or greater, that repetitive stooping or bending would be specific activities that would be hard on his back. I also mentioned directly driving a truck or any vehicle for long periods of time as this also tends to put a lot of the work on the back and would not be beneficial.

Dr. McCuskey opined claimant has a permanent impairment of ten percent as of August 17, 1981. Dr. McCuskey described claimant's injury as a soft tissue injury. Dr. McCuskey disclosed that he sent claimant to be examined in Iowa City and treated. They also rated claimant's impairment at ten percent. Dr. McCuskey opined claimant reached his maximum improvement in February 1982.

J. Nemmers, M.D., in a report dated February 11, 1980 stated:

> PI: This man was involved in a truck accident while driving for Flexsteel in December 1979 and he had to take the ditch to avoid a head on collision and got along all right [sic] for a few days and then about 3 days later had back pain and some pain in the left leg which seems to be in about the L4-L3 dermatome. The pain goes down the anterior thigh and across the front of the knee across the front of the knee down the left pretibial area into his foot. He also gets numbness in the foot. He has pain in the low back. He has not worked since the injury.
>
> Physical examination shows about 50% limitation of lumbar motion and possibly a little more. His pain in the back is inconsistent. His leg signs are

negative and the neuro exam of the lowers is negative. Routine views of the lumbar spine show pre-existing narrowing of the lumbosacral disc space. Myelogram is negative although there is a big space anterior to the dural sac which could still have an L5 disc in that area.

Diagnosis: I do not believe this man has a ruptured disc and I believe the best thing would be a return to work. I do believe the man is genuine in his complaints but I believe he will not be made worse by work and that I would get him on a program of exercises and back to work.

In his report of February 20, 1980, R. S. Cairns, M.D., ated:

In the past I have seen this patient for back pain with some radicular element. This was in 1978 and the patient responded well to a conservative treatment program. He states he has had no significant problems since.

The patient currently complains of pain in the back with radiation down the anterior thigh to the foot. He complains of numbness in this region. He states that there is one exercise which apparently involves straight leg raising which seems to precipitate his problems.

PHYSICAL EXAMINATION: Shows that the patient points to the left sacroiliac region as the source of his pain. He has no palpable muscle spasm. He is tender in the lumbosacral region over the posterior elements. Straight leg raising is normal. His reflexes are symmetric. Toe strength is intact. There is no atrophy. Sensation is somewhat diminished over the anterior and medial aspect of the foot and leg. X-rays are reviewed and the patient is noted to have a transitional vertebra with what appears to be lumbarization of S1. The myelogram appears to be normal.

IMPRESSION: Back strain, R/O aggravation of pre-existing degenerative disc disease. I do not believe this patient has a frank herniation of nuclear material and would feel that a conservative treatment approach is indicated.

RECOMMENDATION. I believe this patient should be fit with a lumbosacral corset ambulated. He should confine his exercises to the pelvic tilt, knee to chest and isometric situp. He may be discharged as soon as the corset is fit and he has demonstrated the ability to ambulate in it without severe aggravation of symptoms. I would hope that within several weeks that he might be returned to a light duty type job.

Claimant's exhibit 9, which appears to be doctor notes from wa City dated December 19, 1980, contains the following:

IMPRESSION - this patient is experiencing chronic low back pain and leg pain similar to a L5 radicular pain. At this point, the patient appears to be approximately 10% total body disability, medically.

RECOMMENDATIONS - vocational rehabilitation was discussed with the patient and the patient was advised regarding the vocational rehabilitation at the University of Iowa and a brochure was given to the patient. If this option is not excepted [sic] the healing period for this patient should shortly be ended. We are not recommending surgery at this point. The patient is advised, however, to continue strengthening exercises. Patient seen and examined with Dr. Lehmann.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of evidence that the injury of December 21, 1979 is causally lated to the disability on which he now bases his claim. dish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). ndahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A ssibility is insufficient; a probability is necessary. Burt v. n Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 955). The question of causal connection is essentially within domain of expert testimony. Bradshaw v. Iowa Methodist spital, 251 Iowa 375, 101 N.W.2d 167 (1960).

Expert medical evidence must be considered with all other idence introduced bearing on the causal connection. Burt, 247 wa 691, 73 N.W.2d 732. The opinion of experts need not be uched in definite, positive or unequivocal language. Sondag v. ris Hardware, 220 N.W.2d 903 (Iowa 1974). An expert's inion may be accepted or rejected, in whole or in part, by the ier of fact. Id., at 907. Further, the weight to be given to ch an opinion is for the finder of fact, and that may be fected by the completeness of the premise given the expert and her surrounding circumstances. Bodish, 257 Iowa 516, 133 N.W.2d 7. See also Musselman v. Central Telephone Co., 261 Iowa 352, 1 N.W.2d 128 (1967).

Our supreme court has stated many times that a claimant may cover for a work connected aggravation of a preexisting ndition. Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 W. 35 (1934). See also Auxier v. Woodward State Hosp. Sch., 5 N.W.2d 139 (Iowa 1978); Gosek v. Garmer and Stiles Co., 158 W.2d 731 (Iowa 1968); Barz v. Oler, 257 Iowa 508, 133 N.W.2d 1 (1965); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 W.2d 251 (1963); Yeager v. Firestone Tire & Rubber Co., 253 wa 369, 112 N.W.2d 299 (1961); Ziegler v. United States psum Co., 252 Iowa 613, 106 N.W.2d 591 (1960).

As claimant has an impairment to the body as a whole, an dustrial 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, 255 Iowa 1112, 125 N.W.2d 251. 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.

Section 85.36(6) states:

> In the case of an employee who is paid on a daily, or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of said employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury.

ANALYSIS

Claimant has met his burden in proving his present back complaints are causally connected to his injury on December 21, 1979. No evidence indicated otherwise. The undersigned found the testimony of Mr. Freese that claimant complained of a bump on his back on the following Monday and his inability of remembering prior problems as very supportive of claimant's claim. The causal connection is also supported by the greater weight of medical evidence.

Claimant has shown by the greater weight of evidence that he has a ten percent permanent impairment to his body as a result of his injury with defendant employer. However, functional impairment is only one of the criteria in determining a person's industrial disability.

Claimant is 38 years old and is a high school graduate. While in high school claimant took courses in mechanics and construction. Claimant has worked in construction as a laborer and heavy equipment operator. Claimant has also worked as a truck driver, and for a period of time was part owner in a partnership which owned and operated three dump trucks. Prior to his injury claimant also worked as an office dispatcher. In May of 1978 claimant started working for defendant as an over-the-road truck driver. Since his injury claimant has attempted to do over-the-road driving but has found the work to be too strenuous. Claimant's lifting restrictions and problems with sitting and being jostled around make it unlikely that claimant could ever drive a truck on a full-time basis again. Claimant is presently working as a manager and truck dispatcher. Claimant was laid off by defendant employer but not because of his injury. Based on all the evidence presented, it is determined that claimant has an industrial disability of twenty-five percent as a result of his injury on December 21, 1979.

Claimant argues that he is entitled to further healing period benefits and in support of his argument relies on the testimony of Dr. McCuskey. The greater weight of evidence indicates that claimant had a physical impairment of ten percent since December 19, 1980 as shown in claimant's exhibit 9. Although claimant may have had some improvement in his physical condition since then, it has not been significant. Even the rating given by Dr. McCuskey is the same as given on December 19, 1980. Contrary to claimant's argument, the law is construed in claimant's favor, not the facts. Claimant has failed to prove he is entitled to any further healing period benefits.

It is apparent from a review of the records submitted by defendants that claimant is entitled to the maximum rate. Defendants argue in their brief that claimant's rate should be figured from the date of January 20, 1979 to April 14, 1979. Defendants' argument is that there is a break because of layoff which would make any other calculation inaccurate. Such a method of figuring a rate might deprive a claimant of having a rate anything near his salary at the time of the injury. This agency has previously held that a period of layoff can be bridged in order to come up with the thirteen consecutive weeks. The intent of the statute is to compensate claimant fairly based on his earnings at the time of the injury.

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 21, 1979 claimant was injured while driving a truck for defendant employer.

FINDING 2. As a result of that injury claimant has a permanent impairment of ten percent (10%) of the body as a whole.

FINDING 3. Claimant is 38 years old and is a high school graduate.

FINDING 4. Claimant has worked in construction as a laborer and a heavy equipment operator.

FINDING 5. Claimant has worked as a truck driver and was part owner in a trucking company.

FINDING 6. Claimant has worked as an office dispatcher.

FINDING 7. Claimant started working for defendant employer as an over-the-road truck driver in May of 1978.

FINDING 8. Since his injury claimant has tried to work as an over-the-road truck driver with resulting problems.

FINDING 9. Claimant's restrictions make it unlikely that claimant could ever work as a trucker again.

FINDING 10. Claimant is presently working as a truck dispatcher and manager.

FINDING 11. Claimant was laid off by defendant employer but not because of his injury.

CONCLUSION A. As a result of his injury on December 21, 1979 claimant has a permanent partial disability of twenty-five percent (25%).

FINDING 12. Claimant reached maximum recovery on December 19, 1980.

FINDING 13. Since December 19, 1980 claimant has not had any significant improvement.

CONCLUSION B. Claimant has failed to prove he is entitled to any further healing period benefits.

FINDING 14. Claimant's salary was over the amount entitling him to the maximum rate of weekly compensation.

CONCLUSION C. Claimant's healing period rate is three hundred fifty-two dollars ($352.00) per week, and claimant's permanent partial disability rate is three hundred twenty-four dollars ($324.00) per week.

ORDER

THEREFORE, defendants are to pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at a rate of three hundred twenty-four dollars ($324.00) per week.

Defendants are to be given credit for permanent partial disability benefits previously paid.

Defendants are to pay the costs of this action but will only reimburse claimant one hundred fifty dollars ($150.00) towards the fee of Dr. McCuskey's deposition.

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 payment of this award.

Signed and filed this 23rd day of August, 1983.

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOAN KERKMAN,	:	
Claimant,	:	FILE NO. 683135
vs.	:	A R B I T R A T I O N
ARMOUR-DIAL COMPANY,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

This is a proceeding in arbitration brought by Joan Kerkman, the claimant, against Armour-Dial Company, her self-insured employer, to recover benefits under the Iowa Workers' Compensation Act by virtue of an injury which became disabling April 6, 1980. This matter was heard and fully submitted on April 20, 1983 in Mt. Pleasant, Iowa.

The issue apparently is whether or not claimant sustained an injury which arose out of and in the course of her employment for the defendant.

The record in this matter consists of the transcript of the proceedings wherein the claimant and Martin Graber testified in open hearing, together with claimant's exhibit 1 and 2 as well as the evidentiary deposition of Bruce Sprague, M.D.

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

Claimant, 40 years of age, divorced with three dependent children, has been employed by the defendant since 1977. Claimant has been a meat canning machine operator. This activity may best be described by claimant's following question and answer (transcript page 8, lines 9-17):

> Q. So 8,000 times a day then you would, more or less you would reach in there and pick these wieners up and put them up above?
>
> A. Well, you have to while it's going around, you have to grab them and then put them in the machine and then the next one comes right behind and you put it in, and you catch about every other one, but that depends on the position that you are standing to whether you catch every other one or every one that goes past.

This constant wrist bending in the opinion of Dr. Schrier, the company physician, caused the ganglia found and removed from claimant's right wrist (tran., p. 18, l. 22). Defendant considers the claimant's right wrist condition as compensable. Claimant then filed this proceeding with regards to a ganglia which appeared on her left wrist which condition the defendant now denies as being compensable.

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

In applying the foregoing legal principles to the case at hand, it is found that the claimant has not sustained her burden of proof as regards the ganglia in her left wrist. Bruce Sprague, M.D., an orthopedic surgeon, testified that the orthopedi profession has no knowledge as to the source of ganglia (depositio p. 7, l. 5) and that repetitive motion and trauma do not appear to cause ganglia. In view of Dr. Sprague's superior expertise, his testimony is given the greater weight. This record is silent as to whether repetitive motion aggravates such ganglia.

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

1. That this agency has jurisdiction of the parties and the subject matter.

2. That this claimant worked on a marlin machine that required her to bend her wrists 8,000 times during her normal shift.

3. That the claimant has developed a ganglia on her left wrist.

4. That the same said ganglia is not work connected.

5. That the claimant has been discharged by the defendant and that the basis of the discharge is the fact that the claimant can no longer operate her machine.

6. That the employment dispute is outside this agency's jurisdict

THEREFORE, IT IS ORDERED that claimant take nothing further as a result of these proceedings.

Defendant is ordered to pay the costs as provided in Industria Commissioner Rule 500-4.33 as well as an expert witness fee of one hundred fifty and no/100 dollars ($150.00) payable to Bruce Sprague, M.D.

Signed and filed this 24th day of October, 1983.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HAEL DEAN KIMREY,

Claimant,

vs.

FT INDEPENDENT PACKING,

Employer,

and

IONAL UNION FIRE URANCE COMPANY,

Insurance Carrier, Defendants.

File No. 711220

A P P E A L

D E C I S I O N

Defendants appeal from an order filed August 3, 1983 that y provide substitute care from a list of three orthopedic geons. The order was in response to claimant's application alternate care filed July 11, 1983.

Code of Iowa Section 85.27 states in part:

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

Claimant filed an action on September 21, 1982 asking for ernate medical care from that which was being provided by R. W. fman, M.D. Although this action was dismissed, due to lack proof of service, it is inconceivable defendants were not ised of claimant's dissatisfaction with the care offered by endants.

There is no indication the employer requested that the satisfaction with the care be communicated to it in writing. e is also no indication the employer offered alternate care sonably suited to treat the injury.

Claimant on his own went to Marvin Dubansky, M.D., after ch he filed this current application for alternate care. endants thereafter filed a request for examination by Peter z, M.D., which was granted on July 28, 1983.

Defendants complain on appeal that no reason for dissatisfac- n of the offered alternate care tendered July 21, 1983 has stated. Claimant stated his dissatisfaction with the final offered care. He then stated his desire for treatment Dr. Dubansky. Defendants offered care by Dr. Wirtz. This stitutes a disagreement over alternate care.

The deputy, pursuant to the application, allowed and ordered r care. The record is sufficient to show "reasonable" ofs of the necessity therefore.

WHEREFORE, the order of the deputy is affirmed.

THEREFORE, it is ordered that the defendants provide substitute from any of the following physicians: Arnis B. Grundberg, , Ronald K. Bunten, M.D., or Joe F. Fellows, M.D., and that care shall be offered within ten (10) days from the date w.

Signed and filed this 30th day of December, 1983.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ALICE KINTZLE,

Claimant,

vs.

WATERLOO INDUSTRIES,

Employer,

and

GALLAGHER-BASSETT INSURANCE,

Insurance Carrier, Defendants.

File No. 700876

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant suffered an injury to her back which arose out of and in the course of her employment on March 3, 1982. She received temporary disability payments during the period of May 12, 1982 through August 11, 1982. Payment of benefits was renewed during an additional 30-day period (so as to extend until September 10, 1982) due to the failure of the insurance carrier to provide notice of termination of benefits prior to August 11, 1982. Claimant now appeals from an arbitration decision wherein she was awarded additional temporary total disability benefits, medical expenses, and mileage expense as a result of the injury occurring on March 2, 1982.

At the time of the hearing there was a separate review-reopening proceeding pending concerning a prior injury to claimant's back which had occurred on April 7, 1981. While the record indicates that claimant received additional temporary total disability benefits during the period of December 6, 1982 through January 15, 1983, payment of such benefits appears to have been with regard to issues concerning the April 7, 1981 injury and shall have no bearing upon the instant proceedings.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Marvin F. Piburn, Jr., M.D., William Kintzle, John O'Connell, Don Prosser, Frank Martin, Russell Woodrick, and Marlene Kruger; claimant's exhibits 1 through 12; defendants' exhibit A; records from Schoitz Memorial Hospital with regard to claimant's treatment in 1976; and the filings of all parties on appeal. Claimant filed an appellate brief with regard to this matter.

ISSUES

1. Whether the deputy's determination that claimant suffered no industrial disability as a result of the March 2, 1982 injury is supported by the record.

2. Whether the deputy's determination that claimant's suicide attempt was not related to her work related injury is supported by the record.

3. Whether the deputy's determination of claimant's entitlement to healing period benefits is supported by the record.

4. Whether the deputy incorrectly calculated claimant's weekly earnings in determining her benefit rate.

5. Whether the deputy erred in failing to award benefits pursuant to Iowa Code section 86.13.

REVIEW OF THE EVIDENCE

At the time of the hearing claimant was 37 years old, married and had two dependent children. She has been an employee at Waterloo Industries since May 1967. The record indicates that claimant has suffered a number of injuries to her back dating back to September 1977 when she experienced muscle strain while attempting to move a heavy pallet. She also injured her back in April 1978, July 1978, and April 1981 while performing heavy lifting at work, and received temporary total disability benefits for short periods of time following each of those injuries. (Transcript, pages 5-14, 159-163)

On March 2, 1982 claimant strained her back at work as she attempted to lift a pallet weighing between 64 and 115 pounds. On the following day when it became apparent that she could no longer perform her assembly line job due to shoulder and back pain claimant was taken to Allen Hospital in Waterloo. Claimant was off work for two days whereupon she returned to her regular work. She recalled that on May 12, 1982 she was having difficulty performing her assigned jobs of "changing heavy hooks" on a line positioned above an assembly line. Claimant testified that after complaining that she was unable to hold her head back in the manner required to perform the work, she was told by management that there was no further work and that workers' compensation benefits would be initiated. (Tr., pp. 20-27)

Marvin F. Piburn, Jr., M.D., a psychiatrist who specializes in pain and stress management, evaluated claimant on April 29, 1982. In a report prepared after the initial visit with claimant, Dr. Piburn wrote, in part.

> Her lifting responsibility at her usual and customary job is about as much as she can handle without difficulty and she does not seem to be healing the muscular injuries that she has had since 1977, a matter of five years now....Certainly, the lifting requirements that she described now would play some part in keeping this thing going and whenever she gets under stress or whenever she gets upset her physical problems get a lot worse. (Defendants' Exhibit A)

On June 16, 1982, Dr. Piburn reported:

> We evaluated Alice Kintzle with an intake interview at the Pain and Stress Management Clinic April 29, 1982. We had contact with her subsequent to that May 11th, and May 27th, 1982. This lady has had a tendency to develop [sic] muscular pains in the upper and lower back which can radiate into the shoulder and into the head and on occasion down the arm or leg, especially on the right side. Onset followed an industrial accident September 26, 1977. Alice tends to react to physical exertion or stress or the presence of pain with increased muscle tightness. This keeps the pain syndrome going. She has had various changes in jobs. When she is in a job that reqires lifting over 20 or 25 lbs. or when she is in a job that involves repetitive use of the arms for pushing, pulling or lifting, especially if she has to raise the arms up above the level of the shoulder she develops increased pain. She has seen numerous physicians and had numerous treatments. Currently, she is in the pain management program.
>
> In our clinic, we use a non-addicting medication for muscle relaxation. In her case this is Amitriptyline. She uses the non-addicting pain killer Naprosyn which also has anti-inflammatory properties. We have attempted to train her to use cool spray and muscle stretching on herself at home and also through the St. Francis Physical Therapy Department. We have trained her to use a T.E.N.S. unit on her back continuously and we periodically do neuroprobe type electrical stimulation through the St. Francis Physical Therapy Department.
>
> Reviewing her type of injury and the number of years since the original accident plus the history of her pain increasing and decreasing with changes of jobs and varying levels of stress I find every reason to believe that she will pass through recurrent cycles of pain if she is working in her usual and customary job. This lady may be able to avoid periodic interruptions of work and development of symptoms if she is permanently assigned to a light-duty job. The best job description would avoid lifting more than 20 to 25 lbs. and would avoid repetitive pushing, pulling or lifting with the arms, especially pushing, pulling or lifting that involves raising the arms above shoulder height. This sort of thing really increases pain from arising from the muscles of the neck and upper spine. (Def. Ex. A)

Dr. Piburn testified during the hearing that his examination of claimant revealed no nervous system problems, nor was there any evidence of a fracture dislocation or advanced degeneration of the disks. He diagnosed claimant's problems as muscular pain syndrome. Dr. Piburn further testified that claimant currently suffers from a 10 percent total body disability to each of the upper and lower spines based upon American Academy of Orthopedic Surgeons manual. (Tr., pp. 89-103)

Claimant was also examined by Richard P. Neiman, M.D., a neurologist, on October 27, 1982. Examination revealed claimant to have full mobility of the neck as well as full flexion and extension on lateral rotation of the back. Dr. Neiman found no evidence of muscle atrophy or loss of sensation. On December 28, 1982, Dr. Neiman reported:

> I believe I have already sent you my initial correspondence on your client, Alice Kintzle. We did do a CT scan and EMG, both of which are negative. I thought the patient basically had a chronic lumbosacral strain with no evidence of any permanent disability. I think this lady should be encouraged to return to work with perhaps a weight restriction of 25 to 35 pounds. The heavy lifting that she describes of 110 to 115 pounds would seem to be excessive in view of her back pain. I think surgical intervention at this time is definitely contraindicated. One of our physical therapists, Stan Christensen, has special expertise in chronic back pain and may prove quite helpful. However, the choice of having her come to see Stan Christensen would certainly be left in your hands. At this stage I do not find any evidence of permanent disability or anything to at all account for the 25 per cent [sic] functional disability. I do think with a weight limitation of 25 to 35 pounds she could return to work at any time. If you wish further information or further discussion, please contact me. (Def. Ex. A)

John O'Connell, administrator of the insurance carriers workers' compensation benefits, testified that temporary total disability benefits to claimant were cut off on August 11, 1982 following a meeting attended by himself, claimant, claimant's attorney, and Dr. Piburn. O'Connell recalled that Dr. Piburn had determined that claimant had reached her maximum recovery by that date and had suggested a permanency rating. He noted that benefits were subsequently extended until September 10, 1982 due to his failure to provide a 30-day notice of termination. (Tr., pp. 156-192)

The record indicates that claimant broke her wrist when she fell on a dance floor on August 21, 1982. She testified that the pins were not removed from the wrist until January 10, 1983 and that her doctor suggested she not return to work until the following month. (Tr., pp. 58-63)

Claimant testified that on September 10, 1982 she called her employer to find out where her compensation check was. Upon being informed that she would no longer receive workers' compensation benefits claimant attempted to commit suicide by taking an overdose of Tylenol 3, amitryiptyline, and Naprosyn. Claimant indicated that she had become upset because she didn't know how the bills would be paid without workers' compensation benefits. (Tr., pp. 50-52) On cross-examination claimant admitted that she had not been getting along with her family during the two weeks preceeding her suicide attempt. The family problems apparently stemmed from disagreement with her husband as to the method of disciplining their two sons. (Tr., pp. 62-64) Claimant was hospitalized from September 10, 1982 through October 24, 1982 as a result of her attempted suicide. (Claimant's Ex. 5)

William Kintzle, claimant's husband, testified that the problem with their sons were "his" and that claimant lent no support in their discipline. He stated that on the evening preceeding claimant's suicide attempt he had "stated some facts to her." (Tr., pp. 137-145)

Don Prosser, claimant's supervisor at work, testified that claimant had problems getting along with her coemployees. (Tr., pp. 201-204)

Frank Martin, the plant manager, testified that claimant is generally disruptive. He indicated, however, that claimant may return to her job at such time as her wrist is sufficiently healed. (Tr., pp. 207-222)

The record indicates that claimant was paid as follows for the 13 weeks prior to her injury.

Week Ending	Hours	Overtime Hours	Gross Pay
12-06-81	40.0	4.5	396.25
12-13-81	40.0	5.0	402.79
12-20-81	20.3	3.5	216.12
12-29-81	36.0	2.0	329.17
01-03-82	40.0	0.0	337.20
01-10-82	31.0	2.5	294.37
01-17-82	32.0	0.0	270.40
01-24-82	34.0	.5	294.29
01-31-82	40.0	4.8	408.77
02-07-82	40.0	4.0	389.54
02-14-82	40.0	2.5	374.70
02-21-82	40.0	.9	350.65
02-28-82	40.0	0.0	339.20

(Cl. Ex. 1)

Claimant testified that she customarily worked 40 hours per week. She recalled that she took vacation days on December 17 and 18. Claimant further recalled that she missed a full day of work in each of the weeks ending on January 10, 1982, January 17, 1982, and January 24, 1982 due to snowstorms. Her rate of pay was $8.48 per hour. (Tr., pp. 24-37)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 2, 1982 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 85.36 states in part:

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had he worked the customary hours for the full pay period in which he was injured, as regularly required by his employer for the work or employment for which he was employed, computed or determined as follows and then rounded to the nearest dollar:
>
> ....
>
> 6. In the case of an employee who is paid on a daily, or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of said employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury.

Iowa Code section 86.13 states, in part:

> If an employer or insurance carrier fails to file the notice required by this section, the failure stops the running of the time periods in section 85.26 as of the date of the first payment. If commenced, the payments shall be terminated only when the employee has returned to work, or upon thirty days' notice stating the reason for the termination and advising the employee of the right to file a claim with the industrial commissioner.

ANALYSIS

The record discloses that claimant has been off work since May 12, 1982 and had not returned prior to the time of the hearing. The unrebutted testimony of John O'Connell, however, indicates that during a meeting held in August 1982 in the company of himself, claimant, claimant's attorney, and Dr. Piburn, it was determined by the doctor that claimant had reached her maximum medical recovery. There is further evidence

o the effect that the reason claimant had not returned to work y the date of the hearing was that her wrist, which had been ractured in August 1982, had not yet healed. The cause of laimant's fractured wrist is unrelated to any industrial njury, thus she is not entitled to workers' compensation enefits for the period during which it heals. Claimant may be aid to have been on constructive notice of an ensuing termination of benefits following the meeting attended with O'Connell nd Dr. Piburn. Because the benefits were extended an additional 0 days in order to comply with the notice provision of Iowa ode section 86.13, temporary total disability were properly xtended to September 10, 1982.

With regard to the deputy's failure to award unto claimant enefits for an alleged permanent disability, it is noted that either Dr. Piburn or Dr. Neiman were able to discover a neurological basis for claimant's continuing back problems. Dr. iburn suggests in his reports that claimant's continuing pain elates back to the onset of back problems in 1977 and that she uffers from a pain syndrome caused in part by stress. The eight limitation suggested by Dr. Neiman, as stated by the eputy, appears to be based primarily upon the subjective omplaints of pain by claimant. The deputy's denial of permanent isability benefits was proper and supported by the record.

With regard to claimant's attempted suicide, it appears that he primary cause thereof was family problems, specifically roblems with disciplining her sons. As such, any expense elating to claimant's attempted suicide are not compensable.

As to the applicable rate of compensation, it appears that laimant customarily worked 40 hours per week for an average eekly wage of $339.20 per week. When the additional 30.2 vertime hours worked during his final 13 weeks of employment re added at straight time, claimant's average total weekly wage ppears to be $358.90. The corresponding weekly compensation ate is $222.03.

FINDINGS OF FACT

1. Claimant was employed by Waterloo Industries on March 2, 982.

2. Claimant injured her back while working on March 2, 1982.

3. Claimant subsequently was off work from May 12, 1982 hrough the date of the hearing.

4. Claimant was paid temporary benefits from May 12, 1982 hrough September 10, 1982.

5. Claimant reached her maximum medical recovery in August 982.

6. Benefits were extended until September 10, 1982 in order or defendants to comply with Iowa Code section 86.13.

7. A subsequent suicide attempt by claimant was related to amily problems and not to the injury of March 2, 1982.

8. Claimant did not suffer permanent disability as a result f her March 2, 1982 injury.

9. The applicable rate is $222.03 per week.

CONCLUSIONS OF LAW

Claimant has sustained the burden of proving temporary isability to her back from May 12, 1982 through September 10, 982.

WHEREFORE, the deputy's decision filed July 27, 1983 is firmed in part and modified in part.

THEREFORE, it is ordered:

That defendants pay unto claimant seventeen and two-sevenths 7 2/7) weeks of temporary total disability benefits at the te of two hundred twenty-two and 03/100 dollars ($222.03) per ek for the period of May 12, 1982 through September 10, 1982.

That defendants pay unto claimant the following:

Dr. Piburn	$ 335.00
St. Francis Hospital	4,338.22
Mileage	450.67

Costs are taxed to the defendants pursuant to Industrial mmissioner Rule 500-4.33.

Signed and filed this 30th day of April, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JACK KLASS, SR., Claimant, vs. COMMERCIAL SERVICES, INC., Employer, and EXCALIBUR INSURANCE CO., Insurance Carrier, Defendants.	File No. 674610 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals and defendants cross-appeal from a proposed review-reopening decision of the deputy wherein claimant was awarded permanent partial disability benefits and medical expenses. The record on appeal consists of the transcript of the review-reopening proceeding, claimant's exhibits 1 through 9, defendants' exhibits A through H, and the filings and briefs of all parties on appeal.

The deputy sustained an objection by defendants to claimant's exhibit 10, which consisted of a decision by the Social Security Administration, a report of vocational testing made by Iowa Central Rehabilitation Industries and assorted medical reports. The record reveals that no objection was raised by defendants to the medical reports. (Transcript, page 7) That portion of exhibit 10 will be allowed into evidence. The Social Security decision is excluded as immaterial to the issues of the hearing. The objection to the report of Iowa Central Rehabilitation Industries is sustained. Such vocational testing reports have previously been accepted as practitioner's reports by this agency where it was shown that the compiler of the report had specialized training and experience within a defined profession. Absent evidence in the record that the compiler of the vocational studies is a qualified practitioner within a recognized profession, the Iowa Central Rehabilitation Industries report will not be considered.

ISSUES

Claimant states the issues on appeal as:

I. Whether the deputy erred in excluding the testimony of two live witnesses when the claimant had missed the deadline for exchange of witness lists by five days.

II. Whether the deputy erred in finding that some of claimant's injuries were not related to the accident and then by discounting the 22% impairment rating given by Dr. John Walker.

III. Whether the deputy erred in view of all the evidence in making an award of 15% permanent partial disability.

Defendants state the issues on cross-appeal as:

Even if we assume the claimant has complaints referable to his back the evidence is undisputed that this is the natural consequence of the injury to his ankle and altered gait. Therefore, as a matter of law the claimant is limited to the amount of compensation provided for a scheduled injury relating to the right lower extremity.

There is no evidence of any permanent injury to any part of the body other than the right ankle, and, therefore, the claimant is limited to the amount of compensation provided for a scheduled injury relating to the right lower extremity.

REVIEW OF THE EVIDENCE

The parties stipulate that the applicable rate of compensation is $194.33 per week. (Tr., p. 2) They further agree to the reasonableness of medical costs at issue and certain travel expenses. The parties stipulate that claimant has not returned to work since the date of injury. (Tr., pp. 2-4)

At the date of the hearing, claimant was 53 years old, married and had three children, none dependent. (Tr., p. 20) Claimant attended school through the seventh grade but can neither read nor write. (Tr., p. 21) Claimant stated he could recognize some words and could write his own name. (Tr., pp. 21, 36) He has been employed since age 15 when he began working on a farm. (Tr., p. 22) Claimant's previous work experience was as a mechanic and a truck driver. (Defendants' Exhibit H) His medical history includes a hernia operation and pneumonia. (Tr., p. 22) Claimant had sprained his right elbow approximately 10 years ago and had broken two toes on his right foot 30 years previously. (Cl. Ex. 9, p. 8) Claimant testified he had no physical problems at the time of his injury and had worked two jobs in recent years. (Tr., p. 23) On June 25, 1980 claimant was employed as a truck driver for defendant employer. While delivering a load, claimant's truck was struck in a head-on collision with an auto that came into claimant's lane of traffic. (Tr., p. 23) Claimant crawled out of his truck to a field where he was found and taken to Algona Hospital. (Tr., pp. 24-25; Def. Ex. A) Claimant was x-rayed and transferred to Trinity Hospital in Fort Dodge. (Def. Ex. A) Paul L. Stitt, M.D., examined claimant and noted:

EXTREMITIES: Reveals swelling deformity about the right ankle. X-rays revealed a bimalleolar fracture

twenty-five percent (25%).

16. That the applicable rate of compensation is one hundred ninety-four and 33/100 dollars ($194.33) per week.

CONCLUSIONS OF LAW

Claimant is entitled to permanent partial disability benefits based upon a finding of twenty-five percent (25%) industrial disability.

Claimant is entitled to healing period benefits from the date of the injury through March 24, 1981.

WHEREFORE the proposed decision of the deputy is affirmed in part and modified in part.

ORDER

THEREFORE it is ordered:

That the employer shall pay unto claimant permanent partial disability benefits for a period of one hundred twenty-five (125) weeks at the rate of one hundred ninety-four and 33/100 dollars ($194.33) per week.

That the healing period extends from the date of injury through March 24, 1981 and weekly benefits shall be paid to claimant for this period of time at the rate of one hundred ninety-four and 33/100 dollars ($194.33) per week.

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

That the defendants shall pay unto claimant the following charges:

American Prosthetics	$ 27.00
Orthopedic Specialists	473.00
Associated Physicians	75.00
Wood Motor Lodge	110.70

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

That interest shall accrue as of the date of this decision pursuant to section 85.30, The Code.

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

Signed and filed this 29th day of June, 1984.

Appealed to District Court;
Pending

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HELEN KLEIN,

Claimant,

vs.

FURNAS ELECTRIC COMPANY,

Employer,

and

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 506048

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant injured her right elbow at work on September 12, 1977. A first report of injury was filed on September 14, 1977 and a memorandum of agreement was filed May 15, 1978. Claimant later filed an action against the employer and insurance carrier with regard to injuries to both upper extremities, her cervical spine, and an emotional condition. In a review-reopening, arbitration and section 85.27 benefits decision filed December 31, 1980 the deputy made the following findings of fact:

That claimant sustained her burden of proof and established that on September 12, 1977 she sustained an injury to her right elbow which arose out of and in the course of her employment with defendant-employer.

That claimant sustained her burden of proof and established that subsequently she sustained an injury to her left upper extremity which arose out of and in the course of her employment with the defendant-employer.

That claimant sustained her burden of proof and established that as a result of the aforementioned incidents, she sustained a psychological disability.

That claimant has not returned to work and has not recuperated as contemplated in section 85.34(1).

Defendants were ordered to pay unto claimant a running healing period benefit award until the requirements of section 85.34(1) were met. Defendants were also ordered to pay unto claimant $3,007.19 for expenses incurred at Des Moines General Hospital and $34.00 for prescriptions and related expenses. Claimant was ordered to promptly commence treatment with Todd F. Hines, Ph.D., as outlined in his deposition, with the cost thereof to be borne by defendants under the terms of section 85.27.

The parties later agreed that the extent of claimant's permanent disability entitlement would be at least 125 weeks in addition to healing period benefits which were to be paid by the insurance carrier until her release from the treatment of Dr. Hines. Claimant applied for a partial commutation of benefits of the stipulated disability for the purpose of purchasing a car to enable her to keep appointments with Dr. Hines. Defendants consented to the application which was approved on April 28, 1981.

On April 22, 1982 defendants filed an application for hearing to determine the cessation of healing period and the determination of permanent partial disability. A review-reopening hearing was held from March 14 through March 16, 1983, and the present appeal stems from the review-reopening decision filed with regard thereto on July 20, 1983.

Also germane to issues submitted on appeal, but with respect to the first hearing, is a petition filed by defendants on June 25, 1982 requesting a declaratory ruling on the status of payments of $3,007.19 for hospital expenses and $34 for prescription charges which they had been ordered to pay in the initial decision. Defendants' contention was that all but $120 of the total sum had been paid by insurance carriers not made parties to this action, and that defendant-insurance carrier should directly reimburse these non-party insurance carriers upon application. In a declaratory ruling issued July 12, 1982 the deputy determined the original ruling of December 31, 1981 to be res judicata, and ordered that the $3,007.19 and $34.00 be paid directly to claimant. An appeal ruling issued September 27, 1982 affirmed the delcaratory ruling. Blue Cross/Blue Shield apparently filed a lien on October 12, 1982 in the amount of $1,931.20 to recoup monies paid for claimant's hospitalization. On November 12, 1982 defendants filed an application for order to determine validity of lien. At the time of the review-reopening hearing held in March 1983 the order to pay the amounts unto claimant was again ruled res judicata, and no further evidence was heard concerning the matter. On August 22, 1983 a check draft was issued by defendant-insurance carrier to claimant and her attorney in the amount of $3,007.19.

In the review-reopening decision filed July 20, 1983 the deputy made the following findings of fact:

That claimant sustained a work injury to her right elbow on September 12, 1977 and subsequently injured her left upper extremity.

That the aforementioned injuries lead to permanent partial physical impairment in her left and right upper extremities and her neck and shoulders.

That claimant has no permanent mental impairment.

That claimant was age 49 at the date of the hearing and had completed the ninth grade and that claimant's work history includes work as a cashier and salesperson, as a catalog and merchandise handler at Spiegel Catalog in Omaha, as a packer on a line in a turkey processing plant and as a nurse's aide, as well as the light industrial work at Furnas Electric.

That claimant's recuperation from the aforementioned injuries was accomplished on March 16, 1983.

Healing period was determined to have ceased on March 16, 1983 and claimant was determined to have an industrial disability of 60 percent of the body as a whole.

Claimant now appeals from portions of the July 20, 1983 review-reopening decision. A cross-appeal filed by defendants was dismissed as untimely.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Michael J. Taylor, M.D., Betty Foster, Sally Riekena, Todd F. Hines, Ph.D, and Ferdinand Klein; claimant's exhibits H through N; defendants' exhibits 1 through 8, 15, and 16; Hines deposition exhibit 1; and the briefs and records of all parties on appeal. Also incorporated into the record was the remaining portion of the prior record of hearing which was not labeled and introduced specifically as exhibits herein.

ISSUES

1. Whether claimant is entitled to permanent total disability benefits.

2. Whether the deputy erred as a matter of law in requiring claimant to again prove that she suffers psychological disability and the cause thereof in this proceeding, and that in order to do so claimant must prove permanent psychiatric impairment or mental disorder.

3. Whether the deputy erred in awarding compensation solely on the basis of physical disability without considering psychological disability, and by basing it entirely upon the physical impairment ratings of Drs. Summers and McClain rather than on the basis of employability or earning capacity.

4. Whether the deputy erred in trying and deciding this case as though it were on appeal from the prior review-reopening decision rather than deciding the case as a review-reopening of the prior decision.

5. Whether the deputy erred in failing to award interest on the $3,007.19 of the prior award.

6. Whether the deputy erred in failing to penalize defendants nder Iowa Code section 86.13 for their failure to promptly pay he $3,007.19 of the prior award.

REVIEW OF THE EVIDENCE

Claimant testified that she was born in 1933 and completed nly the ninth grade. Although she subsequently attempted to btain a GED, she failed to complete the program. (Transcript, p. 331-333)

In a prior decision, filed December 31, 1980, it had been etermined that claimant had sustained work related injuries to oth upper extremities (the right extremity due to an incident ccurring on September 12, 1977 and the left due to daily stress nd strain of claimant's employment) which further resulted in a sychological disability. Claimant's treatment has consisted of surgical release of the left carpal tunnel by David B. McClain, .O., in May 1978 and a series of psychotherapy sessions with odd F. Hines, Ph.D., clinical psychologist, ending in December 981. (Claimant's Deposition Exhibit 1)

Claimant testified to working for several employers prior to he time she was employed by Furnas Electric Company. All of laimant's previous work experience appears to have been in the ature of light manual labor or as a sales clerk. She testified hat she did return to work at Furnas for part of February 1978 nto April 1978 doing light assembly work on small terminal oards. She continued to experience pain in her arms and had to iscontinue working again. (Tr., pp. 333-339)

Claimant testified that her present symptoms include pain in he right elbow extending down the arm into the fingers. She lso testified to continued pain in her left hand and wrist. laimant testified that she now experiences greater pain in her eck and shoulders than at the time of the initial hearing, and hat these problems lead to severe headaches. (Tr., pp. 344-346)

Sally Riekena, personnel manager at Furnas Electric Company, estified that claimant was terminated as an employee in May 979 after exceeding the maximum one year time period for leaves f absence. She stated that employees who are currently on lay ff status would receive employment preference, and that claimant's pplication for employment would be reviewed the same as anyone lse's. (Tr., p. 146-160)

Ferdinand John Klein, claimant's husband, testified that laimant's activities have lessened considerably since her njuries. He further testified to claimant's increased emotional roblems since the original hearing and to her difficulty leeping. (Tr., pp. 380-399)

Claimant was evaluated at the Medical Occupational Evaluation enter at Mercy Hospital in Des Moines in the summer of 1982. G. atrick Weigel, M.A., in a vocational report prepared August 6, 982 wrote, in part:

> As regards her work history, Helen presents an extensive and quite varied work history. The majority of her work has consisted of salesperson work, cashiering, and some experience in a sewing factory. She also worked for one season at the turkey processing plant in Ellsworth, Iowa. The reason for the varied nature of her work experience is explained by virtue of the fact her husband was in the service at that time, and consequently, they did a lot of moving around. Also, she was raising her family at that time, and this necessitated some breaks in her employment.
>
> At the time of her accident, Helen was employed by Furnas Electric in Osceola, Iowa, working on the assembly line. Her work consisted of assembling electrical switches, and also some inspection work. She had been with them since some time in 1975. She continued to work off and on after her accident date of September 12, 1977, until she had her carpal tunnel release on her left wrist in May of 1978. She has not been gainfully employed since that time.
>
> ....
>
> CONCLUSIONS AND RECOMMENDATIONS:
>
> Strictly from a nonmedical point of view, Helen impressed us as being quite depressed during our meetings with her for her evaluation. It would appear at this time, this frame of mind is contributing significantly to her vocational immobility. We note she does have fairly good finger dexterity, both gross and fine, and it would appear that when she is feeling better, she might be able to return to employment, light to medium in nature, possibly in a factory type setting.
>
> The importance of obtaining her G.E.D. has been discussed at length with her, and she realizes this would contribute in a very positive way toward her employability.
>
> The possibility of Helen working to establish for herself a program of vocational rehabilitation was also given serious discussion, and she understands and appreciates this as a vocational alternative to her. It is suggested that when Helen is ready to return to the competitive world of work, she might benefit from a period of job seeking skills training and also, interviewing techniques. (Defendants' Ex. 5, pp. 1-3)

Peter D. Wirtz, M.D., an orthopedic surgeon, examined laimant at the Medical Occupational Evaluation Center. In a eport dated July 28, 1982 Dr. Wirtz wrote:

> Examination of the left hand shows well-healed scar on the radial aspect of the arm near the distal end of the forearm. She also has a well-healed scar between the thenar and hypothenar eminence. She has full feeling in the thumb, index, long, ring, and little fingers. She has full flexion and extension of the fingers, as well as the wrist.
>
> Examination of the right elbow shows 0 degrees to 150 degrees, 90 degrees of pronation and 90 degrees of supination. She is tender to pressure along the lateral aspect. There is atrophy of the fat over the extensor mechanism.
>
> Diagnosis: (1) Status postop left carpal tunnel release. (2) Status postop ganglion removal, left arm. (3) Chronic extensor tendonitis, lateral aspect, right elbow.
>
> This patient has reached her maximum medical benefit from her left carpal tunnel syndrome in that her symptoms have been relieved and the feeling has returned to the fingers. Her tenderness in the scar area is due to scarring of the deep structures and will not change. The left ganglion surgery area has responded without any restriction.
>
> A chronic elbow activity is due to the tendonitis but has full motion.
>
> This patient has full motion of all the joints of her upper extremities and has no neurological involvement. She does not qualify for an orthopaedic permanent partial disability. (Def. Ex. 5, pp. 15-16)

James L. Blessman, M.D., performed a Pain Center Evaluation during claimant's examination at the Medical Occupational Evaluation Center. In a report prepared on July 30, 1982 Dr. Blessman found claimant to have chronic pain syndrome of uncertain etiology, and noted his suspicion of thoracic outlet syndrome. (Def. Ex. 5, pp. 17-18) In a March 8, 1983 letter addressed to claimant's counsel Dr. Blessman recommended treatment in a chronic pain center for three weeks. He wrote that the goal of the proposed treatment would not particularly be to get claimant back to work, but to decrease her level of pain and suffering. (Cl. Ex. I)

Thomas W. Bower, L.P.T., prepared a physical therapist's report which is contained in the assessment from the Medical Occupational Evaluation Center. He stated that claimant had reached her maximum state of recuperation with regard to both upper extremities, and determined that claimant has a six percent impairment of the left upper extremity and a three percent impairment of the right upper extremity. (Def. Ex. 5, pp. 19-20)

Thomas B. Summers, M.D., examined claimant on March 17, 1980. In a February 24, 1983 letter addressed to claimant's counsel Dr. Summers wrote that following his examination of claimant in March 1980 he had diagnosed an epicondylitis of the right humerus which was moderately severe and a post-operative status referrable to the left carpal tunnel release surgery. Dr. Summers indicated that if claimant's symptoms remained unchanged that she should not perform strenuous physical labor. He continued to state that if claimant's symptoms could be alleviated, either in whole or in part, that she possibly might pursue some sedentary type of occupation. (Cl. Ex. M)

David B. McClain, D.O., who performed left carpal tunnel release surgery on claimant in May 1978, stated in reports prepared March 8 and March 10, 1983 that he examined claimant on February 21, 1983. Dr. McClain noted continued complaints of bilateral upper extremity distress (greater on the right side), cervical spine, and bilateral shoulder discomfort. Dr. McClain recorded an impression of probable bilateral carpal tunnel syndrome. He further stated that the permanent partial disability rating he assigned on December 12, 1979 (27 percent to each of the upper extremities--see Cl. Ex. A of the prior review-reopening, arbitration and section 85.27 benefits hearing - file no. 506048) remained unchanged and that she was 100 percent totally disabled on an industrial basis. (Cl. Ex. J and K)

Paul From, M.D., examined claimant on March 7, 1983. In a report prepared March 11, 1983, which contains a lengthy review of data accumulated by all practitioners having treated or examined claimant, Dr. From noted claimant's emotional problems and mentioned the possibility of a thoracic outlet syndrome. Dr. From concluded:

> No matter the diagnostic outcome in this case, it is my impression that Mrs. Klein would have to be considered disabled on the basis of bilateral upper extremity pain and loss of strength from soft tissue injury, even though she has minimal, if any, loss of range of motion. Because there is essentially no loss of range of motion, I find it most difficult, if not impossible, to place any percentage disability on her upper extremities but believe that, taken as an entire person, she is disabled for any occupation other than sedentary and unless she can be rehabilitated into this sort of occupation, she would have to be considered completely disabled. (Cl. Ex. H)

Todd F. Hines, Ph.D., a clinical psychologist, initially evaluated claimant in July 1980 in relation to psychological difficulties stemming from the injures to both arms. In a progress summary and termination report date stamped February 10, 1982, Dr. Hines reported:

> Psychological evaluation disclosed noteworthy levels of anxiety and depression directly precipitated by her loss of the ability to work as a result of her injuries. Debilitating pain persisted in both arms and caused the lack of former capacity to perform to be prominent in her mind and caused the consistent undermining of her emotional stability. She was, essentially, overwhelmed by fear and was so emotionally paralyzed as to be totally vocationally disabled from a psychological perspective alone. She had demonstrated the ability to cope adequately prior to her industrial injury and testing indicated strong vocational rehabilitation potential, even though a complete change of career path would be

necessary in order to move from manual to more intellectually oriented pursuits. It was clear that her significant depression, anxiety and fear would interfere with educational processes and that psychotherapy would be necessary in order to make her accessible to rehabilitation and to facilitate a return to the world of work. Accordingly, she has been seen for individual psychotherapy on 13 occasions between May and December, 1981, with some brief psychological testing to assess progress and to establish accurate therapeutic direction.

Most succinctly stated, Mrs. Klein has failed to progress as anticipated. While therapy may have stayed off further deterioration of her emotional condition, there is, essentially, no evidence of significant progress. She was cooperative and responsible in her participation but in November, 1981, she essentially self-terminated her therapeutic work. Mutual termination was agreed upon in late December, with a subsequent 30 day waiting period established in order to respond to any ambivalence before closing the case.

The coping skills of this woman are simply exhausted. She has, in effect, given up and she is unable to generate enough intrinsic hope and self confidence to overcome her chronic pain responses and her fear that her productive life is over. These injuries have so strongly precipitated her passive-dependent needs and her latent anger at being victimized by powerful forces beyond her control that she continues to be overwhelmed by strong and debilitating feelings of helplessness and hopelessness. Situational pressures of various kinds become magnified and as she can find no strong, dominant figure, be that therapist, physician, attorney, husband or employer, to rescue her from pain and fear, she withdraws into depression and increasing isolation from those attempting to assist her. She has terminated therapy because of her inability to see or to produce concrete change in her life circumstances. She did make early gains in her affective responses and stability but these gains did not result in overt modification of the various stresses impinging upon her and she rather quickly became demoralized and sank back into her depressed state. She now expresses a wish to be left alone and to receive no further treatment. She cries easily. She believes strongly that she has no vocational future. She is increasingly estranged from her husband and family. She denies suicidal intent or ideation. Avoidance and denial of her feelings have become her primary defensive strategies. She has very minimal future concept or orientation. It appears that work gave her a sense of mastery over the environment which was necessary for her internal organization and for the formulation of logical problem solving behaviors; the loss of work capability has disrupted her capacity to organize her perceptions and skills and to move forward toward goals. This condition, by its very nature and magnitude, has also been a barrier to psychotherapeutic progress. It should be noted that this process does not function at a conscious level and does not represent malingering or conscious resistance.

The situation is very difficult from a treatment perspective. She declines further therapy and her faltering commitment is part of the need for treatment. However, assistance on a coerced basis is not likely to be of genuine benefit. Her emotional responses are beginning to coalesce into a depressive neurosis within the context of a passive-dependent personality structure. This condition can be expected to continue for an indeterminate period of time and could very well become an intractable aspect of her psychological status. There are no further recommendations for treatment at this time. It may well be therapeutic to settle the legal aspects of her situation as quickly as possible. (Def. Ex. 4; Hines Dep. Ex. 1)

In a deposition taken August 3, 1982, Dr. Hines described claimant as having a hysterical or passive-dependent personality. He testified that claimant showed progress through the initial two or three psychotherapy sessions, but that her symptoms of depressions then returned. (Def. Ex. 3, pp. 7-16) Dr. Hines also commented as to claimant's prognosis:

> My opinion is, having gone throught [sic] that experience with her, that this is probably an intractable condition. My opinion is that we are probably looking at a permanent psychological condition of essentially total disability, as I mentioned a few moments ago, that might become life threatening. Whether it becomes life threatening or not, I have very little hope. I think the prognosis is very poor for a recovery from this emotional condition. I think there is some possibility, given what I know. And I think we might need more specific information from Mr. Weigel or any other members of the Mercy staff who have acutally examined her recently or any other physician, perhaps, who is qualified to make psychological judgments. Any other physician or professional person who has examined her -- I think we might want an opinion as to whether further psychotherapy would help her.
>
> In my opinion, based on the knowledge that I have at this point, I do not think further psychotherapy would help her. I think she probably will continue for the rest of her life in this status. (Def. Ex. 3, pp. 25-26)

Michael F. Taylor, M.D., a psychiatrist, examined claimant on October 7, 1983. In a report dated October 19, 1982, Dr. Taylor noted the medical information and reports concerning claimant which he had reviewed prior to the examination. That information appears to parallel the medical evidence introduced as exhibits at the hearing. Dr. Taylor concluded in his reports:

> Based upon all the information currently available to me, I can offer the following opinions and recommendations in response to the questions asked by you in your September 10, 1982, letter. I find no evidence that, at the present time, Mrs. Klein suffers from any diagnosable psychiatric disorder. Psychiatrically, she is fully capable of returning to her usual and customary work. Mrs. Klein offers what I consider to be reasonable and appropriate explanations for the emotional lability described by previous examiners, i.e., at the Medical Occupational Evaluation Center at Mercy Hospital. Mrs. Klein is, at the present time, experiencing some emotional discomfort but not a degree that it would be classified as any type of mental disorder. The main reason for this discomfort is difficulties that she is encountering in her relationship with her husband and children. (I find no reference to these factors in Dr. Hines' "Progress Summary and Termination Report.") It is my opinion that it would be in Mrs. Klein's best interest to return to work and, thereby, get out of her current home situation, as soon as possible. (Def. Ex. 6)

Dr. Taylor also testified during the hearing. He indicated that while claimant may suffer from some emotional discomfort, that discomfort does not translate to a disabling psychiatric condition. Dr. Taylor stated that while he had insufficient expertise in orthopedics to comment as to what claimant's physical limitations are, it was his opinion that no psychiatric limitation prevented her from returning to work. (Tr., pp. 34-61)

Dr. Hines also testified at some length during the review-reopening hearing. His testimony primarily reaffirmed his position that claimant is totally disabled from a psychological standpoint. Dr. Hines indicated that he knew of no vocational activity in which claimant could at this time be successful. (Tr., pp. 199-331)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 12, 1977 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).

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).

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).

Iowa Code section 85.26(2) provides, in part:

> Any award for payments or agreement for settlement provided by section 86.13 for benefits under the workers' compensation or occupational disease law 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. (emphasis added)

In Gosek v. Garmen and Stiles Co., 158 N.W.2d 731 (Iowa 1968) the court stated:

> It is now apparent the mere mention of mental and emotional problems confronting claimant on first review-reopening was not of such nature as to permit its consideration by the commissioner in then determining the extent of any disability connected psychosis.
>
> Under the circumstances disclosed this under-

standably stemmed from lack of knowledge with resultant inability on the part of all concerned to appreciate the full extent or significance of claimant's then existing emotional problems. Apparently he did all humanly possible to disclose an awareness of his situation, and inability on his part to alone do more about it.

On the other hand, testimony presented during hearing on the second review-reopening is sufficient to reveal a probable unknown injury connected neurosis at time of the first hearing; a new fact neither recognized, appreciated nor considered by the commissioner in adjudicating claimant's first review petition for additional compensation.

Iowa Code section 85.30 provides:

Compensation payments shall be made each week beginning on the eleventh day after the injury, and each week there-after 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 secion 535.3 for court judgements and decrees.

Iowa Code section 86.13 provides:

If an employer or insurance carrier pays weekly compensation benefits to an employee, the employer or insurance carrier shall file with the industrial commissioner on forms prescribed by the industrial commissioner a notice of the commencement of the payments. The payments establish conclusively that the employer and insurance carrier have notice of the injury for which benefits are claimed but the payments do not constitute an admission of liability under this chapter or chapter 85, 85A, or 85B.

If an employer or insurance carrier fails to file the notice required by this section, the failure stops the running of the time periods in section 85.26 as of the date of the first payment. If commenced, the payments shall be terminated only when the employee has returned to work, or upon thirty days notice stating the reason for the termination and advising the employee of the right to file a claim with the industrial commissioner.

This section does not prevent the parties from reaching an agreement for settlement regarding compensation. However, the agreement is valid only if signed by all parties and approved by the industrial commissioner.

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.

ANALYSIS

The issue of claimant's entitlement to permanent total sability benefits is dependent to a great degree upon the solution of the second, third, and fourth appeal issues set rth by claimant. Claimant contends that the finding of fact de in the December 31, 1980 arbitration/review-reopening cision, that she suffered a psychological disability as a sult of her industrial injuries, should properly have precluded e deputy from making additional findings with regard to mental pairment in the June 20, 1983 review-reopening decision. aimant further contends that by rejecting the earlier finding psychological disability and instead finding that she suffered permanent mental impairment, the deputy improperly decided is case as an appeal from the initial arbitration/review-reopening ther than as a review-reopening conducted simply to determine e extent of claimant's disability. Neither contention is well ceived, however, due to the fact that the December 1980 cision contains no finding that permanent mental or psychological pairment resulted from claimant's industrial injuries. The rden falls upon the claimant to prove that she has suffered an pairment for which she is entitled to permanent disability nefits. Claimant sustained the burden of proving permanent ysical impairment in the initial hearing, however, the issue permanent mental impairment appears not to have been resolved that time. For the foregoing reasons it is determined that e deputy properly heard additional testimony concerning aimant's mental status and decided the case in a manner mmensurate with review-reopening standards.

Claimant appears to argue that irrespective of the determina- on concerning the propriety of the deputy to hear additional idence concerning mental impairment, the deputy erred in arding compensation solely on the basis of physical disability thout considering psychological disability. The testimony of . Hines and Dr. Taylor illustrated totally divergent opinions to claimant's mental well-being. Dr. Hines was of the inion that claimant suffers from a severe and permanent ychological condition which renders her totally disabled. Dr. ylor, however, while finding some evidence of emotional stress, found claimant not to suffer from any psychiatric or ntal disorder. Viewing psychological and psychiatric disabilities th as mental impairments, the weight to be given expert inions with regard thereto is for the factfinder to decide. ere the evidence regarding mental impairment reaches the point extreme contradiction, such has occurred in the instant case, ference must be paid to the first hand impressions of the ctfinder. The deputy was able to observe and listen to aimant throughout three days of testimony with regard to this tter. While noting the deputy's apparent acceptance that aimant's physical problems may be heightened to some degree by otional problems, the finding that claimant suffered no rmanent mental condition (as a result of her industrial juries) shall be adopted herein. In light of the above, the puty properly declined to consider psychological disability as basis for determining the extent of claimant's permanent sability.

In determining that claimant had sustained an industrial disability of 60 percent to the body as a whole the deputy appears to have considered claimant's functional impairment, age, education, work experience, and prospects for retraining. The deputy's determination regarding the extent of claimant's permanent disability is affirmed.

With regard to claimant's contention that interest should have been awarded on the $3,007.19 ordered to be paid by defendants unto claimant in the December 31, 1980 decision, the deputy properly found that the interest provision of section 85.30 applies only to weekly compensation benefits and is not applicable to benefits provided under section 85.27. The deputy's denial of a penalty under the provision of section 86.13 for the tardy payment of the $3,007.19 was likewise proper. Because the first paragraph of section 86.13 refers only to weekly compensation benefits, it follows that the remaining provision of that section refers to the same, and no penalty is deemed to attach for tardy payment of medical expenses.

FINDINGS OF FACT

1. Claimant was 49 years old at the time of the latest review-reopening hearing.

2. Claimant has a ninth grade education.

3. Claimant's employment history includes light manual labor work, sales work, and cashier work.

4. Claimant was employed as a light laborer by Furnas Electric Co. on September 12, 1977.

5. Claimant sustained a work-related injury to her right elbow which arose out of and in the course of her employment on September 12, 1977.

6. Claimant subsequently reported an injury to her left upper extremity as a result of the strain of daily employment.

7. Claimant underwent a surgical release of the left carpal tunnel in May 1978.

8. Claimant returned to work at Furnas Electric Co. during February, March, and April 1978, but was unable to continue due to pain in her arms.

9. Claimant was terminated as an employee of Furnas Electric Co. in May 1979.

10. Claimant has not worked since April 1978.

11. Claimant currently has some emotional problems, however, has not suffered any permanent mental impairment as a result of her work-related injuries.

12. Claimant's current physical complaints include pain in both upper extremities extending into the shoulders and neck.

13. Claimant's healing period ended on March 16, 1983 (the day of the last review-reopening hearing).

14. Claimant has sustained an industrial disability of 60 percent of the body as a whole as a result of her work-related physical injuries.

15. The applicable workers' compensation rate is $96.57 per week.

CONCLUSIONS OF LAW

Claimant has sustained the burden of proving an industrial disability of 60 percent to the body as a whole.

Claimant is not entitled to an award of interest on the amount of $3,007.19 in medical expenses ordered to be paid by defendants unto claimant in the December 31, 1980 decision.

Claimant is not entitled to a penalty under the provisions of section 86.13 for the late payment by defendants of the $3,007.19 in medical expenses.

WHEREFORE, the deputy's decision filed July 20, 1983 is affirmed.

THEREFORE, it is ordered:

That defendants are to pay weekly compensation benefits for healing period from September 12, 1977 through March 16, 1983, less the time claimant returned to work in 1981 at the rate of ninety-six and 57/100 dollars ($96.57) per week, accrued payments to be made in a lump sum together with statutory interest at the rate of ten percent (10%) per year, less a credit for payments heretofore made.

That defendants are to pay weekly compensation benefits unto claimant for permanent partial disability for a period of three hundred (300) weeks for the permanent partial disability less one hundred twenty-five (125) weeks already received, at the rate of ninety-six and 57/100 dollars ($96.57) per week, accrued payments to be made in a lump sum together with statutory interest at the rate of ten percent (10%) per year, less credit for payments heretofore made.

That the costs of this action are taxed against defendants.

That defendants are hereby ordered to file a final report upon completion of the payments herein ordered.

Signed and filed this 27th day of February, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

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

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT D. KNIESLY,	
Claimant,	File No. 677709
vs.	A P P E A L
BRAZOS TRANSPORT, INC.,	D E C I S I O N
Employer,	
and	
TRANSPORT INSURANCE COMPANY,	
Insurance Carrier, Defendants.	

By order of the industrial commissioner filed June 21, 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 and claimant cross-appeals a review-reopening decision of February 28, 1983.

The record on appeal consists of the transcript; claimant's exhibits 1 through 6, inclusive; and defendants' exhibits 2 through 6, inclusive, all of which evidence was considered in reaching this final agency decision. Claimant's exhibit 7 was in the record, but the hearing deputy stated he would not consider it (Trans., 36). Defendants' exhibit 1 was taken subject to objection, but the hearing deputy stated in his review-reopening decision that it was not a part of the record.

The result of this final agency decision will be the same as that reached by the hearing deputy.

It should be noted that an earlier hearing was held with respect to claimant's compensation being suspended without notice and his rights because of the lack of notice as defined in Auxier v. Woodward State Hospital-School, 266 N.W.2d 139 (1978). Under that decision, defendants were ordered to pay claimant temporary total disability payments from the date of the termination of payment until the date of the hearing (November 20, 1981). That decision was appealed to the industrial commissioner who issued the same order. The industrial commissioner's decision was appealed to the district court.

REVIEW OF THE RECORD

The review-reopening decision has a good review of the facts presented, and they need only be recapitulated very briefly. Claimant had a history of suffering from high air temperatures. In June of 1981, while driving a truck for the employer, the heat outside and inside of the truck's cab combined to cause him to become uncomfortable and disoriented. He had another episode in July. Defendants filed a memorandum of agreement for an injury of June 5, 1981 and do not contest that claimant sustained at least temporary total disability. (See p. 3, defendants' appeal brief.) There is no evidence of any permanent partial impairment as a result of the heat related injury. Claimant received two notices from the employer: "You will not be put back to work till we get a full release for the following illness: directional disorientation, pressure headaches, dizzyness, numness [sic] in arm and a [sic] alleged heart problem," (dated August 13, 1981) and "Due to the fact our doctor reports that you hyper-ventolate [sic] when you get hot from the weather or from excessive work, you are placed on ideffinate [sic] layoff until such time that you can pass a company physical showing you wont [sic] hyper-ventolate [sic] in performance of your equired [sic] duties." (dated September 8, 1981)

ISSUES

The hearing deputy found a permanent partial disability to the body as a whole for industrial purposes of 10 percent. Defendants state the issues thus: "The award of 10 percent industrial disability is not supported by the law of the State of Iowa or, in view of the correct factual findings, from the evidence in this case."

Claimant states the issues thus:

> 1. Mr. Kniesly's loss of not less than 52.18 percent of his income, and as much as 64.62 percent (see p. 12-15 of Trial Brief), for a period to last at least three years, entitles him to more than a 10 percent permanent partial disability.
>
> 2. The Auxier Letter ending the Healing Period had never been sent as of the date of the main hearing in the case. Mr. Kniesly is entitled to healing period benefits through the date of the second hearing. These are independent of the permanent partial disability.
>
> 3. It is the direct refusal of the Employer to permit Mr. Kniesly to return to his job which has created his disability. This disability will endure for three years from the time Mr. Kniesly leaves or is otherwise terminated from his employment with Brazos. At the time of the hearing, Mr. Kniesly was still employed by Brazos, although he was refused the opportunity to work by the Brazos Safety Director.

The issues of the amount of disability and the Auxier letter can be handled here and now. With respect to the amount of disability, this decision will adopt and incorporate the hearing deputy's analysis, findings of fact and conclusions of law and order. Similarly as to the Auxier letter, the hearing deputy ruled on p. 4 of the transcript that the prior decision took care of the Auxier issue. Likewise, in his review-reopening decision, he did not consider any of the evidence in that regard. The hearing deputy's ruling refusing to consider the Auxier issue further is adopted herein.

APPLICABLE LAW

Elements of industrial disability usually are functional impairment, age, education, qualifications, experience and inability, because of the injury to engage in the employment for which a person is fitted. Olson v. Goodyear Services Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963) and Martin v. Skelly Oil Co., 252 Iowa Iowa 128, 106 N.W.2d 95 (1960). See also, however, 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) which both state that reasons for loss of earning capacity may not always be related to functional impairment. McSpadden, at p. 192. These concepts are discussed further below.

ANALYSIS

The basic issue is whether or not a claimant who has no permanent partial impairment and is laid off because of an injury can be entitled to an award of industrial disability. First however, it must be established that the injury was the cause of the layoff.

In that regard, the notices quoted above both followed the heat related episodes in June and July, 1981. The second notice even mentions the excessive work explicitly. Claimant was under the impression that he was laid off because of the inability to tolerate heat (Trans., 45) and finally, Jerry Beir, the safety director for the employer, testified:

> A. He came back with a piece of paper from a Doctor Caughlan, who stated he was capable of going back to work as long as we insured that he was driving an air-conditioned cab.
>
> Q. Why did you not allow Mr. Kniesly to return back to work?
>
> A. Because in the flatbed operation there is no way that he can go back to work without being exposed to the conditions that exist on the day that he is working.
>
> ....
>
> Q. You have indicated that the trucks are air-conditioned, is that correct, at least generally speaking?
>
> A. We are required by labor agreement with the Teamsters to have our trucks air-conditioned. We are not required by the labor agreement to have them in working order. (Trans, p, 88 ll. 11-19 and p. 90 ll. 16-21)

That testimony leads one to believe that claimant was laid off because of his injury and that the employer was unwilling to offer any work environment or a job that claimant's condition could tolerate. In Blacksmith, at p. 354 the court held that claimant was entitled to industrial disability, stating "This is the case of an employee who has no apparent functional impairment and who wants to work at the job he had before but is precluded from doing so because his employer believes the past injury disqualifies him, resulting in a palpable reduction in earning capacity." The facts in the present case are close enough to those in the Blacksmith case to support an award. The findings of fact, conclusions of law and order of the hearing deputy are adopted herin and repeated below:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Finding 1. On June 5, 1981 claimant was injured while working for defendant employer.

Finding 2. Claimant's injury was a heat related problem.

Finding 3. Claimant had a history of heat related problems prior to his injury on June 5, 1981.

Finding 4. Although the injury of June 5, 1981 aggravated claimant's preexisting condition, no permanent impairment resulted from that aggravation.

Finding 5. As a result of his injury, claimant has had an actual reduction in earnings.

Finding 6. Claimant is forty-eight (48) years old and completed three (3) years of high school.

Finding 7. Claimant has taken college courses in mechanics and transportation.

Finding 8. Claimant is a master mechanic and is a transportation consultant.

Finding 9. Claimant has worked as director of transportation for a school system and has owned his own trucking company.

Finding 10. Claimant has derived an income from remodeling houses.

Finding 11. Claimant is only restricted from driving trucks without air conditioning.

Finding 12. Claimant's present income is one-half of his wife's income for managing a motel.

Finding 13. With claimant's experience it is apparent that claimant is qualified for higher paying employment, but has not made attempts at finding such work.

Finding 14. Neither claimant nor his wife were candid at the time of hearing.

ONCLUSION A. Claimant has an industrial disability of ten ercent (10%) as a result of his injury of June 5, 1981.

inding 15. Claimant's medical condition has not improved since ugust 27, 1981 nor is any improvement anticipated.

ONCLUSION B. Claimant's healing period benefits should have nded August 27, 1981.

inding 16. Defendants had probable cause when they terminated laimant's benefits.

ONCLUSION C. Claimant is not entitled to any benefits pursuant o section 86.13, of the Code, as amended.

inding 17. Claimant never returned to work for defendant mployer at a lesser paying job.

ONCLUSION D. Claimant is not entitled to any temporary partial isability benefits.

THEREFORE, defendants are to pay unto claimant healing eriod benefits for the days he missed work from the date of his njury until August 17, 1981 at a rate of two hundred fifty-five nd 08/100 dollars ($255.08) per week and fifty (50) weeks of ermanent partial disability benefits at a rate of two hundred ifty-five and 08/100 dollars ($255.08) per week.

Defendants are to be given credit for all payments previously aid.

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

Costs are taxed to defendants pursuant to Industrial Commissioner ule 500-4.33.

Defendants shall file a final report upon payment of this ward.

Signed and filed at Des Moines, Iowa this 28th day of July, 983.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

ppealed to District Court;
ffirmed and modified
awarded temporary total
isability, no permanency)
ppealed to Supreme Court;
ismissed

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HONDA R. KNOPP, Claimant,	File No. 690613
LLIAM C. BROWN CO., Employer,	A R B I T R A T I O N
d	D E C I S I O N
EAT AMERICAN INSURANCE, MPANY, Insurance Carrier, Defendants.	

INTRODUCTION

This is a proceeding in arbitration brought by Rhonda R. Knopp, aimant, against William C. Brown Company, employer, and Great erican Insurance Company, insurance carrier, for benefits as a sult of an injury on April 13, 1981. On February 23, 1983 is case was heard by the undersigned. This case was considered lly submitted upon receipt of claimant's and defendants' iefs on March 4, 1983 and March 23, 1983, respectively.

The record consists of the testimony of claimant, Patricia n Hamm, Joanne M. Pape; claimant's exhibits 1 through 9 and fendants' exhibits A through L with the exception of page 1 of fendants' exhibit C.

ISSUES

The issues presented by the parties at the time of the aring were whether defendants were given notice of the alleged jury within the meaning of sections 85.23 and 85.24, Code of wa; whether claimant received an injury arising out of and in e course of her employment; whether there is a causal relationship tween the alleged injury and the disability on which she is w basing her claim; and the extent of claimant's disability.

FACTS PRESENTED

Claimant testified she began working for defendant employer May 6, 1974 following her graduation from high school. She stated that her duties with William C. Brown Co. included book binding and operation of a collator. She indicated that operation of the collator required lifting forms from floor level and placing them into the machine at waist level or higher.

Claimant revealed that she first suffered a compensable claim in 1975 when she lifted a box of books off the floor. According to her she was hospitalized for about one week and was off work for an additional one and one-half weeks. She stated that she had no further problems with her back until sometime in 1977, when "it was irritating me." Claimant indicated that she then sought the care of a chiropractor, Samuel J. Sullivan, D.C., who treated her for her back problem for about nine to twelve months. Claimant testified that little progress was made under chiropractic care, so she then sought the care of an orthopedic surgeon, R. Scott Cairns, M.D., who admitted her to the hospital for physical therapy. According to claimant, following her release she remained at home for a week then returned to work, experiencing no further back problems until April 1981.

Claimant testified that in April 1981, she once again began to experience back pain. According to her testimony this back pain began to occur at about the same time that defendant employer installed a new collating machine which required more, heavier and higher lifting. She stated that the pain became so severe and intollerable that she could not wait for two weeks to see Dr. Cairns, so made an appointment with David S. Field, M.D. Claimant indicated that before she went to see Dr. Field, she advised her foreman that she was going to the doctor because of back pain. According to claimant, Dr. Field hospitalized her for physical therapy for about a week or ten days. She revealed that Dr. Field gave her instructions for back exercises at home and she returned to work on May 26, 1981.

Claimant testified she continued to work until August 1981, when the pain once again became so severe that she returned to Dr. Field. Dr. Field again hospitalized her for testing. Claimant disclosed that Dr. Field operated on her back on August 17, 1981 and she returned to work on November 2, 1981. Claimant testified that she worked November 2 and 3, 1981, and was again forced to take off because of the pain.

Following this episode, claimant stated that Dr. Field made arrangements for her to be evaluated at Mayo Clinic in Rochester, Minnesota but claimant did not go.

On cross-examination claimant admitted that she had filed claims against her group insurance and disability insurance carriers for the 1978 back problem and the April 1981 back problem, stating in each instant that the problems were not work related injuries. Claimant also admitted that she was injured on May 30, 1979 playing softball; that she was off work July 10, 1979 through July 15, 1979 from an injury received playing softball; that she was off work from August 12, 1978 through August 21, 1978 from an injury received playing softball. Claimant denied, however, that she told a nurse at Mercy Health Center on May 1, 1981 that she received her injury 12 days earlier playing catch, as reflected in the hospital notes marked and admitted as defendants' exhibit H.

Patricia Ann Hamm, a co-worker of the claimant's, testified that William C. Brown Co., did install a new collator in April 1981. She also stated that this new machine required more lifting and heavier lifting from the employees. In addition, she stated that she was able to observe claimant working on the machine and from her observations it appeared that claimant was experiencing back pain. On cross-examination, however, Ms. Hamm stated that she had made similar observations of claimant six to twelve months prior to the installation of the new machine.

A report of R. Scott Cairns, M.D., dated October 1, 1981 was submitted into evidence as claimant's exhibit 1. Dr. Cairns stated as follows:

> Miss Rhonda Freisinger was seen by me on 11-21-78 complaining of an old injury to her back. She was seen on that date with complaints of pain in her back and some radiation to her left leg. This apparently began three weeks prior to this examination after she had been wearing high heeled shoes. She stated she had an initial episode of pain in 1975 which occurred with a compensible [sic] injury when she bent over to lift a box. She was apparently hospitalized by Dr. Zelinskas. She later went to her chiropractor and made some improvement. She complained of some occasional numbness in her left leg.
>
> Physical examination at that time showed that she had quite good back motion with some complaints of pain at the extremes. She was mildly tender in her sacro-iliac joint. She had positive straight leg raising about 60° on the left side. It was negative on the right. Reflexes, toe strength and sensation were intact. There was no atrophy. X-rays at that time were normal.
>
> My initial impression was that this patient had back pain with some sciatica.
>
> She was instructed to be at bed rest and I told her I would see her in seven to ten days. If she was no better I would consider hospitalizing her.
>
> On 12-1-78 she felt no better. She again had fairly good back motion with straight leg raising positive at 45° on the left side. Reflexes and toe strength were intact. I recommended admitting her to the hospital for continued conservative treatment.
>
> She was admitted to the hospital on 12-2 and treated conservatively and discharged on 12-8-78. At the time of discharge she was much more comfortable.
>
> The patient was seen again on 12-19-78 and stated she was doing quite well. She had only mild leg pain. She had excellent back motion, normal straight leg raising, reflexes and toe strength.

She was released to work the following Tuesday and was seen again on 1-23-79 and found to be doing very well. She had excellent motion, normal straight leg raising, reflexes and toe strength. She denied pain and was discharged from my care at that time.

At the time of her examination on 12-1-78, Miss Freisinger inquired as to whether or not her symptomatalogy was compensible [sic]. My opinion at that time was that her original injury was some three years prior to this and had not been settled. I felt that the statute of limitations had probably expired and I believe that she would have great difficulty in establishing a valid claim at that point in time. If Miss Freisinger is again having difficulties, one would feel that the relationship is even more tenuous. Certainly one would feel more inclined to attach more significance to her claim had she been followed repetitively by me since 1979 with ongoing complaints but this has not been the case.

Also submitted was a report of David S. Field, M.D., dated October 8, 1981 as exhibit 2. Dr. Field made the following comments:

I have been aware as you noted in your letter, that she had previously been admitted to the hospital with regard to low back strain in April of 1975.

From your letter, I do not think that you are aware that she had been previously admitted to the hospital at Mercy Health Center onf 5-1-81, and later discharged 5-10-81, because of history of low back pain in the left side of the buttock and leg complaints. The reason for this admission was that she began experiencing low back pain symptoms suggestive of left sided sciatica approximately April 20, 1981. It was also noted in her history that she had undergone physical therapy in 1978, because of back pain and leg discomfort. Our initial impression at the time of hospitalization in May was that she had definite evidence of sciatica which hopefully would respond to conservative management in the hospital.

She was treated in the hospital for approximately nine days with physical therapy. She made a satisfactory but not total recovery from her back and leg complaints.

She was later again evaluated in August of 1981, with a persistent degree of low back pain and also left leg pain which again had not totally alleviated.

Based on the length of time and involvement of the pain, we elected to admit her to hospital on 8-9-81. While in the hospital, she underwent several investigations with regard to her back and evaluation of her lumbar spine. These studies included a lumbar myelogram, lumbar venogram, and a CAT scan of her lumbar spine.

She was also seen in consultation while in the hospital by a neurosurgeon, Doctor Michael Walus of Medical Associates Clinic.

The overall summary of her tests in the hospital suggested an abnormality located at the level of the L5 - S1 disk. Her clinical findings and studies in the hospital suggested that elective exploration of this area surgically was indicated, and this was undertaken.

At the time of surgery it was apparent that she had a congenital anomaly of the lumbar spine at this level with a very enlarged dorsal ganglion situated within the spinal canal which is unusual. This area was decompressed, and at the time of surgery no evidence of disk protrusion was identifiable.

Her postoperative course was generally satisfactory with improvement of her pain but not total relief at the present time.

It remains to be seen over the next few weeks what kind of recovery will be achieved following surgery for this problem.

Overall, her prognosis is still guarded with regard to her recovery.

As far as I can tell from history, her back symptoms seem to be aggravated by her job, which involved lifting and bending on a fairly regular basis while at work.

At the present time, I will be seeing her in follow-up in our Orthopedic Clinic over the next few weeks and hoping that she makes a satisfcatory recovery from her back situation.

In addition, Dr. Field stated in his attending physician's report dated May 19, 1981, (defendants' exhibit G) that claimant's condition was not due to an injury arising out of claimant's employment.

Finally, there was submitted into evidence a letter (Claimant's exhibit 3) from J. Clarke Stevens, M.D., to Dr. Field, dated March 11, 1982. Dr. Stevens stated:

Thank you for referring Mrs. Rhonda R. Knopp of Dubuque, IA. I know you have taken care of Mrs. Knopp for some time and I will not repeat the history. Currently she complains of left low back pain and a dull, aching, tired feeling in the left anterior thigh and calf. This is present most of the time. In addition, she has momentary shooting pains in the posterior thigh and lateral foot and heel. There was no cough, sneeze or position effect. Any kind of activity increased her pain including walking and sitting. When tired, she experiences numbness of the posterior thigh and lateral foot and heel. She has not been able to work since August, 1981.

On examination, she did not appear to be in significant distress. There was a slight limp of the left leg. Upper limb muscle stretch reflexes were normal. In the legs, the reflexes were symmetrical except for a decreased left ankle jerk. Muscle strength and bulk were normal. There was a subjective decrease in superficial pain sensation in the left posterior thigh and a loss of light touch and superficial pain on the posterolateral aspect of the left foot. Straight leg raising was carried out to 60 degress on the right and to 45 degrees on the left with both sides producing pains in the left lumbar area. Lumber spine flexion was moderately impaired and in extension was mildly impaired, but there was no paraspinal muscle spasm.

My diagnosis was mechanical low back pain with referred aching pain in the anterior thigh and calf; and mild postoperative left S1 radiculopathy.

....

As you requested, we obtained a CT scan of the lumbar spine on the GE scanner. This demonstrated a laminectomy on the left at L5 and some residual myelographic contrast material. No other abnormalities were identified. X-rays of the lumbar spine were negative except for postoperative changes. An EMG of the left lower extremity was essentially normal with no evidence of an active radiculopathy. here were some motor unit changes present in the gastrocnemius but no fibrillation was observed.

Mrs. Knopp was concerned about obtaining Workmen's [sic] Compensation for her current symptoms. She feels her back problem began in 1975 while working in a book binding factory lifting heavy bundles. I would estimate her impairment to be about 5 percent.

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 April 13, 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 claimant also has the burden of proving by a preponderance of the evidence that the injury of April 13, 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).

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

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. Garner 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).

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. Id., at 613

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

ANALYSIS

Claimant has failed to carry her burden that on April 13, 1981 she received an injury arising out of and in the course of her employment. The medical records indicate that claimant's April 1981 back injury was first attributed to playing catch. Claimant did not apparently consider the injury work related until late 1981. While Dr. Field did state in his letter of October 8, 1981 that her problem seemed to be aggravated by her work, he did not express such an opinion earlier. Dr. Field does not explain what medical evidence was relied upon for his statement. The greater weight of medical evidence indicates that there is at most mere speculation as to whether claimant's disability was related to her employment.

Even though claimant contends her back problems have been aggravated by defendant employer's installation of a new collating

achine, she had in fact been suffering from back ailments for everal months prior to its installation. In addition, claimant's redibility is impaired by her repeated statements on various nsurance claim forms that the injury was not work related. his position is supported by Dr. Field's attending physician's eports that the injury was not work related and the above eferred to hospital record which attributes the injury to laying catch.

THEREFORE, claimant is to take nothing as a result of this ction.

Defendants are to pay the costs of this proceeding.

Signed and filed this 29th day of February, 1984.

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RGARET A. KOOPMANS, Claimant,	File No. 694831
WA ELECTRIC LIGHT AND WER COMPANY, Employer, Self-Insured, Defendant.	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 Margaret A. Koopmans, aimant, against Iowa Electric Light and Power Company, self-sured employer, defendant, to recover benefits under the Iowa rkers' Compensation Act for the death of her spouse, Gerald L. opmans on March 5, 1980. It came on for hearing on July 6, 83 at the Juvenile Court Facility in Cedar Rapids, Iowa. It s considered fully submitted at that time.

The industrial commissioner's file contains a first report injury received on June 2, 1982.

The record in this matter consists of the testimony of aimant; claimant's exhibit 1, a death certificate; claimant's hibit 2, decedent's personnel file; claimant's exhibit 2A, the cedent's workers' compensation file; claimant's exhibit 2B, rious medical data; claimant's exhibit 3, the original notice d petition and return of service; claimant's exhibit 4, a tter from Darrel A. Morf dated May 19, 1980; claimant's hibit 5, a report of employee occupational injury or illness; aimant's exhibit 6, the deposition of Donald L. Carlson; aimant's exhibit 7, the deposition of Wayne Robinson; claimant's hibit 8, the deposition of Charles Helgeland; claimant's hibit 9, the deposition of Ralph Robert Little; and claimant's hibit 10, the deposition of Margaret A. Koopmans. The parties led briefs.

ISSUE

The sole issue in this matter is one of notice pursuant to wa Code section 85.23.

STATEMENT OF THE CASE

Claimant testified both at hearing and by deposition.

Fifty-seven year old widow of decedent Gerald Koopmans stified to her marriage to decedent in 1946 and to their ving three sons, one of whom was under age 18 at the time of s father's death.

She gave a personal history of completing the eighth grade a small Iowa town where there was no high school and no bus ansportation. She worked as a babysitter until she was old ough to get a job as a waitress. She took a typing course. e married and commenced work in a small department store where e did a variety of jobs from marking to banking. She stopped rking to stay at home and have a family.

She moved with that family to Cedar Rapids in 1958. She ok a series of tests to see what course work she might need r a GED and was told that her grades were high enough to able her to undertake college work although she was lacking in dern math. She intended to enroll in college, but she became egnant and stayed home with her child instead. She did volunteer toring for children with emotional and reading problems and rked with a group of senior citizens. She took a part-time b as a school cashier and has recently added another part-time b as a cashier in a lumberyard. She denied any insurance rk, personnel work, jobs for lawyers or in health benefits. nce her husband's death she has taken some college courses.

She recalled that decedent who died at home on March 5, 1980 11:00 p.m. of a heart attack had worked for defendant over 22 ars, beginning as a lineman and later becoming a foreman in the underground division. She reported that he was on call for emergencies and that he might be called at night and then work his regular schedule the next day. He had not been working irregular hours on the day of his death.

She acknowledged that her husband had been to see doctors because of stress and that Valium was prescribed for him. He had stomach trouble consisting of indigestion and diarrhea when he worked irregular hours. She did not think those problems had increased over the years, but she said that it was difficult to tell as the erratic hours varied. She suspected that things which were stressful might contribute to a heart problem. She reported that both decedent's father and brother had heart problems.

Claimant testified that her estate lawyer dealt with the defendant's personnel office and made inquiries about the benefits available. She thought it was that attorney who sent the death certificate to defendant. She said that she did not know when her husband died that a workers' compensation claim could be made when job stress produces a heart attack. She denied any experience with workers' compensation death claims. It was her thinking that persons who received workers' compensation had been injured rather than that they were ill. Her spouse had received compensation for permanent partial disability and medical expenses for a knee injury. She remembered that she first learned from her attorney on January 29, 1982 that a stress induced heart attack could be compensable. At that time depositions were scheduled relating to a claim for retirement benefits. She completed the petition on that day. She made no attempt prior to that time to learn whether or not defendant might have to pay benefits if work caused the death.

On cross-examination she admitted knowing at the time of her husband's death that stress could cause heart attacks and that she had a suspicion that his work might have been related to his death and that she had wondered about it. She agreed that she knew before January 29, 1982 her husband's work was stressful and that he died of a heart attack. She was questioned:

> Q. What was it that occurred that finally caused you to decide to file this Worker's [sic] Compensation claim and essentially, to assert that in fact, his occupation was contributing factor for his death?
>
> A. I wasn't aware that I could make such a claim until the date that you have. I wasn't aware that there was this possibility.
>
> Q. Well --
>
> A. Or that it was available. I don't know what word I want to use here.
>
> Q. You knew there was Worker's [sic] Compensation, didn't you?
>
> A. Yes.
>
> Q. You knew that if he had been, for example, electrocuted at his employment, that Worker's [sic] Compensation would be available, didn't you?
>
> A. I'm not sure I knew that.
>
> Q. Well, you knew that if people were injured at work, there was Worker's [sic] Compensation?
>
> A. Yes. Yes, but I did not know in death what happened.
>
> Q. And you said that before that you had thought -- that you had wondered in your own mind whether or not his employment might have contributed to his death, isn't that right?
>
> A. Repeat that.
>
> Q. Didn't you say a little while ago that you wondered in your own mind whether his employment might have contributed to his death? In some way you thought that that might be possible?
>
> A. I knew that he was under stress. I knew that he was very nervous.
>
> Q. Okay.
>
> A. And I did wonder if this would cause your heart to overwork or whatever.
>
> Q. You thought -- I think you said --
>
> A. That there could be a connection.
>
> Q. Okay. So what was it, then, on or about February 2 -- on or right before February 2, that you found out that you didn't know before?
>
> A. What did I find out? I just don't know how to answer that. If you -- If you have something that caused -- that would cause death, that Worker's [sic] Compensation was available, I never knew that before. (Koopmans dep., pp. 21-23 11. 12-25, 1-25 and 1-3)

She was unaware of anyone's reporting to defendant that decedent's death might be work related.

Claimant recalled that in 1980 she filed suit for pension benefits.

Claimant said that decedent had bid a job in an attempt to move from the electric department to the gas division. She believed her husband felt trapped because of retirement and benefits he had coming as a result of the years he had in with the company.

Donald L. Carlson, a thirty-six year employee of defendant, supervisor since 1967 and supervisor of line crews since 1978 testified that he had known decedent in the time he worked for the company and was his crew foreman for a period in which claimant worked as an underground cable splicer. As duties for a cable splicer foreman he listed directing the field crew, making out material charges, recording working times and keeping safe working conditions. He estimated a work crew would range from three to eight or ten. Directions for the day's work would come from the immediate supervisor. There were also subforemen or working foremen. Both the witness and Robinson would be involved in assigning the completion time for a job. He acknowledged that an outage could result in a foreman's being called for the emergency.

If he suspected an individual job was taking too long, he would first speak with Robinson to try to ascertain a reason. Jobs have to be completed within a budget. New construction is budgeted differently from routine maintenance with construction being more tightly controlled. It was practice to give the foreman an idea of time and materials for a given job.

The witness thought decedent was a conscientious worker who tried to do the work given him. He did not feel claimant's use of alcohol or tobacco was excessive. He described claimant as "very calm" and "deliberate."

Carlson said that Little's duties generally would be the same as the decedent's.

Wayne Robinson, a thirty-three year employee of defendant, who has been a distribution supervisor for 12 years and an underground cable foreman for part of his time with the company, testified that claimant had worked for him directing underground cable crews. The witness has a line foreman and underground foreman who work with him and each foreman has three working subforemen with a man working with each. Decedent's crew would ordinarily be six persons. The work done by decedent would include new construction work, periodic maintenance and emergency work. Robinson agreed that emergencies could occur at any time and in any type of weather and that the foreman might not actually have to go out, but he would have to make a decision. Work was assigned on a priorty basis. Emergency work, according to Robinson, would account for five to ten percent of the total work load.

The witness said that the responsibility for budgeting would be his. Jobs were laid out on paper including the material needed, but not necessarily the time or dollar amounts to be expended. He said that if problems such as wet weather or rock conditions are encountered, application would be made for more money. The foreman's responsibilities in addition to seeing that men work include enforcement of safety procedures and filing of equipment, time and material reports. Regarding day to day activities the supervisor said that he kept a running tab on the jobs to be done. He would put a print of the area of the job and a note on decedent's desk. As jobs were done by decedent, they were marked off the list. Daily morning conferences were held.

Robinson agreed that decedent was industrious, conscientious and knowledgeable and most of the time tried to see the job was done as outlined. He observed that decedent smoked what he estimated to be at least two packs a day. Regarding job tension, the witness said "he [decedent] set his pace and went at that pace." He was not aware of decedent's having stomach problems or of a near accident in December of 1979. Decedent had complained of his injured knee from time to time. Robinson did not know if sending a death certificate to the company was unusual or routine.

Ralph Robert Little, interim cable splicer foreman, testified that his work entailed scheduling crews for different projects, insuring work is performed safely, responding to directions from Robinson, dealing with men and seeing to it that material is charged out. He said that he might be called in an emergency situation regardless of the time of day or night or of weather conditions.

Little stated that decedent was a conscientious foreman. He characterized claimant's habits with reference to alcohol as temperate. He observed that claimant "quite frequently" smoked. He did not find claimant nervous nor did he recall complaints of dizziness or stomach trouble.

Charles Helgeland, claim representative with defendant for six years, testified that he was unfamiliar with what the company required to be filed on the death of an employee and he was uncertain whether the death certificate went to the personnel department.

The witness said he would have seen a copy of claimant's notice in February of 1982 after it came through the company office and legal department.

Records from defendant show decedent started work on December 16, 1959 as a lineman. In 1961 he became an apprentice cable splicer. In March of 1964 he was listed as a cable splicer. He became a subforeman in 1969 and a foreman on January 17, 1971.

A company form shows claimant tore a cartilage in his left knee on September 29, 1978. He was admitted to the hospital on October 24, 1978 for surgery in which a displaced portion of the medial fibrocartilage of the left knee was removed. An electrocardiogram was normal. Peripheral pulsations were good. Claimant's family history indicated his father died of heart disease.

Old medical records record the death of a brother from a heart attack.

A certificate of death documents claimant's death on March 5, 1980. Cause of death is listed as cardiac arrest due to arteriosclerotic cardiovascular disease. A pathology report shows an autopsy was done on March 6, 1980. The left coronary artery had moderate arteriosclerotic changes extending into the anterior descending branch, moderately severe atherosclerotic changes with atheromatous narrowing of the middle third. The aorta and main branches had moderate arteriosclerotic changes. There was focal mild interstitial fibrosis in the interstitial capillaries.

APPLICABLE LAW AND ANALYSIS

This matter was bifurcated by another deputy industrial commissioner with the sole issue to be considered at the time of hearing whether or not claimant gave notice as required by Iowa Code section 85.23 which 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.

Notice is an affirmative defense. The Iowa Supreme Court in Reddick v. Grand Union Tea Co., 230 Iowa 108, 296 N.W. 800 (1941) set forth the rule for dealing with affirmative defenses. The opinion of the court in Reddick provided that once claimant sustains the burden of showing that an injury arose out of and in the course of employment, claimant prevails unless defendant can prove by a preponderance of the evidence an affirmative defense.

In DeLong v. Iowa State Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940) the court recognized the industrial commissioner's treatment of notice. The commissioner, quoted in DeLong at 702-03, 92, wrote:

> that while the weight of the evidence is not entirely free from doubt, much of which may be due to lapse of time...we are of the opinion claimant sustained the burden of proof in that respect, but in this the question upon whom the burden of proof may rest is not free from doubt. We are constrained to believe that want of such notice is an affirmative defense and if that be true the burden of proof would rest upon the defendant.

Theoretically the issue of notice should not and need not be considered until claimant has established by a preponderance of the evidence that decedent's death arose out of and in the course of his employment. This matter is being ruled on by assuming without deciding that claimant has carried that burden.

The Iowa Supreme Court most recently dealt with notice in Robinson v. Department of Transportation, 296 N.W.2d 809, 811 (Iowa 1980) as follows:

> 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 section 85.23.

Defendant herein knew of decedent's death from a heart attack. This situation is very much similar to that of the employer in Robinson who also was aware of the employee's heart attack. However, as the court in Robinson pointed out at 311, "the actual knowledge alternative must include information that the injury might be work-connected."

There was testimony in the record that the foreman spent a small percentage of his time dealing with emergencies in inclement weather. There was some overtime work. The work required decision making. Company records in the week preceding decedent's death show he was working regular eight hour days. At the end of February decedent took two sick days.

Decedent was described by Little, the person who took over his job, as conscientious and temperate. Little did not find him to be nervous or to complain of physical problems. Robinson also thought decedent conscientious, knowledgeable and industrious. He observed that decedent smoked a lot. He felt decedent set his own pace and went at his own pace, and he was unaware of decedent's having any health problems or making physical complaints. Carlson, too, viewed decedent as conscientious. He characterized decedent as "a very calm person, deliberate." He was unaware of decedent's having any health problems.

Neither of the management people who testified reported anything about dececedent that might have alerted them to a

otential compensation claim. On the contrary, decedent appeared ot to have indulged in excesses, not to have expressed physical omplaints and not to have exhibited the type of personality ypical of the heart attack victim. Decedent did not die at ork.

It is unclear from the record how or when defendant first btained decedent's death certificate. However, the cause of eath contained therein--cardiac arrest due to arteriosclerotic ardiovascular disease--does not suggest a work-related mishap. t more likely suggests a death attributable to a disease.

Medical records obtained when decedent injured his knee ontained an electrocardiogram which was normal and a family istory of decedent's father dying of heart disease.

Based on the record here presented defendant cannot be found o have had actual knowledge that decedent's death might be ork-related.

As defendant has not been found to have actual knowledge, it s necessary to examine whether or not someone on decedent's ehalf gave notice within ninety days from the occurrence of njury.

In Jacques v. Farmers Lumber & Supply, 242 Iowa 548, 552, 47 N.W.2d 36, 239-40 (1951) the Iowa Supreme Court defined "occurrence" o be when the employee found out about the disease. Robinson . Department of Transportation, 296 N.W.2d 809, 812 (Iowa 1980) iscusses Jacques and then makes reference to 3A Larson, Workmen's ompensation § 78.41 at 15-65 to 15-66 for the rule: "The time eriod for notice or claim does not begin to run until claimant, s a reasonable man, should recognize the nature, seriousness nd probable compensable character of his injury or disease." easonableness of claimant's action is to be based on claimant's ducation and intelligence.

Claimant's early education, because she lived in a small own, was limited to eighth grade. She subsequently has taken ollege courses. She is an intelligent and capable person. She as spent much of her life being a mother and homemaker. Her ecent work experience has been part-time. Although decedent as worker and a union member very likely was exposed to workers' ompensation, claimant's exposure due to her life experience was ore limited.

As decedent died, there can be no question but that claimant new of the seriousness of decedent's injury.

Whether claimant knew the nature of the condition is a more fficult question. Claimant has been found to be a credible tness, but reconciling her testimony regarding decedent's rvousness with that of his co-employees presents a dilemma. e testified that decedent had gastrointestinal problems when worked irregular hours and that she suspected stressful nditions might contribute to heart problems. She admitted ndering whether the stress her husband was under might cause s heart to overwork. She stated her thought that there could a connection. Claimant at most had a suspicion as to the ture of her spouse's death.

The most difficult question is whether or not claimant knew e probable compensable character of decedent's death. She ew that decedent collected workers' compensation for a knee jury in 1978. She claimed, however, that she did not know rkers' compensation could be obtained for other than traumatic juries such as when workers die. When she was asked what it s that she found out that she did not know before which led to e filing of her petition, she responded: "If you have something at caused--that would cause death, that Worker's [sic] Compen- tion was available. I never knew that before."

The focus in this decision will be on the modifier probable. e Iowa Supreme Court did not define probable in either Robinson Department of Transportation, 296 N.W.2d 809 (Iowa 1980) or Orr v. Lewis Central School District, 298 N.W.2d 256 (Iowa 80). Black's Law Dictionary 1365 (fourth edition 1968) terestingly cites an Iowa case in its definition of probable ich is in part as follows: "Having the appearance of truth; ving the character of probability; appearing to be founded in ason or experience. State v. Thiele, 119 Iowa, [sic] 659, 94 N.W. 256." e also know that in evaluating medical evidence probability is re than a possibility. See Burt v. John Deere Waterloo actor Works, 247 Iowa 691, 73 N.W.2d 732 (1956).

Claimant did not know the probable compensable character of r husband's death. There are several levels of knowledge plicable to workers' compensation. Many persons understand at traumatic injuries are compensable. Somewhat fewer comprehend at employee deaths can result in payment of benefits. Finally, rather sophisticated grasp of worker' compensation is necessary anticipate the compensability of heart attacks, strokes and ntal injuries. These latter conditions are not infrequently ewed as not compensable by attorneys and not recognized as mpensable by insurance carriers. To expect a woman of claimant's perience to recognize "the nature, seriousness and probable mpensable character" of decedent's death is expecting too much. en she realized "the nature, seriousness and probable compensable ture" of the death she immediately filed a petition thereby ving defendant notice. That notice was given in a timely nner.

As it was pointed out above, the procedure followed in this se is atypical as ordinarily claimant would have the burden of tablishing by a preponderance of the evidence that decedent's ath arose out of and in the course of his employment before matter of defendant's affirmative defense would be addressed. is is a bifurcated proceeding. Claimant still must prove the ath arose out of and in the course of decedent's employment. is case will be returned to the docket for the mailing of alysis of status/certificates of readiness. See Industrial mmissioner Rule 500-4.2.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant's testimony at the hearing was credible.

That claimant was the spouse of decedent.

That decedent died on May 5, 1980.

That decedent did not die at his job site.

That decedent was not known to indulge in excesses, to express physical complaints or to exhibit nervousness at work.

That defendant did not not have actual knowledge that decedent's death might be work-connected.

That claimant is 57 years of age.

That claimant has an eighth grade education, a GED and has taken additional college courses.

That claimant has done volunteer work.

That claimant has done part-time work as a cashier at a school and in a lumberyard.

That claimant has not worked in insurance, personnel, law or health benefits.

That decedent had gastrointestinal problems when he worked irregular hours.

That decedent had collected workers' compensation for an injury to his knee in 1978.

That claimant knew her spouse's condition was serious.

That claimant only suspected the nature of her spouse's death.

That claimant did not know the probable compensable nature of her spouse's death.

That when claimant realized "the nature, seriousness and probable compensable nature" of the death, she filed her petition.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant gave timely notice within the provisions of Iowa Code section 85.23.

ORDER

THEREFORE, IT IS ORDERED:

That this case be returned to docket for the mailing of analysis of status/certificates of readiness to determine the other issues in this case.

That defendant pay costs pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 29th day of March, 1984.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FRED A. KOTH,	:	
Claimant,	:	
vs.	:	File No. 665847
WILSON FOODS CORPORATION,	:	A P P E A L
Employer,	:	D E C I S I O N
Self-Insured,	:	
Defendant.	:	

STATEMENT OF THE CASE

Defendant appeals from a review-reopening decision wherein claimant was awarded permanent partial disability benefits based upon a finding of 17 percent industrial disability.

The record on appeal consists of the transcript of the review-reopening proceeding which contains the testimony of claimant, Fred A. Koth; claimant's exhibits 1 through 4; and the briefs and filings of all parties on appeal.

ISSUE

Defendant appeals on the basis that the deputy industrial commissioner erred on finding for the claimant an industrial disability of 17 percent of the body as a whole.

REVIEW OF THE EVIDENCE

Counsel for the claimant and for the employer stipulate that:

1. The claimant's rate of compensation benefits is $275.09.

2. The date of commencement of any additional permanent partial disability would be October 26, 1981. (Transcript, pp. 2-3)

3. The claimant executed a waiver of employer's liability with regard to the contracting of the occupational disease brucellosis. (Tr., p. 21)

Claimant, who was 43 years old at the time of the hearing, has been employed by defendant as a retaining room butcher for approximately 16 years. He is a high school graduate and has previously worked as a farm implement assembler, a truck driver and a construction worker. He also has raised hogs on his own farm.

In his present job as butcher, claimant splits the hog carcass with a saw and removes the viscera with a knife. The activity requires pulling and pressure on the tools and lifting of up to 100 pounds. (Tr., pp. 9-11) The job of retaining room butcher commands the highest pay of any production worker of the employer. Claimant earned $8.70 at the time of the hearing. (Tr., p. 24)

Claimant testified that during 1978 he began having pain in his legs while he was working. He continued his employment with intermittent periods of time off with back problems. (Tr., p. 13) On March 25, 1981 claimant reported a back injury due to a slipping accident. (Employers Work Injury Report) He was diagnosed as suffering from a herniated disc of the lumbar spine. On July 28, 1981 claimant had surgery to remove one disc and repair another. The report of John Connolly, M.D., orthopaedic surgeon, states that claimant "needs to have his back in good condition before he gets back to doing that kind of work." (Claimant's Exhibit 2) On October 26, 1981 claimant returned to work at the same job he had prior to his injury.

On May 27, 1982 Oscar Jardon, M.D., of the University of Nebraska Medical Center, reported a permanent partial disability of 10 percent of the whole body.

Claimant testified that pain keeps him from sleeping on days when he has done too much lifting and he still takes medication for the pain. (Tr., p. 17) He is unable to stand or sit for longer than 45 minutes without suffering soreness (Tr., p. 20) He no longer raises hogs on his farm and has given up other activities which involve lifting, kneeling or bending. At work, claimant depends on the help of other employees to complete his lifting tasks. (Tr., pp. 16-21)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 25, 1981 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).

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).

ANALYSIS

The sole issue on appeal is whether claimant is entitled to industrial disability benefits beyond the 10 percent which the employer has already paid.

A finding by a medical evaluator of impairment to the body as a whole does not equate to industrial disability. Impairment and disability are not identical terms. Although the doctor spoke in terms of disability, it is not industrial disability but rather functional impairment to which he refers. 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, II Iowa Industrial Commissioner Report 39 (1981); Enstrom v. Iowa Public Services Company, II Iowa Industrial Commissioner Report 142 (1981); Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981).

Defendant is correct in its assertion that the deputy erred in finding functional disability of 17 percent of the body as a whole. Review of the record and the analysis of the deputy leads one to believe the 17 percent functional impairment finding was a typographical error, and that a nunc pro tunc would have issued to correct the finding to 10 percent functional impairment had the matter been brought to the attention of the deputy. As noted, however, this is not fatal to the outcome of this case.

FINDINGS OF FACT

1. Claimant is 43 years old.

2. Claimant has a 12th grade education.

3. Claimant has worked 16 years for defendant employer.

4. Claimant's job as butcher involves pressure and lifting activities.

5. Since 1978 claimant has suffered from pain in his back and legs.

6. In 1981 claimant slipped while working and injured his back.

7. Claimant underwent surgery for a herniated disc of the lumbar spine.

8. Following a recovery period, claimant returned to his same job.

9. Claimant has been paid by defendant employer for a 10 percent functional disability of the body as a whole.

10. Claimant is unable to bend, kneel or lift without pain.

11. Claimant cannot stand or sit for long periods of time.

12. Claimant requires the help of other employees for lifting tasks.

13. Claimant's sleep is interrupted by pain in his legs.

14. Claimant takes aspirin and Darvocet for pain.

15. Claimant's previous jobs require lifting, bending, or prolonged sitting.

16. Claimant's doctor has stated that claimant's back must be in good condition before he returns to his kind of work.

17. Claimant has an industrial disability of 17 percent of the body as a whole.

18. Claimant's rate of compensation is $275.09.

19. Permanent partial disability benefits commence October 26, 1981.

CONCLUSION OF LAW

Claimant has sustained the burden of proving an industrial disability of 17 percent as a result of his work related injury.

WHEREFORE, the deputy's decision filed August 2, 1983 is affirmed.

THEREFORE it is ordered that defendant is to pay unto claimant eighty-five (85) weeks of permanent partial disability benefits at a rate of two hundred seventy-five and 09/100 dollars ($275.09) per week commencing October 26, 1981.

Defendant is to be given credit for benefits previously paid.

Accrued benefits are to be made in a lump sum together with statutory interest at the rate of ten percent (10%) 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.

Signed and filed this 19th day of January, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MES E. LAMBERT,	:	
	:	
Claimant,	:	File No. 716025
	:	
	:	A P P E A L
	:	
SECOND INJURY FUND OF IOWA,	:	D E C I S I O N
	:	
	:	
Defendant.	:	

Claimant appeals from a ruling denying claimant's motion to instate a claim against the Second Injury Fund.

REVIEW OF THE EVIDENCE

Claimant filed a petition in arbitration claiming an injury his left foot and leg. Claimant further claimed benefits om the Second Injury Fund due to prior loss of his right foot.

On May 12, 1983 claimant entered into a special case settle- t pursuant to section 85.35, Code of Iowa with the defendant loyer and its insurance carrier. This special case settlement eement was presented to and approved by a deputy industrial missioner. The settlement denied the existence of a job ated injury affecting claimant's left lower extremity and red any further claim against the employer or insurance rier related to such alleged injury. Claimant filed a missal of his action against the employer and its insurance rier. On May 10, 1983, two days prior to the settlement of case with the defendant and its insurance carrier, an order missing claimant's petition was entered for claimant's lure to show cause within 20 days of an order entered April 1983 why the action of claimant should not be dismissed for lure to comply with certain prehearing procedures.

Claimant filed his motion to reinstate on the same day the cial case settlement was submitted and approved.

ISSUE

Does the special case settlement entered into by claimant, loyer and its insurance carrier without the participation of Second Injury Fund bar the claim for benefits against the ond Injury Fund?

APPLICABLE LAW

Section 85.64, Code of Iowa states:

If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no preexisting disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

Any benefits received by any such employee, or to which he may be entitled, by reason of such increased disability from any state or federal fund or agency, to which said employee has not directly contributed, shall be regarded as a credit to any award made against said second injury fund as aforesaid. (emphasis added)

Section 85.35, Code of Iowa states:

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. The settlement shall not be approved unless evidence of a bona fide dispute exists concerning any of the following:

1. The claimed injury arose out of or in the course of the employment.

2. The injured employee gave notice under section 85.23.

3. Whether or not the statutes of limitations as provided in section 85.26 have run. When the issue involved is whether or not the statute of limitations of section 85.26, subsection 2, has run, the final disposition shall pertain to the right to weekly compensation unless otherwise provided for in subsection 7 of this section.

4. The injury was caused by the employee's willful intent to injure himself or to willfully injure another.

5. Intoxication of the employee was the proximate cause of the injury.

6. The injury was caused by the willful act of a third party directed against the employee for reasons personal to such employee.

7. This chapter or chapter 85A, 86 or 87 applies to the party making the claim.

Approval by the industrial commissioner shall be binding on the parties and shall not be construed as an original proceeding. Notwithstanding any provisions of this chapter and chapters 85A, 86, and 87, an approved settlement shall constitute a final bar to any further rights arising under this chapter and chapters 85A, 86, and 87. Such payment shall not be construed as the payment of weekly compensation. (emphasis added)

A special case settlement is basically a release and does not establish that an injury arose out of and in the course of employment. Furthermore, the fact that that money is paid in settlement does not conclusively show that employee's injury was work-related and compensable. Rich v. Dyna Technology, Inc., 204 N.W.2d 867 (Iowa 1973).

ANALYSIS

Claimant argues the agency has previously allowed claims against the Second Injury Fund where a special case settlement has been entered into with the employer citing Driscoll v. Wilson Food Corporation, II Iowa Industrial Commissioner Report 130 (1981). In this case recovery against the Second Injury Fund was denied for other reasons and the issue of the viability of the claim was not discussed.

Claimant also cites Hickson v. W. A. Klinger, Inc. and Second Injury Fund, 34th Biennial Report of the Industrial Commissioner, p. 135. This case is not on point as it deals with a commutation which can only be granted where the claim is determined to be compensable and the period during which compensation is payable can be definitely determined.

Although the industrial commissioner was formerly the conservator of the assets of the Second Injury Fund this no longer is true as of July 1, 1983 so any perceived conflict of interest ceases to exist.

Claimant contends the special case settlement was intended to preserve claimant's cause of action against the Second Injury Fund. It is incomprenensible how the claimant and defendant employer and its insurance carrier can agree that claimant has preserved a cause of action against a third party to the detriment of the third party. The statute under which the settlement was effectuated indicates the settlement is a "final bar to any further rights arising under this chapter and chapters 85A, 85B, 86 and 87." The Second Injury Fund is created by Code sections 85.63 et. seq.

By far the better rule is that indicated by White v. Weinberger, 49 Mich.App. 430, 212 N.W.2d 307 (1973), aff'd 397 Mich. 23, 242 N.W.2d 427 (1976) in which the Court of Appeals of Michigan stated in 212 N.W.2d at page 312 "the establishment of employer liability, either by admission or adjudication prior to redemption, is an absolute prerequisite to Second Injury Fund liability." The redemption referred to under Michigan law is similar to the special case settlement in Iowa.

FINDING OF FACT

Claimant entered into a special case settlement with the employer and its insurance carrier for the alleged injury to his left lower extremity pursuant to section 85.35, Code of Iowa.

CONCLUSION OF LAW

Claimant's action against the Second Injury Fund as a result of the claimed injury to his left lower extremity is barred by the special case settlement between claimant and the employer and its insurance carrier.

ORDER

WHEREFORE the ruling of the deputy is affirmed.

THEREFORE claimant's motion for reinstatement is overruled.

Signed and filed this 30th day of September, 1983.

Appealed to District Court;
Dismissed by claimant

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JERROLD B. LANG, Claimant, vs. HUMBOLDT COMMUNITY SCHOOL, Employer, and ST. PAUL INSURANCE COMPANIES, Insurance Carrier, Defendants.	File No. 667534 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 wherein claimant was awarded permanent partial disability benefits based upon a finding of 25 percent industrial disability of the body as a whole. Costs were denied for chiropractic care which was unauthorized. The record on appeal consists of the transcript of the review-reopening proceeding; claimant's exhibits 1 through 28; defendants' exhibits A through J; and the briefs and filings of all parties.

ISSUES

1. Whether claimant's earnings from Lang's Flower & Garden Center, Inc., should be included as income in determining the applicable rate of compensation.

2. Whether claimant is entitled to an industrial disability in excess of 25 percent.

3. Whether costs for claimant's continuing chiropractic treatment should be allowed.

REVIEW OF THE EVIDENCE

The parties stipulate that medical expenses at issue are fair and reasonable. They further agree that the charges of David W. Hoyt, D.C., have been paid by defendants through December 24, 1981. (Transcript, page 2) It is stipulated that claimant has three exemptions. (Tr., p. 20)

At the time of the hearing claimant was 49 years old. He is married and has three children, one of whom is living at home. (Tr., pp. 19-20) Claimant has a high school education and has had no further vocational training. He worked for Earl May Seed Company from 1953 until 1969, primarily in a managerial capacity. Claimant described his duties as both administrative and physical labor. He unloaded and carried heavy trees and bags and estimated he worked with weights of 50 - 150 pounds. (Tr., pp. 21-25) In 1970 claimant purchased his own garden business and incorporated under the name of Lang Flowers & Garden Center, Inc. (Tr., pp. 25-26) He has been in business since that time. On April 3, 1981 claimant was driving a school bus for defendant employer. While stopped at a railroad crossing, the bus was struck from the rear by a semi truck. (Tr. p. 33) Claimant was thrown back in his seat. He testified he finished his route but felt sick. The next day he consulted David Hoyt, D.C., with complaints of neck stiffness, headaches and queeziness. (Tr., pp. 35-36) Dr. Hoyt took x-rays and formed a preliminary diagnosis of moderate tearing of the sternocleidomastoid muscles of the neck and moderate sprain of the right trapezius muscle, midway between spine and shoulder. (Claimant's Exhibit 28, pp. 20-22) Dr. Hoyt also determined acute traumatic myofascitis of the cervical spine at C 4-5 and C 5-6, which he termed "whiplash syndrome." (Cl. Ex. 28, p. 23) Dr. Hoyt treated claimant with chiropractic adjustments and hand-applied traction until August of 1981. (Cl. Ex. 28, pp. 24-28) Claimant testified that defendant insurer arranged for him to see John Grant, M.D., an orthopedic surgeon, in the summer of 1981. (Tr., pp. 38-39) Dr. Grant notes that claimant reported pain in the left shoulder and upper back with occasional headaches. (Cl. Ex. 3) Dr. Grant found a limitation of 50 percent of the neck in extension, tilting and turning and a decrease in shoulder motion.

> It is my feeling that this gentleman has sustained a strain of the cervical spine which has of itself been enough to produce some symptoms but has aggravated pre-existing narrowing of the disc space at C5,6 and foraminal narrowing as well. Some of his radicular pain may be associated with nerve root irritation based on these findings. Secondly, I feel he is developing an adhesive capsulitis of the left shoulder as a result of chronic strain. Other than this, I find no striking abnormalities.
>
> I have suggested to him the use of Codman's shoulder exercises and stressed the need for him to do these routinely. I have given him a trial of Butazolidin for its anti-inflammatory affect and have suggested that he take this three times a day for a week to 10 days. Finally, I think it may be necessary to consider an intensive physical therapy program with a licensed physical therapist regarding shoulder motion. If this does not provide relief then possible manipulation of the shoulder under anesthsia must be considered.
>
> It is my feeling that he will see ultimate significant improvement but I suspect that he may have some partial permanent physical impairment as a result of the aggravation of pre-existing degenerative disc disease of the neck and foraminal encroachment. I would hope that there will be little or no partial permanent impairment with reference to the shoulder. (Cl. Ex. 3)

On referral by Dr. Hoyt, claimant consulted F. L. Tepner, D.O., during the fall of 1981 for treatment. (Defendants' Ex. H) Dr. Tepner determined a 15 percent partial disability from a diagnosis of whiplash injury; dorsal nerve root irritation, cervical spine area; and bursitis of the left shoulder. (Def. Ex. D and E) Claimant continued to receive weekly chiropractic treatment from Dr. Hoyt. He returned to work as a school bus driver on November 9, 1981. (Interrogatories #13; Def. Ex. C) Claimant acknowleges that he was notified by defendant insurer that further chiropractic treatment would not be authorized after December of 1981. (Tr., pp. 102-103) Claimant was offered treatment by a medical doctor, but he continued to receive chiropractic care. (Tr., pp. 101-102) In May of 1982 claimant again saw Dr. Grant with complaints of pain in the lower part of his neck and upper thoracic area. (Cl. Ex. 4) Dr. Grant found evidence of cervical spondylitis with degenerative disk disease and attributed claimant's symptoms to the April 3, 1981 injury. (Cl. Ex. 4) Dr. Grant determined a physical impairment of 15 percent of the whole man and advised claimant to permanently avoid heavy lifting or work duties that required repeated neck motion or prolonged holding of the head in one position. (Cl. Ex. 4) Dr. Grant advised physical therapy, but claimant did not follow-up on the recommendation. (Tr., p. 103) Dr. Hoyt's records indicate that claimant was engaging in heavy lifting in his florist business after January of 1982 and his neck condition regressed. (Cl. Ex. 28, pp. 35-36) In February of 1982 claimant slipped on ice and wrenched his neck. He began receiving twice weekly chiropractic treatment which continued through June 1982. (Cl. Ex. 28, pp. 43-46) In August 1982 claimant strained his lower back while working in his business. (Cl. Ex. 28, p. 40) Dr. Hoyt testified that the strain related partly to claimant's injury of April 3, 1981 and partly to claimant's previous lumbosacral injuries of 1977, 1978 and 1979, which were not related to work activities for defendant employer. (Cl. Ex. 28, pp. 40-41) In March of 1983 claimant was evaluated by Gary Gonnerman, D.C. (Cl. Ex. 1) Dr. Gonnerman reported that claimant had reached maximum medical improvement and determined a permanent impairment rating of 20 percent of the whole man. (Cl. Ex. 1)

Claimant testified that his April 3, 1981 work-related injury interfered with his landscaping and gardening business. He was unable to do the heavy lifting and carrying required and could not afford to hire labor. (Tr., pp. 40-41) Claimant has had low back problems since 1971 that have occurred in relation to his business, and for which he has sought chiropractic care. (Tr., pp. 56-63) He stated that he takes aspirin for pain when he does heavy work, but is on no other medication. (Tr., pp. 77-78) He has a contract with defendant employer to drive a school bus for the 39 week school year and is now paid at a higher rate than prior to his 1981 injury. (Tr., pp. 80-82) Claimant has also continued to work at the flower and garden center since his April 3, 1981 injury. (Tr., pp. 88) He has phased out the landscaping portion of the business to avoid heavy lifting tasks and has concentrated in the areas of floral displays and greenhouse growing. (Tr., pp. 129-131) Claimant's wages from his employment with Lang Flower & Garden Center, Inc., have remained basically the same for the years prior to and following the injury. (Tr., pp. 104-106)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 3, 1981 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).

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, 902 (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, 257 (1963).

Section 85.36, The Code, provides in part:

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had he worked the customary hours for the full pay period in which he was injured, as regularly required by his employer for the work or employment for which he was employed, computed or determined as follows and then rounded to the nearest dollar:

4. In the case of an employee who is paid on a monthly pay period basis, the monthly gross earnings multipled by twelve and subsequently divided by fifty-two.

....

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.

ANALYSIS

Claimant contends on appeal that he is an employee of both defendant employer and Lang Flower & Garden Center, Inc., and, under the provisions of section 85.35(10), The Code, his income from both sources should be combined in calculating the rate of compensation from total earnings. Implied in claimant's argument is the supposition that his wages as a school bus driver are less than the regular full time earnings for that line of industry. In fact, the line of industry in question is school bus driving. The earnings of school bus drivers for their regularly scheduled hours do not represent part-time employment within a category of full time bus driving, but are full time wages for that particular line of industry. Since the record indicates that claimant's employment contract with defendant employer provides for claimant to receive wages based on the regularly scheduled 39 weeks of school bus driving, the provisions of subsection 10 are not applicable, and other income may not be included in total earnings. Accordingly, this decision does not reach the questions of the employer-employee relationship or corporate benefit earnings as argued by the parties.

The deputy found the applicable rate of compensation to be $58.58 per week. This is the figure determined by defendant insurance carrier based on claimant's preceding 12 months earnings. The first report of injury indicates claimant's pay period basis to be monthly. Since claimant is paid on a monthly basis, his rate of compensation should have been computed under the provisions of section 85.36(4), The Code. Under subsection 4, claimant's gross monthly earnings at the time of injury ($376.32) are multiplied by 12 ($4,515.84) and divided by 52 to find gross weekly earnings, rounded to the nearest dollar, of $87. With three exemptions, claimant's rate of compensation is $65.14 per week.

Claimant argues in his second issue that he has suffered a 75 percent reduction in his earning capacity and should receive a 75 percent industrial disability. The evidence does not support a finding in excess of 25 percent as determined by the deputy. Claimant has returned to his regular bus driving duties and is now paid at a higher rate than he was at the time of the injury. His wages from the corporation following the injury are basically the same or slightly higher than what his wages were in the years prior to the work-related injury.

Claimant's lifting and range of motion restrictions have necessitated a modification of his duties for Lang Flower & Garden Center, Inc. He is no longer able to perform the heavy work tasks of landscaping and has had to focus the business on the greenhouse and floral arrangements aspect. Although claimant's ability to participate in the more strenuous demands of his business has been impeded, other injuries incurred by claimant are likely contributing factors to his present physical limitations.

Claimant's last issue on appeal concerns unauthorized medical care. Claimant was advised by defendant insurer that continuing chiropractic treatment received after December of 1981 would not be authorized, and claimant was offered the services of a local medical doctor. Under the provisions of 85.27, The Code, defendants have the right to choose reasonable medical care, absent an agreement between the parties as to alternative treatment. Claimant continued to receive unauthorized chiropractic treatment, and the deputy was correct in denying the costs thereof.

FINDINGS OF FACT

1. Claimant is 49 years old and has a high school education.

2. Claimant is married and has one dependent child.

3. Claimant worked as a store manager for Earl May Seed Company for approximately 16 years.

4. In 1970 claimant purchased his own business and incorporated under the name of Lang Flower & Garden Center, Inc.

5. On April 3, 1981 claimant was injured while driving a school bus for defendant employer.

6. Claimant suffered a whiplash injury to his neck and a sprain of the right shoulder muscles.

7. Claimant was treated by Dr. Hoyt, a chiropractor and by Dr. Grant, an orthopedic surgeon.

8. Dr. Grant determined a physical impairment of 15 percent of the whole man as a result of the April 3, 1981 injury.

9. Claimant has restrictions on heavy lifting and on the movement of his neck.

10. Claimant returned to school bus driving on November 9, 1981.

11. Claimant continued to work for Lang Flower & Garden Center, Inc., following the work-related injury.

12. Claimant continued to receive unauthorized chiropractic treatment after defendants had offered alternate medical care.

13. Claimant's earnings from defendant employer and from the Lang corporation have not been diminished as a result of the work-related injury.

14. Claimant is no longer able to perform heavy work tasks in landscaping and has had to change the focus of the business to less demanding activities.

15. Claimant has incurred other injuries which were unrelated to his work activities for defendant employer.

16. Claimant has sustained an industrial disability of 25 percent as a result of his April 3, 1981 injury.

17. Claimant's earnings from school bus driving are full time wages for that line of industry.

18. Claimant's income from Lang Flower & Garden Center, Inc., may not be included as total earnings to compute the rate of compensation.

19. The applicable rate of compensation is $65.14 per week.

CONCLUSIONS OF LAW

Claimant is entitled to permanent partial disability benefits based upon a finding of 25 percent industrial disability. The applicable rate of compensation is $65.14 per week. The costs of unauthorized chiropractic treatment are not chargeable to defendants.

WHEREFORE the proposed decision of the deputy is affirmed in part and modified in part.

ORDER

THEREFORE it is ordered:

That defendants shall pay unto claimant permanent partial benefits for the period of one hundred twenty-five (125) weeks at the rate of sixty-five and 14/100 dollars ($65.14) per week.

That the employer is given credit for all benefits previously paid.

That the employer is given credit for twenty-five and three-sevenths (25 3/7) weeks of healing period benefits previously paid. This credit is to be applied to the permanency award.

That interest shall accrue pursuant to section 85.30 as of the date of this decision.

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

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

Signed and filed this 21st day of June, 1984.

Appealed to District Court;
Affirmed

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN N. LARSEN, Claimant, vs. FARMERS COOP COMPANY OF CLEGHORN, Employer, and FARMLAND INSURANCE COMPANY, Insurance Carrier, Defendants.	FILE NO. 682330 R E V I E W - R E O P E N I N G D E C I S I O N

This is a proceeding in review-reopening brought by the claimant, John N. Larsen, against Farmers Coop Company of Cleghorn, his employer, and Farmland Insurance Company, the insurance carrier, to recover additional benefits under the Iowa Workers' Compensation Act for an injury which occurred on June 7, 1978.

This matter was heard in Des Moines, Iowa on December 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 live testimony of the claimant, John N. Larsen, together with the evidentiary depositions of J. Clarke Stevens, M.D., and Thomas A. Carlstrom, M.D. The claimant also introduced his exhibits 1-10. The defendants introduced their exhibits 1-4.

The parties stipulated that the claimant had incurred mileage in the amount of 3,872 miles which was as yet unreimbursed for travel to and from his various doctors' offices. The parties also stipulated that claimant has incurred 16 1/2 days off work for consultation with his doctors. At the time the claimant was injured his gross weekly wage was $654.00 and he had five exemptions.

The issues in this matter are whether there is a causal relationship between the alleged injury and the disability; whether claimant is entitled to benefits for temporary total disability, healing period and permanent partial disability; and 85.27 authorization.

There is sufficient credible evidence contained in this record, based upon the undersigned's notes, to support the following statement of facts:

John Larsen testified that he was the general manager at Farmers Coop Company of Cleghorn, Iowa. He further testified that on June 7, 1978 he was helping one of the distributors unload a box of fertilizer from a truck when the endgate fell down and the edge of it hit the top of his head. He described it as feeling like something hit him on top of his head like a sledgehammer, driving him to his knees. He could feel his neck go together like an accordion. He was immediately taken to the hospital where he received stitches. Mr. Larsen was off work for a couple of days and then resumed working again.

Claimant had problems with his neck and shoulder off and on for the next three years. All of the medical bills so incurred were paid by the defendants. Because he was still experiencing problems in September of 1981, he was referred to Horst Blume, M.D., a neurosurgeon located in Sioux City, Iowa who admitted claimant to the hospital. Dr. Blume felt Mr. Larsen should undergo surgery to correct the problem and attributed the injury with the accident on June 7, 1978. Because Dr. Blume had recommended surgery, claimant sought a second opinion after first advising the insurance carrier and made an appointment with the neurology department at the Mayo Clinic, Rochester, Minnesota. Mr. Larsen was first seen by Catherine Weideman, M.D., at the neurosurgery department, who diagnosed him as having posttraumatic musculo-skeletal pain accounting for his neck and shoulder problems. She attributed this to the incident on June 7, 1978 and was told to come back as needed. Claimant visited the Mayo Clinic a total of four times from this date with the latest date being October, 1983. His primary physician was J. Clarke Stevens, M.D., of the neurology department. Dr. Stevens testified through his deposition that the problems Mr. Larsen was experiencing were due to the injury sustained on June 7, 1978. He found that Mr. Larsen had sustained a permanent partial disability of 10 percent to the body as a whole.

Also during this period of time Mr. Larsen was seeing Dean E. Meylor, D.O., a chiropractor located in Cherokee, Iowa. The insurance carrier paid part of Dr. Meylor's bill and part of the Mayo Clinic bill, but has refused to pay the remainder. Dr. Meylor sent Mr. Larsen to a James P. McCarthy, D.C., for a degree of disability rating. Dr. McCarthy is a chiropractor located in Sioux City, Iowa, and after testing, reached the conclusion that Mr. Larsen had sustained a permanent partial disability of 15 percent to the body as a whole.

The defendants retained Dr. Thomas Carlstrom as their expert witness who found that claimant had neck pain most of the time and some shoulder pain and that the neck pain was considerably more severe than the shoulder. Dr. Carlstrom concluded that the claimant sustained a myofascial strain in the incident in 1978 and that his current symptoms sprung from and were related to that incident and that his symptoms would not significantly improve in the future. Dr. Carlstrom found that Mr. Larsen sustained a permanent partial disability of approximately one percent to two percent of the body as a whole.

All the claimant's medical bills were paid with the exception of the Mayo Clinic bill in the amount of $988.10 and Dr. Meylor's bill in the amount of $1,284.00. Claimant also claims mileage of 3,872 miles, 16 1/2 days off work to visit his respective doctors and $150.00 for lodging while at the Mayo Clinic.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 7, 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).

In applying the foregoing legal principles to the case at hand, it is clear that the claimant has bourne his burden of proof. It should be noted that all medical experts agree that medical causation exists in this matter.

Claimant is entitled to benefits under section 85.34(2)(u), Code of Iowa, 1977. Claimant has had no reduction in wages, but claimant's condition has taken him out of the "running" for bigger and better job opportunities. Claimant appears to be able to handle his current assignment, but basically is prevented from seeking assignments that would require additional efforts. Claimant's functional impairment is found to be 12 percent of the body as a whole and is hereby advised that should his current employment be terminated by reason of the limitations he sustained by reason of this review-reopening, he has the right under section 86.34, Code of Iowa, 1977, to petition for an additional review-reopening award being guided by the applicable statute of limitations.

Dr. Horst Blume, the neurosurgeon that the claimant saw in Sioux City stated in his report that Mr. Larsen suffered from neck pain, cervical-occipital pain and a localized pain at the vertex of the head as a result of being hit in the head with the endgate. The next doctor the claimant saw was Dr. Catherine Weideman at the Mayo Clinic, Rochester, Minnesota. Dr. Weideman stated that she examined Mr. Larsen for complaints of neck and right arm pain and right arm numbness as the result of a traumatic incident which occurred in 1978. Mr. Larsen also saw Dr. J. Clarke Stevens of the neurology department at the Mayo Clinic. Dr. Stevens' reports and his deposition all reveal that the claimant's disability was a direct result of the injury which he sustained on June 7, 1978. Even the defendants' expert, Dr. Thomas Carlstrom, testified that Mr. Larsen sustained a myofascial strain in the incident in 1978, that his current symptoms sprung from that incident and that they should be considered to be related to that incident. Dr. Stevens' deposition reveals that although the various doctors use different terminology to describe the injury, they all mean the same thing.

Claimant, at the date of hearing, was approximately 45 years of age. Mr. Larsen has worked his way through the echelon of a grain elevator, beginning from the bottom and working up to directly under the Board of Directors. The next move in his scheme of events for his future would have been to a larger grain elevator with more responsibilities. The claimant expressed fear concerning his ability to take on the responsibilities of a larger elevator because of the injuries which he has sustained. He testified that he is unable to work as efficiently at his job now as he was prior to the time of the injury because he cannot sit at his desk for long periods of time. He must get up approximately every half hour to walk around or move his neck which cuts down on his work product. Prior to the time of the injury in this case, he did a certain amount of outside work at his elevator which he is completely unable to do at this point in time. The pain in his neck also makes it difficult for him to concentrate at times. At his age and with his experience, Mr. Larsen would not be qualified to do anything other than work in a grain elevator.

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

1. This agency has jurisdiction of the parties and the subject matter.

2. That on June 7, 1978 claimant sustained an admitted industrial injury.

3. That the claimant has received his healing period entitlement at the weekly rate of two hundred forty-seven and no/100 dollars ($247.00), the maximum allowable.

4. That the claimant has been examined by physicians at the request of the defendants and that the claimant has lost sixteen and one-half (16 1/2) days of regular employment by reason of such examinations.

5. That the claimant has a twelve percent (12%) functional impairment of the body as a whole.

6. That certain of his medical expenses have not been paid.

THEREFORE, IT IS ORDERED that beginning on the date that the defendants received the medical report of Thomas Carlstrom, M.D., defendants shall pay the claimant a fifty-one (51) week period of permanent partial disability benefits together with statutory interest from the date due at the weekly rate of two hundred forty-seven and no/100 dollars ($247.00).

IT IS FURTHER ORDERED that the defendants pay the claimant his regular wages for a period of sixteen and one-half (16 1/2) days with statutory interest from the date of the examinations.

Defendants shall pay the following medical expenses:

Mayo Clinic	$ 988.10
Dean Meylor, D.C.	1,284.00
Transportation and Meal Expenses	1,079.00

Costs are charged to the defendants as contemplated by Industrial Commissioner Rule 500-4.33.

Defendants are ordered to file a closing notice within twenty (20) days from the date below.

Signed and filed this 18th day of April, 1984.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ARRY LEWIS,

Claimant,

s.

OSTER-SMETANA, INC.,

Employer,

nd

AUSAU INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

File No. 520933

A P P E A L

D E C I S I O N

By order of the industrial commissioner filed March 7, 1984 he undersigned deputy industrial commissioner has been appointed nder the provisions of §86.3, Code of Iowa, to issue the final gency decision on appeal in this matter. Claimant appeals from adverse ruling.

The record is the industrial commissioner's file. There was hearing in review-reopening, but claimant appeals only from a uling which was issued subsequent to that hearing. Claimant id not file a transcript because, he says, one is not necessary nd that the costs would be prohibitive. One agrees that a ranscript is probably not necessary in this case, and that is a nance claimant took in not filing the transcript since this uling will affirm the action by the hearing deputy. (That the osts of the transcript would be prohibitive is not accepted as he reason for not filing it.)

REVIEW OF THE RECORD

As stated, a full hearing was held on December 8, 1983. laimant wanted to amend the petition to bring into the case the ssue of an alleged failure to file a 30-day notice of termination payments as required by §86.13, The Code, and Auxier v. Woodward tate Hospital-School, 266 N.W.2d 139 (Iowa 1978). Claimant iled such a motion in writing on December 12, 1983. On January 1984, the deputy industrial commissioner ruled on claimant's otion to amend his petition. In denying claimant's motion to mend, the deputy industrial commissioner stated:

> Here, however, the allegations claimant seeks to add relate to information of which claimant, through due diligence and proper discovery, should have become aware in advance of hearing. Had he done so, defendants would have had opportunity to defend regarding the allegations recited above. In this case, amendment after hearing affords defendants no such opportunity. The interests of justice will not be served by permitting amendment under these circumstances.

On January 13, 1984, claimant filed an application for a hearing (which was never ruled upon and therefore deemed nied) and on January 24, 1984 filed a new petition for review- opening. After that, claimant appealed the result of the ling to the industrial commissioner.

APPLICABLE LAW

Rule 500-4.35, I.A.C. states:

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

Rule of civil procedure 88 states:

> A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial calendar, the party may so amend it at any time within twenty days after it is served. Otherwise, a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

In B & B Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 279, 4 (Iowa 1976), the Iowa Supreme Court stated that "an amendment conform to proof should usually be allowed when it does not ostantially change the issues." Of course, there is broad scretion to permit or deny amendments to pleadings, including ose to conform to proof. Marx Truck Lines, Inc. v. Fredericksen, 0 Iowa 540, N.W.2d 102 (1967) See also Mundy v. Olds, 254 wa 1095, 120 N.W.2d 469 (1963)

ANALYSIS

In claimant's statement of the case in his brief, he states:

> [c]laimant discovered that defendants had violated his constitutional rights by failure to give the thirty-day notice of termination now required by Section 86.13 and the decision in Auxier v. Woodward State Hospital-School, 266 N.W.2d 139 (Iowa 1978). The defendants have not filed a Form 2 or Form 2A showing correct payment dates and accordingly not until the date of hearing were the details of violation revealed. Thereupon, claimant filed an amendment to his Petition to allege that defendants violated such constitutional rights. This was an amendment to conform to proof.

In his argument, claimant states:

> The defendants have not filed a complete and current Form 2 or Form 2A showing the disability payments. Although there is no transcript at this point, the claimant alleges that it is clear the defendants did not give a thirty-day notice of termination of disability benefits at a time claimant had not returned to work. The violation appeared for the first time at the hearing.
>
> ....
>
> The workers' compensation act was created for the benefit of workers, not employers or insurance carriers. Here, the Deputy ignores that fundamental principle and rules that the claimant must actively enforce the filing requirements promulgated by the Industrial Commissioner. The Commissioner's rules require the employer and carrier to file full forms but because they didn't the claimant is penalized, according to the ruling of the Deputy. That is wrong.

It should be stated that the industrial commissioner's file shows filing of a form 2A (or its predecessor the form 5) on at least five occasions: May 9, 1980; January 14, 1981; February 26, 1982; April 9, 1982; and December 27, 1983.

However, the exact issue in this case is whether or not an amendment to the petition should be allowed. It is clear that the allowance of such an amendment is discretionary, and, although this review is de novo, a certain reliance must be placed upon the hearing deputy. (For the significance of a proposed agency decision, see Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293 [Iowa 1982].) Here, one would agree with the hearing deputy that the claimant could have discovered the alleged absence of the required notice through due diligence. Claimant surely would have known that the compensation checks stopped and whether notice was given thereof. One would also believe that injecting the Auxier issue into the case would substantially change the nature of the issues of the case would surprise defendants. For the above reasons, the ruling will be upheld.

Claimant also states that he should be allowed "to raise the constitutional issue in a second review-reopening proceeding." (Division II. of claimant's brief) It is premature to rule on that issue at this time, and no ruling will be made.

FINDINGS OF FACT

Claimant moved orally in the hearing of December 8, 1983 to amend his petition to include the Auxier issue and made the same motion in writing on December 12, 1983.

The deputy industrial commissioner ruled against claimant's motion.

CONCLUSION OF LAW

The ruling of January 6, 1984 correctly denied claimant's motion to amend filed December 12, 1983.

WHEREFORE, claimant's motion to amend filed December 12, 1983 is hereby denied. The case is remanded to the hearing deputy to write the decision on the basis of the record made at the hearing.

Signed and filed at Des Moines, Iowa this 29th day of May, 1984.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BARRY LOCHMILLER,	:	
	:	
Claimant,	:	
	:	File No. 637158
vs.	:	
	:	R E V I E W
BILL BLAIR,	:	
	:	R E O P E N I N G
Employer,	:	
	:	D E C I S I O N
and	:	
	:	
AID INSURANCE SERVICES,	:	
	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Barry Lochmiller, claimant, against Bill Blair, employer, and Aid Insurance Services, insurance carrier, for the recovery of further benefits as the result of an injury on April 26, 1980. Claimant's rate of compensation as indicated in the memorandum of agreement previously filed in this proceeding, and agreed to by the parties, is $50.72. A hearing was held before the undersigned on July 13, 1983. The case was considered fully submitted upon completion of the hearing.

The record consists of the testimony of claimant, claimant's exhibit 1, and defendants' exhibit A.

ISSUES

The issues presented by the parties at the time of the pre-hearing and the hearing are the extent of permanent partial disability benefits he is entitled to; a question regarding 85.27 benefits; and an offset because of claimant's recovery in a third party action.

FACTS PRESENTED

On April 26, 1980 claimant received an injury arising out of and in the course of his employment with defendant when, while driving a tractor on Highway 30, he was rear-ended by a semi-truck. Claimant stated that prior to the accident he was in good health. As a result of the accident, claimant had a compression fracture of his back. At the time of the accident, claimant was a junior in high school. Claimant graduated from high school in 1981.

Claimant testified he has problems when he works with his hands out in front of him and feels like his condition has worsened within the last year.

In a report of consultation dated December 2, 1980 William R. Hamsa, M.D., stated:

> Patient now about 6 months post injury. Kyphosis in back seems to be clinically improved. I think this is from his muscle mass redeveloping. Occasional pain with prolonged standing. Anterior, posterior and lateral compression of chest does not produce pain. Normal range of motion of the lumbar spine. No evidence of any straight leg raising limitation. Reflexes of the knee and ankle areas normal. Feel patient can return to kind of a light type of employment but should not lift more than 50-75 pounds on a repetitive basis. See when one year post injury and at that time get x-rays prior to being seen and we will give a final disability evaluation.

In his report of May 15, 1981 Dr. Hamsa indicated the following:

> Your client, Barry Lynn Lochmiller, was first seen by myself at the Orthopedic Clinic at Denison Hospital on May 13, 1980. Enclosed in this letter is a copy of this examination which I am sure that you already have, as well as follow-up examinations at the Denison Clinic for June 6, 1980, September 9, 1980, December 2, 1980, as well as my last examination of him in Denison on Februrary 17, 1981. This would be a complete file, which the patient has in the medical records department at Denison Hospital.
>
> Barry was seen for one additional time in my office on January 1, 1981. At that time, he had had some increased symptoms in the mid-dorsal spine. He had a sense of catching or an occasional click. He had definite dorsal kyphosis. No evidence of muscle spasm. There was full motion of the lumbar spine. Peripheral neurovascular status was normal in the lower extremities. Anteroposterior and lateral films of the lorsolumbar spine, plus a spot of the lower dorsal area, showed a prior described compression fracture of the lower dorsal spine, with the kyphosis and lumbar dordosis. There was no evidence of shift in any of the vertebra. The patient was advised that he would have this muscle spasm once in awhile, with this problem. I suggested that he use some heat and salicylates for the present and cut down on heavy lifting he might be doing. He was to be seen again at a regular appointment.
>
> Barry, I think, generally is getting along fairly well. I am quite sure he will have permanent residual disability in his back and this often, with this type of injury, would result to twenty-five percent total body, but again this is a variable figure tht can only be determined at a later date. Long term effects that you questioned about, would be pain with excessive bending, lifting and stooping. I do not think that it would result in any particular neurological loss, but just something that he will be faced with over a long term period.

In a report dated July 6, 1981 Dr. Charles Roland, M.D., stated:

> This is an eighteen year old gentlemen [sic] with a history of back pain. The patient states on 4/26/80 he was driving a tractor and was hit from the rear by a semi truck. He was apparently knocked unconscious and he suffered multiple contusions and trauma. At that time, x-rays revealed compression fracture of the 9th thoracic vertebrae, as well as slight involvement of T6, 7, 8, 10 and 11 posteriorly, according to the records. Since his injury he was eventually returned to work, however, he has been unable to return to heavy type of work which he had done prior to his accident. He is presently on a job in a packing house which does not cause him problems. He states his present symptoms in his mid to low thoracic back are made worse by sitting in a straight chair, sitting in a soft easy chair, bending forward, when he awakens in the morning, in the middle of the day, lying flat on his back, lying flat on his stomach, riding in a car, with increased amounts of tension, and when bending forward. After walking, bending forward does not relieve his pain. There is no incontinence of bowel or bladder. No difference with coughing and sneezing.
>
> Physical examination: On standing there was an obvious marginal kyphosis in the mid to low thoracic region. There was slight tenderness in the paraspinal muscles in this region approximate level T10, however, this is not marked. The range of motion at the lumbosacral spine is within normal limits. He does have some decreased flexibility in the mid to low thoracic spine in flexion and extension and this was difficult to measure. I would venture to say that forward flexion in the thoracic spine is decreased 20 percent in flexion and extension. Neurological evaluation in the left and right lower extremity was normal. Straight leg raising was negative. Sensation is intact. The deep tendon reflexes were 2+/2+ at the knees and ankles. The motor exam was graded 5/5.
>
> X-rays of the thoracolumbar spine, AP and lateral, revealed a severe compression fracture at T9 and the wedge angle at T9 measured approximately 8 degrees with at least 50 percent loss of heighth [sic]. The other vertebrae appeared normal in terms of wedge angles or involvement. AP alignment is satisfactory without evidence of scoliosis. The thoracic kyphosis was measured from T5 to T11 and measured 45 degrees.
>
> Impression: Intermittent thoracic back pain secondary to compression fracture at T9 with mild thoracic kyphosis.

Horst G. Blume, M.D., in a report dated September 11, 1981 stated:

> I saw this patient on August 6, 1981, with chief complaint of back pain, mainly the lower thoracic spine, induced by any type of activity. Reportedly the patient had an accident while driving a tractor, which was struck from behind by a semi. The initial physical and x-ray evaluation at Copper County Hospital revealed apparently a fracture of the thoracic spine. The patient was treated conservatively.
>
> Because of the persistence of his pain on activity, the patient was sent to me by AID Insurance Company for further evaluation. A complete physical and neurological evaluation including review of different systems, peripheral nerves, cranial nerves, and the rest of the central nervous system failed to reveal any lateralized signs. However the patient was showing signs of local tenderness over the spinous processes T8, T9, T10 and T11 centrally and paravertebrally, especially at T10, which was interpreted as an irritation of the rami dorsalis of the posterior nerve roots of the intervertebral joints of T8, T9, T10, T11 on both sides.
>
> Review of the thoracic spine films showed evidence of a compression fracture of T9, T10, and questionable T11. There was also some narrowing of the T8 and T9 interspaces. My impression was that the patient had a fracture by compression mechanism of T9 and a mild compression fraction of the anterior vertebral body of T10. The last x-rays, taken on August 6, 1981, failed to reveal any new fractures.
>
> The patient was told that, besides conservative treatment, he may need a nerve block to the rami dorsalis of the posterior nerve roots of the intervertebral joints T8, T9, T10 on both sides, and if this is of benefit, the patient would be considered as a good candidate for future radio-frequency denaturation procedure. In the meantime, the patient was advised to continue with conservative type treatment, including Meclomen medication and Sono-Neodynator treatments.. The patient was advised to avoid jogging or any other type of activity which may aggravate his pain condition in the back.

APPLICABLE LAW

An employee is entitled to compensation for any and all ersonal injuries which arise out of and in the course of the mployment. Section 85.3(1).

The claimant has the burden of proving by a preponderance of he evidence that the injury of April 26, 1980 is causally elated to the disability on which he now bases his claim. odish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). indahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A ossibility is insufficient; a probability is necessary. Burt v. ohn Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 1955). The question of causal connection is essentially within he domain of expert testimony. Bradshaw v. Iowa Methodist ospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

Section 85.27 states:

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, 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 resonably [sic] 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 85.22 states as follows:

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

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

2. In case the employee fails to bring such action within ninety days, or where a city or a city under special charter is such third party, within thirty days after written notice so to do given by the employer or his insurer, as the case may be, then the employer or his insurer shall be subrogated to the rights of the employee to maintain the action against such third party, and may recover damages for the injury to the same extent that the employee might. In case of recovery, the court shall enter judgment for distribution of the proceeds thereof as follows:

a. A sum sufficient to repay the employer for the amount of compensation actually paid by him to that time.

b. A sum sufficient to pay the employer the present worth computed on a six percent basis of the future payments of compensation for which he is liable, but such sum thus found shall not be considered as a final adjudication of the future payments which the employee shall receive and the amount received by the employer, if any, in excess of that required to pay the compensation shall be paid to the employee.

c. The balance, if any, shall be paid over to the employee.

3. Before a settlement shall become effective between an employee or an employer and such third party who is liable for the injury, it must be with the written consent of the employee, in case the settlement is between the employee and such third party; or on refusal of consent, in either case, than [sic] upon the written approval of the industrial commissioner.

4. A written memorandum of any settlement, if made, shall be filed by the employer or insurance carrier in the office of the industrial commissioner.

5. For subrogation purposes hereunder, any payment made unto an injured employee, his guardian, parent, next friend, or legal representative, by or on behalf of any third party, his or its principal or agent liable for, connected with, or involved in causing an injury to such employee shall be considered as having been so paid as damages resulting from and because said injury was caused under circumstances creating a legal liability against said third party, whether such payment be made under a covenant not to sue, compromise settlement, denial of liability or otherwise.

6. When the state of Iowa has paid any compensation or benefits under the provision of this chapter, the word "employer" as used in this section shall mean and include the state of Iowa.

An employer is entitled to indemnification for workers' compensation benefits for payments claimant receives from third party tort feasors, Armour-Dial, Inc. v. Lodge & Shipley Co., N.W.2d (Iowa 1983).

ANALYSIS

The first issue presented by the parties is the extent of permanent partial disability benefits that claimant is entitled to. It is noted that nowhere in the record does there appear to be a rating of permanent impairment. The report of Dr. Hamsa would suggest at least as of May 15, 1981 he could not make a determination as to claimant's permanent impairment. The report of Dr. Blume would also indicate that claimant may need further surgery. It would be mere speculation for the undersigned to give claimant a rating of permanent disability on the record presented.

The parties also raised a question regarding 85.27 benefits, but indicated at the beginning of the hearing that all medical bills had been paid. It would appear that claimant wishes this agency to order defendants to pay future bills.

The undersigned does not have the power or statutory authority to order future medical bills paid. Actions for the payment of medical bills are contested case proceedings and future medical expenses may not be reasonable. Also, defendants may be able to claim that the treatment sought by claimant is unauthorized.

The last issue raised by the parties is whether defendants are entitled to offset. It is clear that defendants have a right to indemnification for all benefits that they pay under the workers' compensation statutes. However, since claimant is taking nothing as a result of this proceeding, it is inappropriate at this time to say anything else on the subject.

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 April 26, 1980 claimant was injured while working for defendant employer.

FINDING 2. A permanent impairment rating has not been placed on claimant's condition.

FINDING 3. Claimant may need further surgery.

FINDING 4. It would be mere speculation to attempt to determine claimant's industrial disability.

CONCLUSION A. The undersigned is unable to determine claimant's permanent partial disability at this time.

FINDING 5. All of claimant's medical bills to date have been paid.

CONCLUSION B. Claimant has failed to prove he is entitled to any medical benefits under section 85.27 of the Code, and the undersigned is unable to order future medical benefits.

FINDING 6. Claimant has settled a case with a third party tort feasor for the amount of eighty-one thousand, eight hundred twenty-three and 56/100 dollars ($81,823.56).

CONSLUSION C. Defendants would be entitled to indemnification for workers' compensation benefits.

THEREFORE, claimant is to take nothing from this proceeding.

Claimant is to pay the costs of this action.

Signed and filed this 27th day of July, 1983.

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DWAYNE L. LONG, Claimant, vs. ARMSTRONG RUBBER COMPANY, Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File No. 664659 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision wherein the deputy held that claimant failed to prove that his employment caused his myocardial infarction of November 10, 1980.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Martin Gene Wickett, Earl Seymour, David Fines, Raymond Magnani, and James Schwinn; the depositions of claimant, Paul From, M.D.; and L. A. Iannone, M.D.; claimant's exhibits 1 through 12; defendants' exibits A through E; and the filings and briefs of all parties on appeal. On the morning of the hearing the deputy visited the employer's premises and observed the job which claimant held at the time of his myocardial infarction.

ISSUE

Whether claimant's myocardial infarction, which occurred on November 10, 1980, arose out of and in the course of his employment so as to constitute a compensable injury under the Iowa Workers' Compensation Act.

REVIEW OF THE EVIDENCE

At the time of the hearing the parties stipulated the applicable workers' compensation rate, in the event of an award, to be $270.97 per week. (Transcript, p. 89)

Claimant, who was 46 years old at the time of the hearing, began working for Armstrong Rubber Company in 1965. Prior to 1980 claimant had been assigned to positions as a rubber cutter, utility worker, and jeep operator while being paid an hourly wage. In May 1980 claimant began working as a mill operator, a piecework position at which his exact rate of pay was dependent upon the production rate established by himself and a co-worker who operates a banbury machine. (Long Deposition, pp. 3-13)

A mill operator's duties consist of overseeing the operation of three rubber processing machines which are connected by conveyor belts. A banbury machine, which is situated on a level directly above the milling area, drops a mass of very hot rubber onto a conveyor leading to the first machine (called a "drop mill"). The drop mill flattens the rubber into a continuous sheet approximately one quarter inch thick. From there the rubber rides a conveyor about 30 feet to a shaping mill where the rubber is cut to size. The rubber is finally fed into a "wigwag" and is momentarily submerged in soapy water for the dual purposes of cooling and preventing sticking. Barring any difficulties with the rubber being processed, the milling operation is designed to be continuous and the mill operator's job is to correct any problems before it becomes necessary to shut down the machinery. The mill operator and banbury operator are not in view of one another while working, however, a communication system exists whereby the mill operator can ring a bell and then talk to the banbury operator through a voice tube. The mill operator has access to a panel of switches from which the milling machinery may be shut down. (Long Dep., pp. 13-40; Tr., pp. 12-42)

The record indicates that several grades of rubber are processed by Armstrong Rubber Company and that each individual grade carries unique characteristics. At the relevant times herein a rubber known as T-54 was being processed. This particular grade is processed at a cooler temperature, causing it to break up and pull apart easier than other grades. T-54 grade rubber is also processed at a rate faster than most other rubbers, with a new mass being dropped from the banbury at approximately one minute intervals. (Long Dep., pp. 18-36; Tr., pp. 42-50)

Claimant testified that he reported to work at 11:00 p.m. on November 9, 1980 and began to process T-54 grade rubber about 45 minutes later. He recalled that T-54 had been running for about two weeks, but that it was particularly difficult to work with on that evening. Claimant stated that the rubber was pulling apart and that approximately three-fourths of it would fall onto the floor as it was dropped from the banbury. Claimant testified that some of the pieces weighed 100-150 pounds and had to be "manhandled" back onto the conveyor. Claimant worked for about one hour, but continued to fall further and further behind as rubber began to accumulate on the floor. He indicated that he did not stop the machines when he first fell behind because he would not be paid for the time that the machines are down and because the foreman looked disfavorably upon stopping the machines. Claimant testified that he finally got so far behind that he ran to a phone approximately 100 feet away to call his foreman for help. Upon discovering that the P. A. system was out of order claimant returned to his station and shut down the machinery. (Long Dep., pp. 27-46)

Upon returning to his work station claimant's arm and hand began to get numb. He recalled telling his foreman that he was sick as he proceeded to the nurse's station. By the time claimant reached the nurse's station he was experiencing shoulder and chest pain, and remembers nothing from that point in time until three days later. (Long Dep., pp. 46-48)

Defendants' exhibit C reveals that claimant arrived at the nurse's station at 12:20 a.m. on November 10, 1980. Oxygen was administered. Blood pressure was 200/120, pulse 130. Claimant was taken to Mercy Hospital Medical Center in Des Moines. The records indicate that claimant was admitted at 1:49 a.m., although the emergency room notes indicate that claimant was there at 1:05 a.m. Claimant was treated by David P. Gordon, M.D., a Des Moines cardiologist. Claimant was in full cardiac arrest. He was cyanotic, pulseless, and unresponsive. Cardiac arrest procedures were performed and he was resuscitated. Claimant had an inferior wall myocardial infarction. A coronary angiogram revealed a total occlusion of the right coronary artery. During the hospitalization, claimant was treated by Liberato A. Iannone, M.D., a cardiologist associated with Dr. Gordon. Dr. Iannone has been treating claimant since that time. Claimant was released from the hospital on November 20, 1980, and has never been released to return to work.

Marvin Gene Wickett, called as a witness on behalf of claimant, currently works as a mill operator. Wickett verified claimant's testimony as to the problems involved with processing T-54 grade rubber. He also testified that from time to time rubber falls onto the floor and that the mill operator cuts it down with a knife in order to get it back onto the conveyor. Wickett estimated that the pieces of rubber which fell to the floor weighed from 15 to 40 pounds and that only in rare occurrences would the rubber weigh 100 pounds or more. (Tr., pp. 9-33)

Earl Seymour, who also testified on behalf of claimant in this matter, is vice president of United Rubber Workers, Local 164. He corroborated claimant's testimony as to the mental and physical pressures caused by mill operators, wage schedule and production expectations. (Tr., pp. 107-115)

David Fines, called as a witness on behalf of defendants, is the senior foreman in the milling division at Armstrong Rubber Company. He testified that he has had hands-on experience as a mill operator during strikes. He did not recall ever having to discipline claimant in the line of his duties as a foreman. (Tr., pp. 126-130) Fines testified extensively as to the pay system governing mill operators. He explained that claimant was on a base pay rate of $5.73 per hour. If the mill operator works at a 100 percent efficiency rate he earns an additional rate of $3.98 per hour. Fines stated that a worker who was working at a 116 percent efficiency rate, as had been claimant at the time of his myocardial infarction, would earn $4.56 per hour in addition to the base rate of $5.73 per hour. In the event that the machinery is turned off the operator is paid at a "down-time idle" rate of $3.38 in addition to the base rate of $5.73 per hour during the actual period of shutdown. (Tr., pp. 126-139)

Raymond Magnani, called as a witness on behalf of defendants, is also a senior foreman at the Armstrong plant. Magnani testified that during the 13 plus years that he has known claimant no plant employees have been disciplined by having their pay docked due to shutting down machines. When questioned as to the weight of pieces of rubber which might fall to the floor during the milling process, Magnani indicated that the pieces generally weighed "not over 40 pounds." He further indicated that these pieces of rubber need not be "manhandled" back onto the mill, rather the piece of rubber being manipulated is placed against the turning mill which helps to pull it up. (Tr., pp. 164-170)

James Schwinn, who also testified on behalf of defendants in this matter, is the assistant industrial relations manager and safety engineer with the Armstrong plant in Des Moines. His testimony concerns claimant's health and work attendance record prior to November 1980. (Tr., pp. 187-201)

L. A. Iannone, M.D., a cardiologist, first treated claimant on November 10, 1980. During a deposition taken October 8, 1982 claimant's counsel presented Dr. Iannone with the following hypothetical situation:

Q. Sir, I'm going to give you a set of hypothetical facts that tend to cover the period leading up to Mr. Long's hospitalization there in November of 1980, and I want you to consider these things as true for the purposes of whatever questions that I ask you after that point.

The gentleman that we're talking about here is your patient Mr. Dwayne Long. Mr. Long had been employed at Armstrong Rubber for in excess of thirteen years. Up until approximately May 26 of 1980, most of Mr. Long's work at Armstrong had been as an hourly employee. In other words, he was paid on an hourly basis as opposed to by piecework or by a production rate.

On approximately May 26, 1980, he was assigned the job of mill operator, and he worked that job up until the time of his heart difficulty that commenced during his workday that started at 11 p.m. on November 9, 1980. That would be the eight-hour workday that extended into the early morning hours of November 10, 1980.

Mr. Long's ordinary workweek was forty hours, and he was generally working the night shift at that time. I'll try to give you a discription of the particular mill job that he had. That description would include that he ordinarily works alone, and he works within a twenty-five to thirty foot area, or that would be its boundaries.

....

It is a piecework job meaning that his earnings are determined on the basis of the job pay rate and the amount of product that is processed. It is said that it takes about one year for a worker to really learn this particular job thoroughly.

There is another employee that is working above Mr. Long operating a machine called a banbury. From this machine large globs of heated rubber weighing approximately four hundred pounds are dropped to the area where Mr. Long is stationed. There are various machines and procedures involved while each particular batch of rubber makes its way through Mr. Long's area.

There are two mills, the first larger than the second, a soap tank, and a wigwag machine which makes loops in the strip of rubber. The function of the first mill is to change the glob or batch of rubber into a belt of rubber approximately thirty inches wide and a quarter inch thick.

There are gassy fumes from the hot rubber at about face level on Mr. Long. There is heat from the rubber. The work area is warm enough that a T-shirt can be worn the year round. When the outside temperature is ninety to ninety-five degrees, it will be approximately a hundred and fifteen degrees at his work area. Depending upon the type of rubber being processed, its temperature will range from approximately a hundred and sixty degrees to approximately two hundred ten degrees.

The fluid in the soap tank, because of being heated by the rubber being processed, is of sufficient temperature to burn a person's hand. The frequency of the batches of rubber that are brought to Mr. Long's work area and the speed of the machines that process the rubber through Mr. Long's work area vary, such variance depending in large part upon the particular stock of rubber that is being processed.

The amount of difficulty encountered in Mr. Long's job depends in large part upon the propensities of the particular type of rubber stock being processed, some stock running through the processing with considerably less difficulty than other types of stock. If everything is working okay, then Mr. Long's job involves primarily overseeing type duties, but it is a job where the worker is generally anticipating difficulties arising and waiting for those difficulties to take place.

The nature of the particular stock being processed makes the job hard or not hard. If the rubber is bad, it is difficult to retain on the mill when it arrives at Mr. Long's work area. It may splatter onto the floor requiring Mr. Long to scoop it up with a shovel or a broom. It may require lifting the scraps of the bad rubber and dragging it away and lifting it back onto the mill, portions of rubber weighing upwards of approximately a hundred fifty pounds.

If the rubber is bad, it may plug up in the soap tank requiring Mr. Long to dig it out of there, and this may also involve substantial weights of rubber. When any such difficulties arise, it is the job duty of Mr. Long to resolve the problems before they become so great as to require stoppage of the machines.

One of the goals of the job is to try to maintain a continuous flow of rubber. The foreman is trying to avoid any stoppage or downtime of the machines or to keep to a minimum those stoppages, and the foreman's context with Mr. Long often involved trying to obtain such goals or to encourage such goals.

The worker above Mr. Long and Mr. Long himself make up one work unit for earnings purposes. They are paid together as a unit on a piecework basis, their earnings being greater if they are able to maintain a fairly continuous flow of rubber. There is mental pressure for Mr. Long to keep it running due to the fact that his rate and the rate of the worker above him depend upon his keeping it moving.

Every time it is necessary to stop the machines, it requires a greater amount of work and effort each time for Mr. Long. It is, therefore, advantageous for Mr. Long to work harder in order to avoid a machine stoppage. If the rubber is not the right texture, then it may break. If the problem is great enough, then it is necessary to shut things down in order to cure the problem before restarting the machines.

In performing his job, Mr. Long is trying to feel that he can handle the duties of the job even though problems are occurring. It is difficult for him to admit that the rubber is getting the best of him. He feels that his manlihood is at stake, and it is frustrating. The only time that Mr. Long gets any help is if the difficulties get sufficiently great so that he is required to call his foreman for assistance or if things get so bad that it becomes necessary for him to stop the machines.

The moving machines involved in the milling process are dangerous. This gives additional reasons to keep the rubber picked up from the floor area so as to not to allow it to become an occasion for Mr. Long to stumble or come in contact with the machines.

During the ten-day to two-week period preceding November 10, 1980, there had been a change in the master batch mixture of rubber. It was a mixture that was hard to keep running smoothly. This made for more problems than ordinary. There were occasions when it required not only Mr. Long but two foremen and a supervisor in order to keep things moving. There was difficult or bad stock being run the night that Mr. Long suffered his heart difficulties.

On that evening the rubber being run was known as 54 stock. It involved workaway stock, refined rubber or scrap rubber. It is the kind of rubber that causes problems in the job. It runs cooler than much of the rubber, but it runs faster. It was running at less than one minute per batch, and this is less time between batches than is oftentimes the case in the job, and it requires quicker actions than usual by Mr. Long.

On that night Mr. Long had gone to work at approximately 11 p.m. and had worked a little over one hour before his heart complaints appeared. Because of the kind of stock being run on that evening, there were many problems that developed, and Mr. Long found it necessary to run his ass off trying to keep up. That's, quote, run his ass off, end quote.

There was rubber on the floor. He finally got far enough behind that he thought he needed the assistance of the foreman. He went quickly to the phone, which was approximately one hundred feet away, to try to phone the foreman. The phone or the public address system for the phone would not work, and he ran back to his work place intending to ring the buzzer that would cause the rubber to stop coming.

At about the time that he got back to his work station, he started feeling sick. There was arm numbness, sweating and dizziness. He headed for the workers' station, encountered a foreman, told him he was sick, and proceeded to the nurse. He has no good recall of the events taking place between the time of his arrival at the nurse's station and until some two or three days later while he was in the hospital.
(Iannone Dep., pp. 12-20)

Dr. Iannone responded that the incidents of physical and mental stress mentioned in the hypothetical facts might be sufficient to significantly increase the demands on the heart. He further indicated that if claimant had been subject to the same conditions and stresses as mentioned in the hypothetical situation, that a cause and effect relationship existed between claimant's employment and his myocardial infarction of November 10, 1980. (Tr., pp. 20-26)

Paul From, M.D., a cardiologist, examined claimant on December 31, 1981. During a deposition taken on December 15, 1982 on behalf of defendants, Dr. From responded to the following hypothetical situation posed by defendants' counsel:

Q. Mr. Long was paid on an hourly basis until May 26, 1980, at which time he was on an incentive plan which allowed him to increase his earnings by way of piecework, but was guaranteed that regardless of production, his earnings would never be below approximately 85 percent of his hourly rate even if he were not producing at all.

Mr. Long worked as a mill operator on a shift from 11 p.m. until 7 a.m., 40 hours a week;

That the area Mr. Long works measures about 25 by 30 feet. It is necessary for him to oversee the functioning of a mill, a conveyor, a soap tank, another mill and a so-called wigwag machine, which drapes a rubber strip over a rack. All of this equipment functions automatically and requires only

that Mr. Long correct any failure of the rubber strip to feed properly. He would accomplish this by picking up the end of the strip and feeding it back onto the mill at about chest height.

The weight he would lift would not ordinarily exceed 10 to 20 pounds at most. The only other physical exertion required by Mr. Long might be the clearing of any jam or malfunction of the feeding strip, and would not ordinarily require exertion greater than noted above. Mr. Long had done this work from May, 1980, to November 10, 1980.

The job duties listed above require only about four hours of training to qualify a mill operator to perform the job duties performed by Mr. Long.

The mill supervised by Mr. Long has an exhaust ventilator hood over it with a fan removing the fumes, if any, from the rubber. The rubber material is heated between 160 to 200 degrees Fahrenheit. Fresh air is fed into the area by fans directly above the working space.

Workers are comfortable in T-shirts the year around. Temperatures in the area do not ordinarily exceed 90 degrees. In November, 1980, Mr. Long was able to work comfortably in the area.

In the event of difficulty in feeding the rubber material from a banbury machine above the mill through the mill, Mr. Long had immediate access to a signal buzzer and a voice tube to the banbury operator on the floor above by which he could either slow the flow from above, or stop it completely. Ordinarily, the rubber mix comes to the mill in separate batches of about 400 pounds each.

Some rubber stock is more difficult to work than others. The T-54 stock being worked on November 10, 1980, comprises about one-third of the banbury production of the Armstrong plant.

The banbury operator is also on an incentive plan, but the operator working with Mr. Long had the same guarantees regardless of production.

If Mr. Long encounters any real difficulty, he can stop rubber from coming to his mill by signaling the banbury operator. He can also summon his foreman by use of a telephone and PA system located about 45 feet from his mill.

On the evening of November 9, 1980, Mr. Long began work at 11 p.m. and worked till about 12 a.m. He will testify that during that one-hour period, he encountered difficulties in keeping his rubber strip flowing smoothly. He did not communicate with the banbury operator, and did not attempt to summon a foreman until about an hour after he commenced work.

He then walked to the telephone, attempted to summon a foreman, but was not successful because of telephone trouble, walked back to his mill, felt pain in his left arm and shoulder, and started for the nurse's office two floors above his mill and about 100 yards away. At the nurse's office, he was told to lie down, and apparently suffered a myocardial infarction;

That Mr. Long is a cigarette smoker of a little less than a pack a day for 26 years in 1980, and was 44 years old in 1980; that Mr. Long had a five-year history of hypertension.

Now, Doctor, taking into account, if you will--and if you want to read back through that, you will have plenty of time--taking those factors into account, the medical and hospital records which you have reviewed the findings which you obtained in your examination of Mr. Long, the patient history you obtained--and your examination was, of course, on December 31 of 1981--based on all of the foregoing and your knowledge, training and experience, do you have an opinion as to whether there's a causal relationship between the onset and the development of Mr. Long's physical condition after November 10, 1980, and his employment at Armstrong Rubber Company with respect, in particular, to the stresses, if any, of the job which we have described for you?

A. I do, yes.

Q. Will you tell us what that opinion is, sir?

A. It doesn't appear to me that the job had any unusual stresses connected with it. He had been working there for about 13 years, he had been working for about an hour. He didn't have any unusual trouble on his machine. He had not-- He had had some difficulty with the flow of rubber, or something, but I'm sure, in 13 years, that happened before.

There was nothing different about the environment that night. It was said that all workers could work comfortably in T-shirts in this area. He did not bring out to me, nor was there anything in any of the medical histories, of psychological stress from the job, and certainly nothing there in the way of physical stress. He rested almost immediately after the onset of his distress.

I could see no relationship between that job and the onset of his myocardial infarction on the morning of November 10, 1980. (From Dep., pp. 23-27)

Dr. From was also asked to review the hypothetical situation which had earlier been presented to Dr. Iannone. Dr. From stated:

> A. The way this hypothetical question is constructed is different than the other hypothetical question I was given in that some significant points are different; that is, the temperature to which one is exposed, the demands of the job as to worry about other people down the production line, running back and forth, worrying about a machine being left unattended, having to walk rapidly, even to find the foreman, the frustration of not having a telephone work, fumes coming from the rubber and fears that the machine does have dangers, and you've got to get this hot rubber off the floor.
>
> Q. Those contexts make a different anatomy of a job than the other hypothetical question that had been described to you earlier?
>
> A. Right.
>
> Q. Are there elements of this hypothetical, either separately or in combination, that we would look at as presenting a medically stressful situation, sir?
>
> A. Well, I think everything taken into account in this one would make more stress. (From Dep., pp. 66-67)

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...."

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 couse 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."

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 10, 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 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."

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."

The court continued:

> 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.
>
> ....
>
> It has long been legally recognized that damage caused by continued exertions required by the employment after the onset of a heart attack is compensable....("The most obvious relevance of this element [continuing exertion after symptoms] is in showing causal connection between the obligations of the employment and the final injury; for if the workman, for some reason, feels impelled to continue

with his duties when, but for these duties, he could and would have gone somewhere to lie down at once, the causal contribution of the employment to the aggravation of the condition is clear.").

The common knowledge that complete rest and immobilization are ordinarily prescribed for persons who are undergoing a heart attack has been judicially noticed.

ANALYSIS

Review of the record indicates that claimant had a pre-existing cardiovascular condition at the time of his myocardial infarction on November 10, 1980. In its decision in Sondag, 220 N.W.2d 903, the court noted the two alternative circumstances under which workers' compensation may be awarded in cases involving a preexisting heart condition: 1) Where a heart attack occurs during an instance of employment stress greater than the stress of non-employment life; and 2) where a heart attack occurs during an instance of unusually strenuous employment exertion.

In finding that claimant had failed to satisfy either of the alternative tests set forth in Sondag the deputy cited to errors contained in the hypothetical situations presented to Dr. Iannone and Dr. From. Claimant now contents that the deputy erred in discrediting the hypothetical situation posed to Dr. Iannone, from which the doctor concluded that a cause and effect relationship existed between claimant's employment and his myocardial infarction of November 10, 1980.

The two major faults the deputy finds with the hypothetical addressed by Dr. Iannone were an overemphasis on the effect that a shut down of machinery would have on claimant's wages and that claimant's job entailed daily lifting of 100-150 pound chunks of rubber. The evidence clearly indicates that claimant's wages were only partially dependent upon his keeping the milling machinery running at all times. The testimony of David Fines regarding wage structure demonstrated that the least claimant would have been paid in the event of a shutdown in machinery was $9.11 (as compared to a maximum of $10.29 per hour while the machines were in operation). Furthermore, the question as to whether claimant ever had to "manhandle" 100-150 pound chunks of rubber remains open in light of testimony to the effect that the chunks seldom weigh over 40 pounds, are helped back onto the conveyor by the action mill itself, and commonly are cut up to make their handling easier.

Dr. From testified to the effect that the factual situation posed to Dr. Iannone would indicate a substantial degree of mental and physical stress. When confronted with a different hypothetical situation wherein the worker lifted chunks of rubber weighing only 20 pounds and little emphasis was placed upon fear of losing wages, Dr. Iannone indicated that there would be insufficient stress to precipitate a heart attack.

Upon reviewing both of the hypothetical questions contained in the record it is apparent that neither is entirely consistent with the facts and events of the instant case. While it would clearly be improper to simply adapt one or the other, in total, as the basis for determining the outcome of this case, it is not improper to note flagrant and material problems with either hypothetical question. The record as a whole indicates that the deputy properly found the hypothetical question presented to Dr. Iannone to be discredited by suggesting that mill operators commonly lift chunks of rubber weighing 100-150 pounds and that substantial mental pressure existed due to the wage structure. The deputy was availed an opportunity to view the performance of the mill operator job first hand to better perceive the degree of physical and mental stress involved with such occupation. It shall be found that the deputy properly concluded that claimant's heart attack did not occur as a result of his employment.

FINDINGS OF FACT

1. Claimant was an employee of Armstrong Rubber Company on November 10, 1980.

2. Claimant experienced a myocardial infarction while working on November 10, 1980.

3. Claimant had a preexisting cardiovascular condition.

4. The exertion required by claimant's employment was not unusually strenuous.

5. Claimant's employment stress was not greater than stress from his non-employment life.

6. Claimant's myocardial infarction did not arise out of his employment with Armstrong.

CONCLUSION OF LAW

Claimant has failed to sustain the burden of proving that his myocardial infarction of November 10, 1980 arose out of and in the course of his employment.

WHEREFORE, the deputy's arbitration decision filed April 25, 1983 is affirmed.

THEREFORE, it is ordered that claimant take nothing as a result of these proceedings.

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

Signed and filed this 31st day of January, 1984.

Appealed to District Court;
Pending

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PATRICK A. MAIN, Claimant, vs. BIELENBERG MASONRY CONTRACTING, Employer, and MARYLAND CASUALTY COMPANY, Insurance Carrier, Defendants.	:	File No. 657287 A P P E A L D E C I S I O N

Claimant appeals from a proposed review-reopening decision which awarded him disability benefits and section 85.27 benefits except for care provided by one practitioner which was found to be unauthorized. The record on appeal consists of the transcript of the review-reopening proceeding together with claimant's exhibits 1 through 9 and defendants' exhibit A, the pleadings and the appeal brief of claimant-appellant.

ISSUE

The sole issue on appeal is whether or not the expense incurred for treatment provided by Alan Bronson, D.C., should be compensated. The remainder of the award is not in dispute and has been or is being paid.

REVIEW OF THE EVIDENCE

Claimant suffered a work-related fracture to the cervical vertebrae on December 29, 1980. Between that date and November 4, 1982, claimant remained under the care of Alexander Kleider, M.D., a neurologist. (Claimant's Exhibit 8) In May of 1981, claimant began consulting Allen Bronson, D.C., with complaints of neck, back and shoulder pain. (Cl. Ex. 8) Over a period of approximately 18 months, claimant visited Dr. Bronson 26 times and incurred expenses of $832. (Cl. Ex. 5) Defendants have paid for Dr. Kleider's treatment and deny that care by Dr. Bronson was authorized. (Answer to Petition for Review-reopening) Claimant seeks compensation from defendants for expenses incurred by Dr. Bronson's treatment.

APPLICABLE LAW

Code of Iowa section 85.27 states in part:

For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee; and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, he should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care resonably [sic] 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

Claimant went on his own to Dr. Bronson. There is no indication in the record that claimant communicated dissatisfaction with Dr. Kleider's treatment to defendant employer and requested the care of Dr. Bronson as either supplimental to or in place of treatment by Dr. Kleider. No application for consideration of alternate care was filed with the commissioner. Instead, claimant continued to keep scheduled appointments with Dr. Kleider while seeking out additional treatment from a doctor of claimant's own choice. Absent agreement between the parties for claimant to receive alternate care, claimant's petition for award of expenses incurred from Dr. Bronson's treatment is denied. The deputy was correct in allowing mileage and expenses for an examination by a doctor of the employee's choice in accordance with Code of Iowa section 85.39. No reason is given, however, for the allowance of two trips to Dr. Bronson or the amount of $75 as a reasonable charge. Only one trip will be allowed and only the expenses of Dr. Bronson for the initial examination of $60 and the narrative report of $26 will be allowed.

FINDINGS OF FACT

1. On December 29, 1980 claimant suffered a work-related injury to the cervical vertebrae.

2. Dr. Alexander Kleider was authorized by defendant employer as the treating physician.

3. Claimant was treated by Dr. Kleider from December 29, 1980 to November 4, 1982.

4. In May of 1981, claimant began visiting Dr. Allen Bronson for chiropractic treatment.

5. Claimant did not communicate his desire for other care to defendants.

6. Claimant continued to keep scheduled appointments with Dr. Kleider while receiving treatment from Dr. Bronson.

7. Defendants have paid for the care rendered by Dr. Kleider.

8. The parties did not have an agreement for alternate care in accordance with Code of Iowa section 85.27.

9. The expenses incurred for Dr. Bronson's treatment are not chargeable to the defendants.

10. Expenses of Dr. Bronson for examination pursuant to section 85.39, Code of Iowa are allowable.

CONCLUSION OF LAW

The decision of the deputy in denying claimant the expenses incurred for the treatment by Dr. Bronson is affirmed and modified.

ORDER

WHEREFORE, the decision of the deputy filed June 28, 1983 is affirmed and modified.

THEREFORE, it is ordered that beginning on May 19, 1980 defendants shall pay the claimant a two hundred (200) week period of permanent partial disability at the rate of two hundred thirty-nine and 64/100 dollars ($239.64) together with statutory interest from the date due.

All accrued benefits are payable in a lump sum.

Defendants are further ordered to pay the claimant the following medical expenses:

Walgreens	04/17/81	$14.85
Greenville Pharmacy	02/23/82	5.80
	07/21/82	20.90

Mileage

10 trips to Dr. Kleider's office at 5 miles round trip	50 miles
1 trip to Dr. Allen Bronson's office at 14 miles round trip	14 miles
1 trip to Walgreens at 3 miles round trip	3 miles
	67 miles
67 miles x .22/mile =	$14.74

Costs of this proceeding are taxed to defendants in accordance with Rule 500-4.33 and shall include the cost of an examination and a report by Dr. Bronson in the sum of eighty-six dollars ($86.00).

The chiropractic expenses incurred by the claimant do not appear to have been so incurred in accordance with section 85.27, Code of Iowa, and are found not to be chargeable to the defendants.

Signed and filed this 28th day of February, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY A. MALONE,

Claimant,

vs.

SCOTT COUNTY, IOWA,

Employer,

and

THE WESTERN INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

File No. 720411

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 A. Malone, claimant, against Scott County, Iowa, employer, and The Western Insurance Companies, insurance carrier, for the recovery of further benefits as the result of an injury on September 9, 1982. A hearing was held before the undersigned on April 16, 1984. The case was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant, Sherry Malone and Kurt Ullrich; claimant's exhibits 1 through 8 and defendants' exhibits A through E.

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 to which he is entitled; whether claimant was authorized to incur certain medical expenses and claimant's rate of compensation.

EVIDENCE PRESENTED

Claimant testified he is 22 years old, has been married for two years and has one child. He is a 1982 graduate of Pleasant Valley High School. He advised that during his high school years he was employed on a part-time basis by a gasoline service station and at an auction house. Claimant revealed, however, that at the time of his graduation from high school in June 1982 he was unemployed. He confessed that due to his inability to find work and the need to support his family he was forced to seek government rental assistance in September 1982 from Scott County, Iowa.

Claimant indicated that his rental payments were $250.00 per month, which Scott County would pay in exchange for 59 hours of his services to the county. Claimant was uncertain when he started to work for the county, but did recall that his injury date was September 9, 1982. He advised that on that day he was working for a Mr. Glover who was supervising claimant and three or four others. They were moving boxes of files from the Scott County courthouse to a warehouse across the street. Claimant stated that there was a construction project in progress along the street he had to cross to get from the courthouse to the warehouse. As a part of this construction project, there was a four foot by five foot trench dug along the street which he had to cross on a long board. Claimant testified that as he was crossing this trench with a load of files, the board gave way and he and the files fell into the trench.

Claimant explained that as a result of the board slipping into the ditch, he ended up pinned against the wall of the ditch with his feet off the ground. He stated that he was helped up the side of the ditch and then someone told him to lay down. Claimant said he refused to lay down and started back toward the building when he doubled up with pain and hit the ground. Claimant testified that at this time someone called an ambulance and he was taken to the Davenport Osteopathic Hospital where he was examined and released. Claimant contended that he experienced pain at that time and later began to experience numbness in his back. Claimant advised that although he was released from the hospital, he did receive physical therapy three times a week following the accident. He stated that he now wears a back brace but is no longer taking pain medication.

Claimant testified that he is now working at Carver Lumber in Princeton, Iowa where he does some wood cutting, bending and lifting. He revealed that prior to his accident he had had one injury to his right arm but no back problems. He further revealed that since his back injury he has on occasion had difficulty getting to sleep because of pain. Claimant indicated that he has limited his activities since his injury.

Sherry Malone testified that she was married to claimant on August 23, 1982 and had known him for two or three years prior to their marriage. She described claimant as a physically active person before his injury, but asserted that since his injury he has been less active and had trouble sleeping. She revealed that claimant often complains about back pain, which he did not do prior to his injury.

Kurt Ullrich testified that he is a deputy county auditor for Scott County, Iowa. He advised that Scott County has an "in house" cleaning program which involves obtaining labor for government cleaning projects in exchange for county rental assistance. He stated that claimant was involved in this program in September 1982 and had been required to furnish 59 hours of his labor in exchange for $250.00 in rent. He revealed that the records of Scott County showed that claimant was injured on September 9, 1982 and that he returned to complete his 59 hours of labor on January 26, 1982.

Richard Beaty, D.O., testified by deposition (exhibit A) that he is an orthopedic surgeon engaged in the practice of medicine in Davenport, Iowa. (Beaty dep., p. 4) He first had contact with claimant in November 1981 when claimant was experiencing a problem with his right shoulder. (Beaty dep., p. 5) The doctor last saw him for this problem in April 1982. (Beaty dep., p. 5) Dr. Beaty saw claimant in September 1982 concerning low back pain after a referral from a Dr. Mehl. (Beaty dep., p. 6) He reviewed claimant's x-rays and took a history from claimant. (Beaty dep., pp. 6-7) Dr. Beaty diagnosed claimant's condition as an acute lumbar myofascial strain superimposed on a spondylolisthesis. (Beaty dep., p. 11) Dr. Beaty outlined at length his course of treatment and care for claimant. (Beaty dep., pp. 13-29)

In a letter dated November 12, 1982 to claimant's attorney, Dr. Beaty established the causal relationship when he stated that he believed the acute lumbar myofascial strain was secondary to the trauma of the fall in the ditch. (See exhibit 3) It was Dr. Beaty' opinion that claimant had suffered a permanent impairment to his back of zero to five percent. (Beaty dep., p. 28) It was also his opinion that claimant achieved maximum recovery from his injury in January 1983. (Beaty dep., p. 26)

Finally, Dr. Beaty stated that the fees he charged claimant were his usual and customary fees. (Beaty dep., p. 32)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 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).

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).

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.

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, II Iowa Industrial Commissioner Report 39 (1981); Enstrom v. Iowa Public Services Company, II Iowa Industrial Commissioner Report 142 (1981); Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981).

Section 85.34(1), Code of Iowa, states:

If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of 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.

Section 85.36(4) states:

The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had he worked the customary hours for the full pay period in which he was injured, as regularly required by his employer for the work or employment for which he was employed, computed or determined as follows and then rounded to the nearest dollar.

....

In the case of an employee who is paid on a monthly pay period basis, the monthly gross earnings multiplied by twelve and subsequently divided by fifty-two.

ANALYSIS

The uncontroverted testimony of claimant and Dr. Beaty compel the conclusion that the cause of claimant's present back difficulties was the trauma to his back which occurred September 9, 1982. Claimant's lay testimony establishes that he had no back problems before the fall into the ditch and no additional injuries after the fall which would cause his problems. Dr. Beaty's expert opinion is most unequivocal and is founded upon his investigation of claimant's condition and the facts surrounding claimant's injury. There also seems little doubt as to the date of termination of healing period benefits since two of three criteria occurred on almost the same date, January 26, 1983. That is the approximate date that Dr. Beaty opined claimant had achieved maximum recovery and is the precise date claimant returned to complete his assigned hours for Scott County. Accordingly, this is the appropriate date upon which healing period benefits should terminate.

While there appears little question that claimant suffered a permanent disability, the difficult question is the extent of that permanency. Dr. Beaty's determination of zero to five percent impairment of the whole man would be most disconcerting if disability were merely a function of impairment. It is, however, just one of the factors to consider.

Claimant has in fact returned to work though it would appear that he continues under a 50 pound lifting limit. Certainly claimant is not excluded from jobs involving manual labor because of his injury. In addition, claimant is a high school graduate and at his age is a very good candidate for rehabilitation. It would appear that claimant is well motivated and although he may have limited his activities somewhat as a result of the injury, he did not describe the kind of severe, continuing pain that would take from him all recreational activities. Also, even though claimant suffers from a low back injury, it must be remembered that many people can and do lead fulfilled productive lives with this kind of injury. Upon full investigation and mature deliberation, it is found that claimant has suffered an industrial disability of 11 percent of the body as a whole.

Claimant contends his rate should be calculated under §85.36(7) and based upon an hourly rate of approximately $4.23 per hour. Defendants argue the rate should be calculated pursuant to §85.36(10). Neither position is correct. Claimant was being paid $250.00 per month and thus his rate should be calculated pursuant to §85.36(4). Section 85.36(7) is not appropriate because claimant was not paid on an hourly or daily basis. Although an hourly rate could be calculated, his pay period was clearly on a monthly basis. Section 85.36(10) is likewise inappropriate notwithstanding the fact that claimant's compensation was paid directly to his landlord. The fact remains that he was being paid for his services and was in essence earning a wage. Accordingly, claimant's rate should be based upon the formula set forth in §85.36(4) [$250 X 12 divided by 52]. Utilizing this basis for computation of rate claimant is entitled to $54.11 per week compensation.

The record establishes that all medical treatment received by claimant was causally related to his injury and was authorized. All of Dr. Beaty's services were provided upon referral of claimant to him by the physician authorized by defendants.

FINDINGS OF FACT

WHEREFORE, based upon the evidence presented the following facts are found:

1. On September 9, 1982 claimant injured his back when he fell into a ditch while at work.

2. Claimant is 20 years old and was married at the time of his injury.

3. Claimant has a high school diploma and is presently employed at a lumberyard.

4. As a result of his injury, claimant suffered a permanent impairment to his low back equal to zero to five percent of his body as a whole.

5. Claimant achieved maximum recovery and was able to return to work on January 26, 1983.

6. Defendants paid claimant compensation at the rate of $117.70 from September 21, 1982 to February 3, 1983.

7. Claimant was paid by Scott County at the rate of $250.00 per month.

8. As a result of his injury, claimant suffered a permanent partial disability for industrial purposes of 11 percent of the body as a whole.

9. Claimant incurred medical expenses as a result of his injury.

CONCLUSIONS OF LAW

WHEREFORE, based upon the facts set forth above and principles of law herein stated, it is concluded:

On September 9, 1982 claimant received an injury arising out of and in the course of his employment.

Claimant's disability is causally related to his injury of September 9, 1982.

Claimant is entitled to healing period benefits from September 10, 1982 to January 26, 1983.

Claimant is entitled to fifty-five (55) weeks of permanent partial disability benefits.

Claimant's medical expenses were authorized and were necessary and reasonable.

Claimant's rate of compensation is fifty-four and 11/100 dollars ($54.11).

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant at the rate of fifty-four and 11/100 dollars ($54.11) compensation for nineteen and five-sevenths (19 5/7) weeks for healing period benefits and fifty-five (55) weeks at the same rate for permanent partial disability benefits, all accrued amounts to be paid in a lump sum together with statutory interest. Defendants shall be given credit for all benefits previously paid and for any overpayment thereof.

IT IS FURTHER ORDERED that the costs of this action be taxed to the defendants pursuant to Industrial Commissioner Rule 500-4.33.

Defendants shall file a final report of payments upon completion of this award.

Signed and filed this 29th day of May, 1984.

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JUANITA L. MANN,	:	
	:	File No. 615959
Claimant,	:	
	:	A P P E A L
vs.	:	
	:	D E C I S I O N
ARMOUR DIAL COMPANY,	:	
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

By order of the industrial commissioner filed May 12, 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. Defendant appeals from an adverse review-reopening decision.

The record on appeal consists of the transcript; the depositions of E. A. Dykstra, M.D., Koert Robert Smith, M.D. (which was also marked defendant's exhibit 1), and the deposition of Christian William Bruehsel, M.D.; defendant's exhibits 1 through 6 and claimant's exhibits consisting of the medical reports attached to claimant's notice of service and intent to introduce filed August 18, 1982, all of which evidence was considered in reaching this final agency decision.

The result of this appeal decision will modify that of the hearing deputy.

REVIEW OF THE EVIDENCE

Claimant testified that she injured her left arm and shoulder while working at the employer's plant in September of 1979 and on October 10, 1979 injured her low back. She continued to work, however, and was treated by various doctors. She has been laid off most of the time since 1982 began.

At the time of the hearing she testified that she could not lift more than 15 or 20 pounds, could not move furniture in her home, could not mow the lawn nor rake leaves, paint walls nor apply wallpaper. She also testified that she cannot drive a car for any great length of time and that she wears a back support much of the time. (Trans., 16-19) She also testified that there were a number of jobs at the employer's plant that she could no longer do: she cannot work in the smokehouse nor on Treat closers, nor in the sanitation department nor in any job which would require standing continuously. (Trans., 20-23)

Claimant, age 43 at the time of the hearing, had worked for the employer since 1974 and had had experience as a waitress and in factory work.

Richard Parrish, an operating supervisor in charge of one of the shifts at the employer's, stated that he had not even been aware claimant had a workers' compensation claim and that she was able to do her work at all times. He also explained that claimant had been on layoff since 1982 and had taken the opportunity to work temporarily, at times taking more strenuous jobs than her regular job. (Trans., 51)

Martin Graber, the employee relations manager at Armour Dial, explained defendant's exhibits 5 and 6: Exhibit 5 showed that on 13 different days between May 18 and September 29, 1982, claimant did temporary work as a packer operator, inspector, dunnage (packing) handler, builder of dry wall, potted meat filler and hand stacking. Defendant's exhibit 6 showed the work claimant did while on recall during 1982 during the period of January 4-22, May 22-July 9, September 13-24 and November 15-19, all of which work was as an inspector.

Mr. Graber explained dunnage:

> A. Okay. The dunnage, as it's called, is really a technical term for what would be dry wall. It's these cardboard boxes. We receive them at the plant and they're flat so they don't take a lot of space to have them shipped in. The dry wall person job would require the person to move like (indicating) so it becomes a box and we have plastic loops or bands which are placed around the cardboard. The dunnage is probably about four by eight and twelve inches thick in most cases.
>
> Q. And she has done the dry wall job building those particular blocks of boxes?
>
> A. That's correct.
>
> Q. Does that involve any lifting?
>
> A. Yes, it would. You'd have to lift the boxes which weight around twenty-five or thirty pounds, or the dry wall. (Trans., p. 63 ll. 7-22)

Claimant testified on rebuttal that the dunnage work would involve two people. (Trans., 83)

Christian William Bruehsel, M.D., testified that he saw claimant in September and not October of 1979 for complaints of backache and pain in the right thigh and knee and pain in the left arm. Dr. Bruehsel referred claimant to Dudley Noble, M.D., of Iowa City, and claimant later saw, inter alia, J. B. Worrell, M.D., a qualified neurologist. Dr. Bruehsel testified that he would agree with Dr. Worrell's rating of 25 percent "disability." (Bruehsel dep., p. 7)

There is little information in the record from Dudley Noble, a qualified orthopedic surgeon, who unfortunately died during his treatment of claimant. Reports of November 9, 1979 and December 7, 1979 show that Dr. Noble treated claimant for her shoulder and neck problems, diagnosing a musculo-tendon type of pain that did not appear to be serious in November and stating in December that claimant was "a lot better." He also remarked that the pain was chronic and that it was possible claimant would have to do another type of work.

E. A. Dykstra, M.D., a qualified orthopedic surgeon, took over the case from Dr. Noble and first saw claimant on May 20, 1980 for left shoulder pain. He recommended exercise, a heating pad and Naprosyn, a pain killer. He saw claimant on June 27, 1980 and gave her shoulder an injection and a local skin steroid. On August 8, 1980 he again injected claimant's shoulder. On February 27, 1981, he found no sign of improvement and again prescribed Naprosyn an anti-inflamatory analgesic. He testified that claimant had a 10-15 percent impairment of the upper extremity.

The reports and notes of J. B. Worrell, a qualified neurologist, were made a part of the record. He saw claimant for her back condition on some six occasions between February and July, 1982. At first, he stated that the diagnosis was rather vague (chronic right back and leg pain) and that there was probably some psychological overlay present. (Report, February 16, 1982) He prescribed Elavil, an antidepressant drug and (in July 1982) Naprosyn. Electromyography results were normal. Although on April 7, 1982, she was improving and by July 2, 1982 she was "getting along reasonably well", Dr. Worrell assigned a partial disability of 20-25 percent. He also stated: "I would rate it at permanent at this point but perhaps in the future the situation will resolve. I do not think at this point we are dealing with a ruptured disc or anything like that."

Koert Robert Smith, M.D., a qualified orthopedic surgeon, testified by deposition that he examined claimant on November 2, 1981. Finding no objective basis for claimant's complaints, Dr. Smith suggested nerve conduction studies and electromyography of the upper extremities. The result of the nerve conduction study was not conclusive, but combined with the electromyography, the two tests suggested a possible mild carpal tunnel syndrome, left. (Smith dep., p. 6) Also, with reference to the low back, Dr. Smith reviewed a myelogram done in Quincy, Illinois in 1981 and interpreted the results as negative. Based on his examination and findings, Dr. Smith found no permanent partial impairment to the neck, shoulders or back. On cross-examination by claimant, he stated the diagnosis to the shoulder was a mild chronic subacromial bursitis.

ISSUES

The hearing deputy awarded claimant a 40 percent industrial disability. Defendant states the issues as follows:

> I. The Deputy Commissioner erred in finding a permanent functional impairment of 15% regarding the Claimant's shoulder difficulties and a finding of permanent functional impairment of 10% regarding the lumbar strain difficulties.
>
> II. The Deputy Commissioner erred in finding Claimant sustained an industrial disability of 40% of the body as a whole.

APPLICABLE LAW

Claimant has the burden to show the extent of her disability. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963) Claimant's disability is industrial, reduction of earning capacity, and not mere functional impairment. Such disability includes considerations of functional impairment, age, education, qualifications, experience and her inability because of the injury to engage in employment for which she is fitted. Id., at 1112, 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

The parties appear to treat this case as involving one injury to the neck and shoulder and to the back. Therefore, although there were actually two separate injuries, they occur in succeeding months and may be treated as one.

Defendant's objection to the hearing deputy's findings of permanent partial impairment has some validity in that Dr. Dykstra found a 10-15 percent impairment to the arm and the deputy found a 10-15 percent impairment to the body as a whole. The former impairment, would, of course, be less than the latter, making the hearing deputy's finding of fact questionable. However, the question of permanent partial impairment relates to industrial disability and must be considered in that respect.

The difficulty here is that a finding of a substantial permanent partial impairment does not match up with what claimant can obviously do. On the one hand, Drs. Dykstra, Worrell and Bruehsel all assess a permanent partial impairment rating. On the other hand, claimant seems to have been able to work as though she had no impairment. Such a willingness to work speaks well for her motivation but is not convincing of a great deal of disability.

This line of reasoning leads one to question the validity of the permanent partial impairment ratings of Drs. Worrell and Bruehsel. Dr. Dykstra's rating of 10-15 percent permanent partial impairment to the extremity does not seem too high or too low.

First, Dr. Worrell estimates the disability thus: "I would estimate her partial disability at 20 to 25%. I would rate it at permanent at this point but perhaps in the future the situation will resolve. I do not think at this point that we are dealing with a ruptured disc or anything like that." The above quotation, which is all that is said about the permanent impairment does not give the basis therefor. One cannot tell what guidelines were used or what criteria were considered. Also, Dr. Worrell's

tatement that he would "rate it at permanent at this point but erhaps in the future the situation will resolve" is contradictory.

Dr. Bruehsel testified thus:

A. I would go along with the person I sent this lady to for consultation in this respect, and this is the board-certified neurologist who agreed that the degree of disability would be twenty-five percent.

Q. And that is your opinion?

A. That's my opinion. Am I allowed speculation, or is that --

Q. Go ahead.

A. I would speculate that with age this would very probably increase, but that is speculation.

Q. Is that based upon your medical background and experience?

A. It's based upon my medical background. My experience with her, particularly with her. Also upon the various very good consultations I had. The complex situation like this is not easily understood. (Bruehsel dep., p. 7 ll 4-19)

ain, there was no showing of any rating system that one can aluate. As for the doctor's medical background and experience, which he refers, one is not privy to the extent of that ckground and experience in industrial cases.

On the whole, one believes claimant does have some permanent pairment to her left shoulder and neck and to her low back, e extent to the low back being very much in question. Taking at interpretation of the evidence and the other evidence of aimant's ability and motivation to work, one cannot conclude at claimant has the 40 percent permanent partial industrial sability found by the hearing deputy.

Claimant was age 43 at the time of the hearing, a high hool graduate, and had experience mainly as a factory worker. nsidering the various elements of industrial disability, her ss of earning capacity is 30 percent.

The findings of fact and conclusions of law are those of the dersigned deputy industrial commissioner. No change will be de in the order to make payment of healing period, since no estion was presented on that subject.

FINDINGS OF FACT

1. Claimant hurt her left arm and shoulder while at work r the employer in September 1979.

2. Claimant hurt her low back at work for the employer on tober 10, 1979.

3. Claimant has permanent partial impairment to her neck d left shoulder as a result of the aforementioned injuries.

4. That during the year of 1982 claimant did temporary work d worked on recall for the employer, and was able to do the llowing jobs: packer operator, inspector, dunnage handler, dry ll builder, potted meat filler and hand stacking work.

5. That claimant is age 43, left handed, has a high school ucation and experience mainly in factory work.

CONCLUSIONS OF LAW

That in September 1979 claimant sustained an injury to her ft shoulder and neck which arose out of and in the couse of r employment.

That on October 10, 1979 claimant sustained an injury to her w back which arose out of and in the course of her employment.

That claimant is entitled to healing period from January 21, 82 until May 1, 1982, for a period of fourteen point two eight (14.286) weeks.

That as a result of said injuries, claimant has a permanent tial disability to the body as a whole of thirty (30) percent.

ORDER

Defendant is hereby ordered to pay weekly compensation nefits unto claimant for a period of fourteen point two eight (14.286) weeks beginning January 21, 1982 at the rate of one ndred ninety-seven and 89/100 dollars ($197.89) per week for healing period, accrued payments to be made in a lump sum gether with statutory interest at the rate of ten (10) percent year beginning January 29, 1982.

Defendant is further ordered to pay weekly compensation nefits unto claimant for a period of one hundred fifty (150) eks at the rate of one hundred ninety-seven and 89/100 dollars 97.89) for the permanent partial disability, said payments to gin as of the date of this decision.

Costs of this action are charged to defendant in accordance h Industrial Commissioner Rule 500-4.33 and shall include pert witness fees payable in the amount of one hundred fifty llars ($150) to Dr. Edward Dykstra and Dr. William Bruehsel.

Defendant is ordered to file a final report form within nty (20) days of the date of last payment of compensation.

Signed and filed at Des Moines, Iowa this 25th day of July, 3.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JUANITA L. MANN,	:	
Claimant,	:	File No. 615959
vs.	:	R E H E A R I N G
ARMOUR DIAL COMPANY,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

Both parties applied orally for rehearing on August 15, 1983, and both applications were granted. Claimant requests a review of the particular paragraph in the appeal decision which ordered payment of permanent partial disability, and defendant wants a review of the extent of the permanent partial disability.

These issues were considered as submitted for decision on August 22, 1983.

With respect to the issue of permanent partial disability raised by defendant, the file has been reviewed and no change will be made in the award.

With respect to claimant's application, the permanent partial disability payments were ordered to commence as of the date of the appeal decision, which was July 25, 1983. Actually, the commencement of the permanent partial disability payment should date back to the end of the healing period, and the interest should begin on the date of the decision.

Therefore the paragraph which ordered the payment of permanent partial disability is hereby changed to read:

> Defendant is furthered ordered to pay weekly compensation benefits unto claimant for a period of one hundred fifty (150) weeks at the rate of one hundred ninety-seven and 89/100 dollars ($197.87) for the permanent partial disability, said payments to commence at the close of the healing period, with statutory interest at the rate of ten (10) percent per year beginning July 25, 1983.

Signed and filed at Des Moines, Iowa this 25th day of August, 1983.

Appealed to District Court; Affirmed

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHARON K. MANNING,	:	
Claimant,	:	FILE NO. 481989
vs.	:	R E V I E W -
RALSTON PURINA COMPANY	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
LIBERTY MUTUAL INSURANCE CO.,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This was a consolidated proceeding in arbitration and review-reopening brought by the claimant, Sharon K. Manning, against her employer, Ralston Purina Company, and its insurance carriers, Liberty Mutual Insurance company and Aetna, to recover additional benefits under the Iowa Workers' Compensation Act as a result of injuries sustained November 15, 1977 and December 10, 1982. At time of hearing a settlement was reached regarding the issues in file number 726458 and defendant Aetna did not participate further in the proceedings.

These matters came on for hearing before the undersigned deputy industrial commissioner at the Bicentennial Building in Davenport, Iowa, February 24, 1984. The record was considered fully submitted on that date.

An examination of the industrial commissioner's file indicates that first reports of injury were filed December 1, 1977 and February 18, 1983, respectively. A memorandum of agreement was filed December 15, 1977.

The record consists of the testimony of the claimant and of claimant's spouse, Russell Alan Manning; of claimant's exhibit 1 through 3 and; of defendant Liberty Mutual's exhibits A, B, and C. At time of hearing, the parties stipulated that the weekly rate of compensation is $158.24.

ISSUES

The issues to be resolved are:

1. Whether a causal relationship exists between claimant's injury and her disability.

2. Whether claimant is entitled to benefits and the nature and extent of such entitlement including a question as to claimant's healing period following her November 1977 injury.

3. The commencement date for interest on any benefit award.

REVIEW OF EVIDENCE

Claimant, Sharon K. Manning, testified in her own behalf. Mrs. Manning is 35 years old and is married with three dependent children. Claimant is a high school graduate but reported she was generally a poor student. Prior to begining work for defendant in 1977, she had held jobs as a seed packer, a welder, and a nurses' aide. Claimant was earning approximately $6.00 per hour when injured in 1977 and $10.72 per hour when injured in 1982.

On her November 1977 injury date, claimant was classified as a "day worker" as such she swept, scooped and shovelled grain, and "did whatever needed doing about the employer's premises." On the injury date, claimant was pushing and pulling a large, full grain bin. She felt pain in her lower back which got worse when she tried to continue working. She reported the injury to her foreman who directed her to M. E. Barrent, M.D. The doctor prescribed medication and bedrest and referred claimant to Charlton Henry Barnes, M.D., an orthopedic surgeon who apparently performed a first surgery. Claimant had numerous subsequent referrals in the intervening two years and in May 1980, Eugene Herzberger, M.D., performed a second surgery.

Claimant returned to work in January 1981. She was restricted from scooping, pushing, and pulling. She had a 15 pound weight restriction and was instructed to twist or turn carefully. She first worked as a coupon dropper and sweeper and then as a cartoner/operator. A coupon dropper drops coupons into pet food cartons; a cartoner/operator drops pet food pouches into cartons.

Claimant missed work because of her back pain and also for other personal and medical reasons. She was asked to sign a written letter of remand regarding her work absences. Defendants' hearsay objection to claimant's testimony regarding her foreman's statements concerning such is sustained. Ralston subsequently terminated claimant. Defendants' hearsay objections to conversations between claimant and her supervisors concerning her termination are sustained.

Claimant sustained her second injury December 10, 1982. She reported a co-worker's arm was trapped in the airgate of an industrial machine. She braced herself to pull the co-worker from the machine. She then felt a twisting, pulling sensation in her back and had problems walking. She began to experience pain and pressure in her head. She subsequently saw Dr. Herzberger. Claimant has seen Dr. Herzberger periodically since December 1982. Both a myelogram and CAT scan have been performed. She indicates the doctor hopes to treat her second injury conservatively before considering surgery. Claimant stated her headaches have increased in severity.

Claimant described her health and physical condition prior to her injuries. She suffered cuts and bruises in a car accident in 1964; she has had a number of miscarriages; she pulled a shoulder muscle while working as a nurses' aide but lost no work because of such incident. She reports she had no back problems before November 1977. Before her 1977 injury, claimant water skied, played tennis and softball, swam and bowled. After that injury, her ability to engage in these activities was severely curtailed. Claimant cannot twist her head or trunk; walking "bothers her something awful;" standing is difficult. She experiences severe back, hip, leg, and ankle pain.

On cross-examination, it was established that claimant was absent from work for 28 days after injuring her elbow in May 1982. She also lost work following a dislocated hip in July 1982. Claimant denied her foreman warned her that continued absenteeism would jeopardize her job. Claimant admitted she has not sought work or vocational rehabilitation since her December 1982 injury. Claimant admitted she is the corporate president of a dress shop, Fashions Unlimited, operated by herself and her husband in Clinton, Iowa. Claimant draws no salary but would share in any profit from the shop. Claimant admitted her doctor has suggested she exercise daily but stated she has been unable to do so since December 1982. Claimant admitted she had successfully performed her duties as a coupon dropper and cartoner.

On redirect examination, claimant stated she is no longer able to assist in the dress shop. Her husband works full time in the shop. She stated the shop has operated at a loss since its inception. Claimant reported she "hurt" after working a full day as a cartoner and that she had been unable to lift her cartons from the skid on which they are placed and, therefore, worked directly from the skid.

On further cross-examination, claimant stated she visits the dress shop once each week and occasionally makes its bank deposits. She stated she performs light house work and child care for two or three hours each day when able; that she drives a car, and "goes along" shopping.

On redirect examination, claimant reported she lies in a dark room when dizzyness and headaches prevent her from performing house work. She can do nothing until her headaches subside.

Russell Allan Manning testified in his wife's behalf. He substantiated claimant's physical complaints and stated that, when her headaches peak, she is disoriented, stumbles, vomits, and needs three or four days bed rest.

On cross-examination, he stated claimant had ticketed garments, steamed clothing, and done book work for the dress shop before December 1982.

He agreed that claimant could still do floor sales work at the shop but opined it was unlikely the shop would be a profitable enterprise.

Claimant's exhibit 1 is the deposition of Eugene E. Herzberger, taken November 4, 1982. The doctor noted that, on exploratory surgery in May 1980, he found claimant had scar tissue without new disc herniation and also atrophy or shrinkage of the S1 nerve root. He noted he again saw claimant June 10, 1981 and at that time she had a new but self limiting injury which improved quickly. He next saw claimant September 14, 1982. She then complained of low back, left hip, and left leg pain which had kept her off work for several days. The doctor explained that claimant's June 1982 and September 1982 complaints were causally related to claimant's original injury "because she was prone to reinjure herself if she didn't watch well enough what she was doing and was trusting her back too much." The doctor also opined that claimant's disability as of November 1982 was causally related to the original 1977 work incident. He stated the following as regards the extent of claimant's permanent disability:

> Q. Doctor, did you evaluate her to form an opinion as to the extent of any permanent partial disability she might have?
>
> A. Yes, I certainly have evaluated her and my evaluation is based a great extent on anatomic findings seen during the surgical exploraiton [sic]. I feel that the atrophy of a nerve root is a significant deficit and the amount of scarring that she has had is also very limiting and it certainly can explain persistent symptoms. Now, usually if a person has had a ruptured disk and has made a good recovery, has no symptoms to speak of and does not have any anatomic nerve root injury, I would say that permanent partial disability which we know is so approximate and perhaps even arbitrary, still would be only like five to seven percent for the body as a whole, but when somebody has an anatomic change, very specific change, nerve root atrophy and severe scarring, then it is definitely more and that's the reason I thought that I might establish it at fifteen percent for the body as a whole.
>
> Q. So in her instance, in her case you determined her permanent partial disability to be fifteen percent of the body as a whole.
>
> A. Yes.

He opined claimant is permanently restricted to lifting of 25 pounds or less.

On cross-examination, the doctor noted claimant then had no restrictions on walking or standing but on pulling, pushing, lifting heavy weights, and on twisting the back. He also agreed that claimant should have been able to perform her job without aggravation of her 1977 injury, if the job involved only standing and walking a line and lifting small objects.

Claimant's exhibit 2 is the deposition of Dr. Herzberger taken April 7, 1982. The doctor noted claimant consulted him December 22, 1982 following her December 10, 1982 injury. He reported claimant underwent a CAT scan in January 1982 which indicated claimant had spinal fluid collection in the lower back at L5-S1. A myelogram revealed an arochnoid cyst at L5-S1 on the right side which was communicating with a thecal sac. The doctor stated these findings when coupled with claimant's headaches which increase in severity when she is up and decline when she is lying down suggested claimant had spinal fluid leakage. The doctor elected to treat claimant conservatively since he believed there was potential for spontaneous healing. The doctor expressed the following as regards claimant's history and symptoms following her 1982 injury:

> Q. All right. Then I think you mentioned that there was a difference in her symptoms when you saw her in December of 1982 from what it had been earlier when you were treating her.
>
> A. Well, the difference was in the fact that she had these headaches. This is, I would say, a very significant difference. She never had that before. Then she used to have back pain and leg pain before and it wasn't so unusual and, of course, seeing the spinal fluid collection and knowing also she has had all the scar tissue, nerve root atrophy.
>
> As I say, my very first impression was that she just strained those very same nerves in her back when she exerted herself and this cyst was just a new added thing. I believe from a straining of the back on the nerves you recover again. It just shows that you are vulnerable to it, that you get in trouble when you exert yourself but if you rest you get better again.
>
> Q. Now, Doctor, you probably told us. So that I can make my record clear in the words that lawyers like to use, based upon a reasonable degree of medical certainty, do you have any opinion as to the causation of the symptoms and the problem for which you treated her for in December of 1982 and performed the tests in January of 1983? I was asking for an opinion as to what was the cause of those symptoms and problems she was having.
>
> A. Well, those symptoms and problems she has had in my opinion are related to the incident she had

that happened on December 10.

Q. That would be December 10th of 1982?

A. 1982. I also think that if she never would have been injured before or never would have had any problem before, perhaps she wouldn't have had these symptoms now. I think that she has a predisposing -- that because of her previous scar tissue, nerve root atrophy and so forth, that she is pretty predisposed to injure easily.

The doctor later opined that claimant's second injury would ...t likely result in additional disability.

On cross-examination, the doctor clarified that the only ...usal relationship which exists between claimant's 1977 injury ...d her 1982 injury was the fact that as a result of the 1977 ...jury she was more likely to have another injury even though a ...cond traumatic event was necessary to create her symptoms ...llowing the 1982 injury. Herzberger deposition exhibits 1 ...rough 3 were fully reviewed in the disposition of this case.

Claimant's exhibit 3 is the November 9, 1983 deposition of . Herzberger. Defendants' objection on the grounds of relevancy overruled. The doctor opined that claimant's permanent ...rtial disability was 20 percent based on the fact that "her ...ssues are so brittle she seems so easily damaged more than ...me other people."

On cross-examination by Mr. Shepler, the doctor elaborated follows concerning what he meant by the tissues being brittle:

Q. Okay. I have only a couple of other questions, Doctor. Mr. Hedberg asked you about your opinion on a percentage impairment of disability, and one of the factors that you identified as contributing to that was something you referred to as the tissues being so brittle. What do you mean by that?

A. Well, Mrs. Manning has an excess, a tendency to excessive scar tissue formation. I have operated on her after somebody else has and I found a very large build-up of scar tissue, and the dura and all the tissues were very hard, were infiltrated by the scar tissue and friable, you know. It's [sic] breaks more easily, tears more easily, and this is, you know, an individual situation. I mean some people just tend to have it. Again it's a small percentage of the population, and she sort of recovered slowly, and in general her progress hadn't been too fast, but finally she did pretty well till this accident and then it started all over again, and I feel that she is brittle and that she has to avoid situations of this sort.

Q. Is that why you indicated that she seemed to be more easily damaged than other people?

A. Yes.

Q. Does the presence of that type of scar tissue represent a concern in and of itself, Doctor?

A. Well, she doesn't have that build-up or at least, you know, at the time I operated on her she didn't have, you know, the build-up to produce an extreme pressure, nor do I think, because we had studies in the meantime, I haven't seen the formation of any significant arachnoiditis, which is --

Q. What is that?

A. A scar tissue build-up inside which involves the nerve roots, and people with arachnoiditis are subject to chronic pain, sometimes intermittently, you know, but quite severe and disabling for some people, for the minority of the people. So, I haven't seen that.

Q. When you say you haven't seen it, you mean during her surgery?

A. Well, during the surgery I didn't open the dura in order to inspect the nerve roots, but with the studies we did, the studies would give us an indication of significant arachnoiditis. Minor arachnoiditis may not be significant.

The doctor subsequently opined that claimant's overall ...airment was slightly worse than he had first estimated and ...t he should have given her a 20 percent rating initially.

On questioning by Mr. Kamp, the doctor stated the following regards claimant's ability to work:

Q. Doctor, as I understand it, you're of the opinion that since December of 1982 Mrs. Manning could have been working performing light duty work, is that correct?

A. Not entirely. When she doesn't have this headache she can work, when she has the headaches she really cannot. So, in other words, if you have an employment where you are expected to be there every day, five or six days a week and then you miss maybe a couple of days out of that, I don't think that goes over well.

Q. Okay, but regardless of what the employer thinks, from a physical standpoint as long as she didn't have headaches she was able to work in her work?

A. Light work.

Q. And by light work are we talking about the work she had been performing prior to December of '82?

A. I have the impression that prior to December of '82 she may have done work that really wasn't that light. I have that impression. I don't have the certainty, it's some sort of recollection, and certainly what she did on December 10 was something she shouldn't have done at all but, you know, with her condition I wouldn't recommend that she should do anything that requires maximal effort. She can do light housework, she can do office work, she can do industrial work that's light, you know, where you don't have any major lifting to do or a great deal of bending or twisting of her back.

Deposition exhibit's 1 and 2 were fully reviewed in the disposition of this case.

Claimant's exhibit 4 is the 1982 financial statement of of Fashions Unlimited. Defendants' objections to the exhibit are sustained.

Defendants' exhibit A is a December 11, 1981 letter of Dr. Herzberger to claimant's counsel in which the doctor opines claimant has a permanent partial disability of 15 percent of the body as a whole based on weakness and limitation of motion of the lower back.

Defendants' exhibit B is a Purina Tender Vittle moist cat food carton which when full has a net weight of 24 ounces. Defendants' exhibit C is a Purina Tender Vittles cat food double size pouch. Eight such pouches are contained in each 24 ounce carton.

APPLICABLE LAW AND ANALYSIS

We first must decide whether a causal relationship exists between claimant's injury of November 15, 1977 and her current disability. At the outset, it is noted that we are concerned with claimant's December 10, 1982 injury only in so far as the issue of a causal relationship between the original injury and the subsequent injury has been raised.

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 15, 1977 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).

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.

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).

Claimant has established that her current disability is causally connected to her work injury of 1977. Claimant's original injury resulted in her being permanently restricted as to the lifting, twisting, pulling, pushing and bending motions she could perform. Claimant subsequently was limited to light duty work which the record reflects she was able to perform adequately. Claimant also formed excessive scar tissue from her 1977 injury, however. This has left her more susceptible to subsequent injury. Dr. Herzberger has opined that claimant's second injury is causally related to her first injury in so far as the first injury left claimant with this greater propensity to reinjury when additional trauma is experienced. Thus, the December 10, 1982 injury evidences this greater propensity. Claimant's episode of back and extremity pain of June 1981 and September 1982 also evidence such propensity. Each reinjury left claimant unable to adequately perform her work duties and resulted in absences from work. (While the record reflects claimant also lost work time for reasons unrelated to her injury, it is also apparent that claimant's reoccurring problems following her initial injury were a factor of some significance in her work absenteeism). Such potential for reinjury is a part of claimant's current disability and Dr. Herzberger stated such when he assigned claimant her later permanent partial disability rating of 20 percent of the body as a whole. Thus, claimant has established a causal relationship exists as to both her physical limitations and symptoms and her 1977 injury; and her propensity for reinjury and her 1977 injury; and her December 10, 1982 injury and her initial injury.

The question of the nature and extent of claimant's benefit entitlement must now be addressed.

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).

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, 902 (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, 257 (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).

Dr. Herzberger has assigned claimant a permanent partial disability rating of 20 percent of the body as a whole. He states claimant will be permanently limited to sedentary light duty work, and will be more easily reinjured than most other persons. He opines that claimant's symptoms from her December 10, 1982 trauma likely will resolve in time. Thus, those symptoms will not be considered in determining claimant's industrial disability. Claimant's susceptibility to reinjury and her history of recurrent injuries are factored in, however. Claimant was terminated by defendants. Her work absences related to her initial injury and her recurrent symptoms were an element even if not the whole basis for such termination. Thus, under McSpadden, claimant's termination in so far as it relates to her disabling condition must be considered in assessing her industrial disability.

Claimant is 35 years old. Claimant is a high school graduate; she testified she had not been a good student. Claimant was well-spoken and evidenced a high level of reasoning powers and of social awareness at hearing, however. Prior to her 1982 injury, claimant had also did book work for the dress job of which she is corporate president. This fact tends to evidence a fair level of competence in analytical skills and abstract reasoning. It appears then that claimant, at minimum, would be a reasonable candidate for vocational rehabilitation training. Claimant apparently has neither sought such training nor sought different employment more suited to her physical limitations. While this is understandable at the current time given the symptoms claimant experiences as a result of her December 10, 1982 injury, the absence of such attempts in the five prior years is troubling and does not speak well as to claimant's motivation. Considered as a whole, claimant has sustained an industrial disability of 26 percent as a result of her 1977 injury. This determination factors in the causal connection between claimant's initial injury and her subsequent injury of 1982. It does not take into account symptoms claimant is experiencing solely as a result of the subsequent injury. These have not subsided. Dr. Herzberger opines they will subside in time. Thus, they are not a factor in claimant's permanent partial disability. Should they fail to subside, any permanent condition would be subject to determination in a later proceeding.

At hearing, the parties indicated an issue as to claimant's healing period following her 1977 injury as such related to the work time lost by claimant in 1980 remained on unresolved. As no evidence was presented on this matter, it cannot be resolved.

We are to determine the commencement date for interest on claimant's benefit award. Section 85.30 concerns this matter and provides:

> 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 rate provided in section 535.3 for court judgments and decrees.

It has been determined that claimant has sustained an industrial disability of 26 percent. Under the statute such percentage results in an award of 130 weeks of permanent partial disability benefits. Claimant has already been paid 75 weeks of permanent partial disability benefits and defendants are credited for those payments already made. The case of Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957) dealt with the commencement date for interest in a review reopening where claimant is awarded additional permanent partial disability and controls the instant case. The Bousfield court stated that the due date for the additional award could not be determined until claimant had applied for same, or a determination was made on her application. The court then held interest could only be allowed from the date the commissioner found claimant entitled to increased compensation. Bousfield at 72.

Therefore, under 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 of permanent partial disability is determined by the proposed award. Defendants' here satisfied the criteria. Claimant is entitled to interest under section 85.30 from the date of filing of the proposed review reopening decision awarding such amounts.

FINDINGS OF FACT

WHEREFORE IT IS FOUND:

Claimant injured her back November 15, 1977 while pushing and pulling a grain bin for her employer.

Claimant has undergone two separate surgeries as a result of such injury.

Claimant has formed excessive scar tissue as a result of her injury. Such tissue has left claimant "brittle" and more susceptible to re-injury than claimant would be had her initial injury not occurred.

Claimant had reoccurrences of her symptoms sufficient that she sought medical treatment in June 1981 and September 1982. Claimant suffered a second injury December 10, 1982 while freeing a co-worker who had caught her arm in an industrial machine. Claimant's propensity for reinjury was an element in her second injury even though a separate trauma was necessary to produce her new symptoms of severe headaches which subside when claimant lies prone. These symptoms indicate spinal fluid leakage.

Dr. Herzberger is treating claimant's symptoms from the second injury conservatively and believes these will not continue indefinitely.

Claimant has twenty percent (20%) permanent partial functional impairment based in part on her propensity to reinjury.

Claimant is thirty-five (35) years old; she is a high school graduate, is well-spoken, and appears to have good abstract reasoning skills.

Claimant had adequately performed her duties as a coupon dropper and cartoner/operator prior to her second injury.

Claimant did not seek alternate employment or vocational rehabilitation evaluation following either her first or second injury. Claimant does not appear highly motivated.

Claimant was terminated by her employer as a result of excessive absenteeism. A number of her absences result from her work injury. Others resulted from unrelated personal problems of claimant.

Claimant may not engage in activities where she must bend, push, pull, twist, or lift greater than twenty-five (25) pounds.

Defendants have paid claimant seventy-five (75) weeks of permanent partial benefits.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established a causal relationship between her November 15, 1977 injury and her present disability.

Claimant has sustained an industrial disability of twenty-six percent (26%) of the body as a whole.

Claimant is entitled to interest on her permanent partial disability benefit award from the date of the filing of this proposed review reopening decision awarding additional permanent partial disability.

THEREFORE, IT IS ORDERED:

Defendants pay claimant one hundred thirty (130) weeks of permanent partial disability benefits at the stipulated rate of one hundred fifty-eight and 24/100 dollars ($158.24) per week with credit for the seventy-five (75) weeks of benefits previously paid.

Defendants pay interest on the award from the date of filing of this proposed review reopening decision.

Defendants pay costs of this action.

Defendants file a final report upon payment of this award.

Signed and filed this ____ day of May, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HARRY MATTISON,
Claimant,
vs.
GEORGE HAYS,
Employer,
and
FARM BUREAU INSURANCE CO.,
Insurance Carrier,
Defendants.

File No. 683245
A P P E A L
D E C I S I O N

By order of the industrial commissioner filed January 23, 1984 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 consists of the transcript; claimant's exhibits 1 through 35, inclusive; and defendants' exibits A through D, inclusive, all of which evidence was considered in reaching this final agency decision. Exhibit E was offered at the time of the hearing, and the deputy industrial commissioner noted the objection (Tr. 40). In the review-reopening decision, the objection to exhibit E (explained below) was sustained.

The result of this final agency decision will be the same as that in the review-reopening decision.

REVIEW OF THE EVIDENCE

The recitation of the evidence in the review-reopening decision is sufficient and under the circumstances adopted and will not be set out herein.

APPLICABLE LAW

The applicable law in the review-reopening decision is adopted and expanded to include the following: Industrial Commissioner Rule 500-4.17, I.A.C. states:

> 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

Defendants argue that there was no causal relationship shown between claimant's injury and last surgery and a stroke suffered four days after that surgery. Claimant took the deposition of John Brinkman, M.D., and that doctor was cross-examined by counsel for defendants. The date of the deposition was January 25, 1983, and the deposition was filed on March 2, 1983. (In the meantime, the prehearing conference had been held on February 2, 1983.) It was not until the hearing of April 25, 1983 that defendants produced defendants' exibit E, a report from Dr. Brinkman dated April 21, 1983.

As stated above, the hearing deputy eventually sustained the objection to the exhibit because it had not been exchanged pursuant to the above quoted rule. It is assumed that since the industrial commissioner's office received the deposition on March 2, 1983, it was available to defendants from that time, leaving then over one and one-half months to obtain a report and to ask for appropriate relief. Such being the case, the hearing deputy's ruling appears correct and will be followed here.

Otherwise, the analysis set out in the review-reopening decision is adopted, as are the findings of fact, conclusions of law and order.

FINDINGS OF FACT

That on September 18, 1981 claimant was an employee of the defendant.

That on September 18, 1981 claimant sustained a personal injury which both arose out of and in the course of his employment relationship with the defendant.

That claimant had a preexisting ulcer condition which flared up twice annually and was not disabling.

That as a consequence of the September 18, 1981 incident claimant aggravated his preexisting ulcer condition to the point where two surgical procedures were required to correct the problem.

That an incisional hernia occurred in the area of the aforementioned surgeries and which was caused by these surgeries.

That a third surgical procedure was performed to repair the incisional hernias.

That four days post surgery claimant suffered a stroke.

That claimant had preexisting bruits of the carotid arteries.

That there exists a causal relationship between the surgery and the resulting stroke.

That as a consequence of the stroke claimant is an invalid and is permanently and totally disabled.

That the medical charges reflected in this record are fair and reasonable and were incurred to treat the stroke in issue.

CONCLUSIONS OF LAW

That claimant has sustained his burden of proof and established a causal connection between the surgical procedure to repair his incisional hernias and the stroke he suffered four days later.

That claimant has sustained his burden of proof and established by a preponderance of the evidence that he is permanently and totally disabled as a consequence of the stroke.

ORDER

THEREFORE it is ordered:

That the employer shall pay unto claimant compensation benefits of sixty-six and 05/100 dollars ($66.05) from September 18, 1981 and continuing during the period of the employee's disability as contemplated under section 85.34(3).

That the employer and insurance carrier are given credit for all benefits previously paid.

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

Mayo Clinic	$23,056.17
St. Marys Hospital	26,013.32
Anderson's Wheelchair	630.00
North Iowa Medical Center	1,371.25
Prescriptions	184.61
Forest City Community Hospital	260.00
Park Clinic	535.00
Rochester Methodist Hospital	464.05

That interest shall accrue from October 24, 1983 pursuant to section 85.30.

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

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

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

Signed and filed at Des Moines, Iowa this 30th day of April, 1984.

Appealed to District Court;
Affirmed

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARVIN EUGENE MCCARRICK,
Claimant,
vs.
HUXTABLE HAMMOND CO. INC.,
Employer,
and
THE HARTFORD INSURANCE CO.,
Insurance Carrier,
Defendants.

File No. 620022
A P P E A L
D E C I S I O N

STATEMENT OF THE CASE AND ISSUE

Claimant suffered an aggravation of a preexisting back condition in a work related incident occurring on December 4, 1979. A first report of injury was filed on December 12, 1979 and claimant was paid temporary disability benefits until June 10, 1980 when he began a new job with a different employer. Defendants did not volunteer payment of permanency benefits and claimant filed a petition for review-reopening on May 15, 1981. In a review-reopening decision issued on May 10, 1983 claimant was awarded 125 weeks of permanent partial disability benefits at the stipulated rate of $259.34 per week, as well as statutory interest accruing from the date of the award. Claimant now appeals from that portion of the deputy's decision pertaining to interest, and asserts that statutory interest should properly accrue from June 10, 1980.

The record on appeal consists of the transcript of hearing containing testimony from claimant and John Mathismeier; the depositions of Steven Ronald Jarrett, M.D., William Catalona, M.D., and Jerry L. Jochims, M.D.; claimant's answers to interrogatories; claimant's exhibits 1A, 1B, 2A, 2B, 2C, 2D, 2E, 3A, 3B, 4A, 4B, 4C, 4D, 4E, 5, 6, 7, 8, 9A, and 9B; defendants' exhibits A, B, C, and D; and the briefs and filings of all parties on appeal.

REVIEW OF THE EVIDENCE

Claimant worked as a steamfitter from 1951 through 1979, an occupation which requires a great deal of bending, stooping, climbing and heavy lifting. Claimant has not worked as a steamfitter since the December 4, 1979 aggravation of his preexisting back condition. At the insurance carrier's request, claimant was evaluated by William Catalona, M.D., on December 27, 1979. Claimant made several follow-up visits to Dr. Catalona. In a February 26, 1980 letter addressed to the insurance carrier, Dr. Catalona wrote: "It appears this man will not be returning to work because of his persistent low back pain and concern of further injurying [sic] his back. It might be of some benefit to you and this man if you obtained a second opinion regarding his condition." (Defendants' Exhibit A) In a March 3, 1980 letter addressed to Disability Determination Services, Dr. Catalona wrote:

> In reply to yours of March 3, 1980, I am enclosing a copy of my office record on the above. This should provide you with the information which you need. I have not made any electrocardiogram tracings, laboratory work, or breathing studies.
>
> As you can read, this man continues to have severe disabling low back pain and it appears he will not be able to return to work because of persistent low back pain. My diagnosis for this man is severe sprain superimposed on degenerative intervertebral disc disease and spondylosis. (Def. Ex. B)

Claimant was treated by Jerry L. Jochims, M.D., from April 18, 1980 through April 6, 1981. In a July 3, 1980 letter addressed to claimant's counsel, Dr. Jochims wrote:

> I am in receipt of your letter of June 25, 1980 requesting more information on Mr. Marvin McCarrick. As of this time, the greatest permanent partial disability rating which I could ascribe to Mr. McCarrick would be that of 10% disability to whole man, relating to an aggravation of a pre-existing condition. This would be based on his diffuse degenerative disease in his back but without evidence for true herniated intervertebral disc. (Claimant's Ex. 7)

On June 10, 1980 claimant began working in the drafting department at Rust Engineering. Claimant's new work responsibilities were sedentary in nature, consisting of drawing and reading blueprints. He was layed off from the job at Rust Engineering on May 22, 1981.

During his deposition taken on November 30, 1981 Dr. Catalona testified that he had read the July 3, 1980 report of Dr. Jochims ascribing a 10 percent permanent disability rating relating to the aggravation of claimant's preexisting back condition. Dr. Catalona stated that he found no fault in the opinion of Dr. Jochims, but indicated that he himself had not attempted to evaluate permanent impairment.

At the insurance carrier's request claimant submitted to another examination on July 14, 1982, this time with Steven R. Jarrett, M.D. During his deposition taken January 25, 1983 Dr. Jarrett refused comment as to the disability rating assigned by Dr. Jochims, stating that he was unable to determine at the date he examined claimant whether his degenerative disc disease had been significantly exacerbated by the December 4, 1979 incident.

APPLICABLE LAW AND ANALYSIS

Iowa Code section 85.30 provides:

> 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.

This appeal presents the question as to when the applicable statutory interest, as provided in section 85.30, accrues in cases where the defendants deny compensability of an apparent permanent impairment which is later held in an agency decision to be compensable.

Claimant was paid temporary disability benefits during the December 12, 1979 to June 10, 1980 period when he was unable to work. Upon beginning a job as a draftsman for a new employer on June 10, 1980, claimant received no further benefits prior to an award of 125 weeks of permanent partial disability benefits in a May 10, 1983 review-reopening decision. Statutory interest was ordered to accrue on the amount of the award beginning on the date of the decision. Claimant now contends that the Iowa Supreme Court's decisions in 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) mandate a modification of the deputy's order to permit the statutory interest to accure from June 10, 1980.

Farmers Elevator Co., Kingsley, 286 N.W.2d 174, involved a situation where the employer from the beginning denied the compensability of a claim. Upon affirming an agency decision in which a 50 percent industrial disability was found, the court stated:

> The Elevator asserts that interest on claimant's unpaid compensation should commence, at the earliest, at the time of the district court affirmance of the agency's decision. This argument stands or falls on construction of section 85.30 of the Code, ... 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. Id. at 180.

In Wilson Food Corp., 315 N.W.2d 756, 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 policy rationale encouraging employers to freely pay employees, even though a subsequent credit would cause inconvience to a claimant by an earlier cut off of benefits. Despite being based upon credit to be allowed for payments made in excess of the amount later determined to be due, Wilson Food Corp. correctly stands for the principle of prompt compensation.

In the instant case, Dr. Catalona notified the insurance carrier as early as February 26, 1980 that claimant would be unable to return to his position as a steamfitter, and the record indicates that the defendants clearly understood claimant's new job with Rust Engineering to be sedentary in nature. Furthermore, it is reasonable to assume that defendants were aware of the 10 percent impairment rating relating to the aggravation of claimant's back condition which was ascribed by Dr. Jochims on July 3, 1980. 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, support a finding that section 85.30 interest should begin to accrue on June 10, 1980 when claimant ceased to be eligible for further temporary disability benefits.

In maintaining that statutory interest should accrue from May 10, 1983, defendants rely upon the Iowa Supreme Court's decision in Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). In Bousfield, the claimant was a nurse who had suffered a work related injury to her back. Findings of the doctor who performed surgery on the claimant's back indicated that she had "about a 15 percent" disability relating to the removal of a herniated disc. As a result, the parties entered into an agreement which stipulated that claimant had received a permanent partial disability of 20 percent arising out of a compensable injury, and benefits were paid accordingly. When the claimant's back condition became worse than had been originally anticipated, a petition for review-reopening was filed. In the review-reopening decision the claimant was found to have sustained an industrial disability of 25 percent. In discussing the interest to be paid on the additional permanent partial disability awarded over that which had previously been paid, the court concluded that the date of maturity of the additional award could not be determined prior to the claimant's application for such. As a result, the court found statutory interest would accrue on the additional award from the time the claimant was found to have been entitled to the increased compensation.

Based upon the court's decision in Bousfield we have held where the employer makes permanent partial disability payments before the proposed determination, and such payments were made in good faith and 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. See Sloan v. Great Plains Bag Corp., Appeal Decision, File No. 642856 (September 1982). The instant case is readily distinguishable in that defendants failed to pay any permanent partial disability benefits prior to the proposed determination on May 10, 1983, despite clear indications as early as February 1980 that payment of such benefits was warranted. Defendants failed to act in good faith by declining to promptly pay to claimant permanent disability benefits, despite the existence of ample evidence to determine that permanent industrial disability did exist and there were reasonable measures to determine at least a minimal extent thereof.

FINDINGS OF FACT

1. Claimant was employed by Huxtable Hammond Co. on December 4, 1979.

2. Claimant aggravated a preexisting back condition while working on December 4, 1979.

3. Claimant received temporary disability benefits from December 12, 1979 to June 1980.

4. On June 10, 1979 claimant began a new job of a sedentary nature with a different employer.

5. Defendants knew as early as February 1980 that claimant would not be able to return to his job as a steamfitter due to his back injury.

6. Claimant sustained a 25 percent industrial disability of the body as a whole as a result of the December 4, 1979 aggravation of his preexisting back condition.

7. Defendants failed to show good faith by refusing to pay unto claimant permanent disability benefits before an award was made in the May 10, 1983 review-reopening decision.

8. Statutory interest under section 85.30 should properly accrue from June 10, 1980.

9. The applicable workers' compensation rate is $259.34 per week.

CONCLUSIONS OF LAW

Claimant has sustained an industrial disability of 25 percent of the body as a whole.

Interest on claimant's award should accrue from June 10,

983 when he ceased being eligible for healing period disability enefits.

WHEREFORE, the deputy's decision filed May 10, 1983 is ffirmed in part and modified in part.

THEREFORE it is ordered:

That defendants pay unto claimant one hundred twenty-five 125) weeks of permanent partial disability compensation at the ite of two hundred fifty-nine and 34/100 dollars ($259.34) per eek.

Interest will accrue on the unpaid amounts from June 10, 983.

Costs of the review-reopening proceeding and appeal are ixed to defendants.

Signed and filed this 30th day of December, 1983.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RVIN EUGENE MCCARRICK, Claimant, . XTABLE HAMMOND CO. INC., Employer, d E HARTFORD INSURANCE CO., Insurance Carrier, Defendants.	: : : : : : : : : : : : : : :	File No. 620022 N U N C P R O T U N C O R D E R

The appeal decision filed on December 30, 1983 and concerning e above entitled matter contains two typographical errors. e second paragraph under the Conclusions of Law caption on ge 6 of the appeal decision states:

> Interest on claimant's award should accrue from June 10, 1983 when he ceased being eligible for healing period disability benefits.

is paragraph should have, and is hereby amended to read:

Interest on claimant's award should accrue from June 10, 80 when he ceased being eligible for healing period disability nefits.

The second paragraph of the order on page 6 states:

> Interest will accrue on the unpaid amounts from June 10, 1983.

This paragraph should have, and is hereby amended to read:

Interest will accrue on the unpaid amounts from June 10, 80.

Signed and filed this 9th day of January, 1984.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TIMOTHY McCRADY, Claimant, vs. IOWA BEEF PROCESSORS, INC., Employer, Self-Insured, Defendant.	: : : : : : : : : : : :	File No. 724354 A P P E A L D E C I S I O N

By order of the industrial commissioner filed April 20, 1984 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 arbitration decision.

The record on appeal consists of the transcript; defendant's exhibits 1,2, 3, 5, 6, 7, 8, 9, 10, 12, 13, 14, 16, 17, 18 and 19; and claimant's exhibits A through G, inclusive, all of which evidence was considered in reaching this final agency decision.

The outcome of this appeal decision will be the same as that reached in the arbitration decision.

ISSUES

The arbitration decision awarded benefits for temporary total disability unto claimant for a period of 4 3/7 weeks at the rate of $236.06 per week and ordered the payment of a doctor bill and a hospital bill.

Defendant states the issues on appeal:

1. Whether claimant sustained an injury arising out of and in the course of his employment on January 21, 1983,

2. If he did sustain an injury, was there a causal connection between it and the condition which he claims has caused compensable disability,

3. If so, the nature and extent of disability, and

4. If so, the matter of set-off for group and unemployment compensation benefits claimant received from the employer.

APPLICABLE FACTS

The arbitration decision contains a summary of the facts which under the circumstances is adopted herein. Those facts which are applicable to the appeal may be stated as follows:

Claimant worked in the employer's meat processing plant and ran a machine which he described as follows:

> Rod and weasel is the-- The weasel is the -- it's like a membrane or that hangs inside the beef. And when the beef comes around, you got to bend up, and it sits right behind the windpipe. And you got to reach up, and you got to ram your two fingers through this membrane so where you make a little hole like.
>
> And then you pull it down, take it -- and you pull it all the way down. And then you take this rod and by walking and bending and pulling, and then you have to stick this rod up all the way. Then you have to pull the weasel and break it, and then you got to run over and you got to take a pliers with a rubber -- these little rubber bearings, stick it on this pliers thing. (Tr. pp. 13-14 ll. 14-25 and 1)

The claimant stated that on January 21, 1983, about 10:30 in the evening, he felt a sharp pain in his back. (Tr., 14).

Since claimant had had prior kidney problems, he went to Drew Sieben, M.D., who stated that claimant had no kidney problems and referred claimant to his family physician, John F. Kelly, M.D. Claimant was released to work on February 22, 1983. (Tr., 33)

Dr. Kelly's evidence consists mainly of a letter of August 30, 1983:

> This patient was seen on January 31, 1983 with a complaint that on the 21st of January he injured his back at work. He had to squat down and sort of reach up and do some pulling and this caused a sharp pain in his lower back. He had been seen by Dr. Sieben for questionable kidney problems, which apparently turned out okay. When I saw him he was moving cautiously and was acutely tender at the lumbosacral junction of the spine. He had no leg radiation. The pain was aggravated by twisting, lateral bending and flexing. An x-ray of his lumbosacral spine was reported as normal. The treatment I prescribed was bedrest on his back with three cushions under his legs.
>
> He was next seen on February 8, 1983. His back was improving and he was moving more freely. The acute phase seemed to be subsiding. He was to continue with the same therapy. On February 15, 1983, he had improved considerably and was started on flexion exercises. On February 21, 1983 he had full range of motion of his back, no detectable discomfort. He was given a work release for February 22, 1983.

> He came back on June 6, 1983 when he stated he was having some discomfort again. It seemed to bother him when he would drive his car a distance, but he was getting relief with lying down. Range of motion was near normal at that time. I advised him to continue his flexion exercises. His final visit was July 20, 1983 at which time his back seemed normal, he had normal range of motion without discomfort and I considered him to have recovered at that time.

Additionally, on June 6, 1983 Dr. Kelly in a short letter stated that claimant did suffer a lumbosacral strain.

John J. Dougherty, M.D., an orthopedic surgeon, examined claimant for defendant and stated in part in a letter of September 13, 1983:

> With regard to whether he has a lumbosacral strain I think that, that is a reasonable diagnosis. He said that he hurt it on the 21st of January, I do not know how much stock we can put in this history from the information forwarded to me, but I would presume that if he overworked a lot, which he was not apparently accustomed to doing this type of work, that he could have some back pain, but it appears that he does have some angulation at L-4-5 with a scoliosis which I feel can contribute to some low back pain if he overuses his back.
>
> I reviewed the information you forwarded to me and it certainly appears to be rather sketchy. As far as whether the condition in January represented an injury, this is going to be hard to tell, but from what he described the job as, I suppose that he could have had some mild strain to his back, but certainly does not appear that he sustained anything significant.

APPLICABLE LAW

One 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 Co., 236 Iowa 296, 18 N.W.2d 607 (1945) and Almquist v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 (1934).

Section 85.33(1) provides as follows:

> 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.

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. "The incident or activity need not be the sole proximate cause if the injury is directly traceable to it." Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974) and Langford v. Kellar Excating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971). "A cause is proximate if it is a substantial factor in bringing about the result." Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

Section 17A.14(1), Code of Iowa, states as follows:

> Irrelevant, immaterial, or unduly repetitious evidence should be excluded. A finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial.

Section 85.38(2) states as follows:

> In the event the disabled employee shall receive any benefits, including medical, surgical or hospital benefits, under any group plan covering nonoccupational disabilities contributed to wholly or partially by the employer, which benefits should not have been paid or payable if any rights of recovery existed under this chapter, 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 nonoccupational plan shall be reimbursed in the amount so deducted. This section shall not apply to payments made under any group plan which would have been payable even though there was an injury under this chapter or an occupational disease under chapter 85A 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.

ANALYSIS

Issues one and two may be discussed together. Claimant went from Dr. Sieben to Dr. Kelly, who treated claimant for a back strain, which treatment was apparently based upon the history given. It would seem to be a reasonable inference that claimant's back problem at work was caused by the incident described in the history. Based upon the evidence available, that is a fair conclusion. Dr. Dougherty concedes his information was sketchy and that he could not form any firm opinion. That being the case, his evidence is accorded less weight than that of Dr. Kelly and the conclusion remains that claimant suffered a compensable incident at work as he described.

Although defendant does not agree that claimant was injured at work, it does not dispute the period of disability.

The final issue, concerning a credit or offset, can be divided into two parts. (1) Claimant apparently drew unemployment compensation benefits during the time he was disabled from work. There is no provision in the law for a credit to the employer, and it would appear that any remedy is owned by Job Service of Iowa. (2) With respect to the credit under §85.38(2), The Code, there was no evidence introduced and therefore no proof of any right to a credit. Therefore, no credit will be allowed.

The findings of fact, conclusions of law and the order of the arbitration decision are adopted herein except that order of interest payment has been changed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Claimant is 28 years old, married, and at the time of his injury had two children.

2. The parties stipulated that the rate in the event of an award is $236.06 and it is so found.

3. On January 21, 1983 claimant suffered a low back strain while at work.

4. As a result of his injury, claimant was temporarily totally disabled from January 22, 1983 to February 22, 1983.

5. As a result of his injury, claimant required certain medical treatment.

6. Claimant paid Dr. Sieben $14.00.

7. Claimant did not suffer a permanent disability as a result of his injury.

IT IS CONCLUDED:

1. On January 21, 1983 claimant suffered an injury arising out of and in the course of his employment.

2. Claimant's injury is causally related to his temporary total disability.

3. Claimant's medical expenses were both reasonable and necessary for treatment of his injury.

ORDER

THEREFORE, IT IS ORDERED that defendant pay to claimant benefits for temporary total disability from January 22, 1983 to and including February 21, 1983 for a total of four and three-sevenths (4 3/7) weeks at the rate of two hundred thirty-six and 06/100 ($236.06), all accrued payments to be made in a lump sum together with statutory interest at ten (10) percent from February 1, 1983.

It is further ordered that defendant pay the following medical expenses:

John P. Kelly, M.D.	$ 64.00
Trinity Regional Hospital	219.50

It is further ordered that defendant reimburse claimant for fourteen dollars ($14.00) paid by him to Dr. Sieben.

Defendant is to be given credit for any payments made as provided in §85.38, The Code.

It is further ordered that the costs of this proceeding are taxed to defendant.

Defendant shall file a claim activity report upon payment of this award.

Signed and filed this 28th day of June, 1984.

Appealed to District Court;
Pending

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

:SLEY D. McDANIEL, :
: File No. 732623
Claimant, :
: A P P E A L
. :
: D E C I S I O N
ERICAN FREIGHT SYSTEMS, :
:
Employer, :
Defendant. :

By order of the industrial commissioner filed January 17, 84 the undersigned deputy industrial commissioner has been pointed under the provisions of §86.3, Code of Iowa, to issue e final agency decision on appeal in this matter. Defendant peals from a decision which denied defendant's motion to set ide a default.

The record on appeal consists of the industrial commissioner's le which includes the affidavits of J. L. Spilde and Deanne e, all of which evidence has been considered in reaching this cision.

The result of this final agency decision on this issue will ffer from that of the hearing deputy in that the order of fault will be set aside.

ISSUE

Defendant states the issue thus: "The issue for determin- ion here is whether good grounds existed for denying Claimant's tion for Default as filed on or about July 26, 1983."

STATEMENT OF THE CASE

On May 31, 1983, claimant Wesley D. McDaniel brought an bitration action against American Freight Systems, and proof service was filed June 2, 1983. In the absence of any answer ing filed by defendant, claimant moved for default on July 21, 83, which action was followed by an answer on July 26, 1983. August 26, 1983 an order of default was entered. On September 1983 a motion to set aside the default was filed by defendant ich was followed on November 9, 1983 by a decision which nied the motion.

The facts concerning how the default came about are simple d uncontested; they appear in two affidavits:

1. That I, Deanne Lee am a clerk employed by American Freight System, Inc., and work in the Sioux Falls, South Dakota, office as an assistant to J. L. Spilde, Workers' Compensation Claims Examiner.

2. That one of my responsibilities involves the handling of in-coming mail into this department and the placing of in-coming mail into appropriate files.

3. That so far as J. L. Spilde and I have been able to determine in the above-entitled cause, the Original Notice and Petition was in fact received on or about May 31, 1983, was placed in an existing litigation file having no reference to this litigation and that mistake was not discovered until a Motion for Default was received on or about July 26, 1983, at which time the litigation files were searched and the Original Notice and Petition discovered.

4. That thereafter the American Freight System's attorneys in Des Moines, Iowa, were notified of the mistake and asked by J. L. Spilde to file an Answer and other responsive pleadings.

1. That I J. L. Spilde am a Workers' Compensation Claims Examiner for American Freight System, Inc. headquartered in Sioux Falls, South Dakota.

2. That my responsibility involves the handling of Worker Compensation Claims made by employees of American Freight System, Inc. including the handling of litigation arising out of injuries sustained in most if not all of the contiguous states of the United States of America.

3. That I apparently received an Original Notice and Petition in the captioned litigation from Attorney Dennis L. Hanssen of Des Moines, Iowa, on or about May 31, 1983.

4. That by reason of a clerical error, the said Original Notice and Petition were [sic] inadvertently placed in another litigation file and were [sic] not brought to my attention until a Motion for Default was received on or about July 26, 1983.

5. That upon receipt of the Motion for Default I immediately notified American Freight System's attorneys in Des Moines, Iowa, the firm of Jones, Hoffmann & Davison, by telephone, and requested them to appear promptly on behalf of the Employer.

6. That on the same date ie., July 26, 1983, the companies attorneys filed an Answer on Behalf of the Employer and a Resistance to the Motion for Default.

APPLICABLE LAW

The industrial commissioner uses the rules of civil procedure ess they are inapplicable for some particular reason. See e 500-4.35, I.A.C. Here the rules do apply.

Rule of civil procedure 236 states:

> On motion and for good cause shown, and upon such terms as the court prescribes, but not ex parte, the court may set aside a default or the judgment thereon, for mistake, inadvertence, surprise, excusable neglect or unavoidable casualty. Such motion must be filed promptly after the discovery of the grounds thereof, but not more than sixty days after entry of the judgment. Its filing shall not affect the finality of the judgment or impair its operation.

The basic interpretation of rule 236 is found in Paige v. City of Chariton, 252 N.W.2d 433, 437 (Iowa 1977):

> "Good cause" for setting aside a default judgment is a sound, effective, truthful reason, something more than an excuse, a plea, an apology, an extenuation or some justification for the resulting effect. The movant must show his failure to defend was not due to his negligence, want of ordinary care or attention, or to his carelessness or inattention. The movant must affirmatively show he intended to defend and took steps to do so, but because of some misunderstanding, accident, mistake or excusable neglect failed to do so. (Citations omitted) By the plain language of rule 236 good cause must be based on (1) mistake, (2) inadvertence, (3) surprise, (4) excusable neglect, or (5) unavoidable casualty.

Also, quoting Newell v. Tweed, 241 Iowa 90, 95, 40 N.W.2d 20, 23 (1949) the court in Hobbs v. Martin Marietta Co., 257 Iowa, 124, 132, 131 N.W.2d 772 (1964) said:

> "It has been the holding of this court that where a party in good faith is shown to have intended to defend but fails to do so because of accident or excusable neglect the trial court is justified in setting aside the default and in permitting the pleading of a defense."

Here the burden is on the defendant-movant:

> to plead and prove such good cause as will not only permit but require a finding of mistake, inadvertence, suprise [sic], excusable neglect or unavoidable casualty. And requisite "good cause" is a sound, effective and truthful reason--something more than an excuse, plea, apology, extenuation or some justification for the resulting effect. Hansman v. Gute, 215 N.W.2d 339, 342 (Iowa 1974)

The agency has broad discretion in ruling on a motion to set aside a default. Paige, 252 N.W.2d 433; Hannan v. Bowles Watchband Company, 180 N.W.2d 221 (Iowa 1970); Hobbs v. Martin Marietta Co., 257 Iowa 124, 131 N.W.2d 772.

The "policy of law is to allow trial of actions on their merits." Avery v. Peterson, 243 N.W.2d 630 (Iowa 1976)

Hannan v. Bowles Watchband Company was a case which had a factual circumstance which was very similar to the present case. The court states the facts thus:

> Defendant delivered the original notice to a claims supervisor for Home Indemnity Company, its insurer, on October 6, 1969. The notice was forwarded to the insurer's Kansas City office on October 13, 1969. The file reached the desk of Mack Duke, Claims Supervisor for the Kansas City office sometime prior to October 24, 1969. For some unexplained reason Mr. Duke failed to complete what is known as the setup sheet, thus no written system was used to call the matter to his attention, he forgot the appearance date and no further response was made until December 31, 1969, when he was notified that default had been entered. He immediately called for the file and it was in its proper place. Action to set aside the default was commenced promptly resulting in the January 5, 1970 motion.

The supreme court upheld the granting of a motion to set aside a default.

ANALYSIS

The briefs by the parties were very helpful and were much appreciated.

The real question here is whether the actions of J. L. Spilde and Deanne Lee amounted to excusable neglect. In that connection, it would appear to be an unfair result to prevent the employer "from defending on the merits because of a minor human error." (Mr. Justice Uhlenhopp in a special concurring opinion in Kreft v. Fisher Aviation, Inc., 264 N.W.2d 297, 305 [Iowa 1978]). The record stands unrebutted that either Spilde or Lee mistakenly put the suit papers in an existing litigation file that was unconnected to the present matter. There is no evidence that defendant meant to delay or otherwise avoid claimant's prosecution of his workers' compensation case. Also, the fact that the papers were handled, however wrongly, by people in the litigation department shows the employer intended to defend the case.

Under these circumstances, it would seem to be a harsh result to hold defendant in default, and this final agency decision on that issue will set aside that default.

FINDINGS OF FACT

The parts of the affidavits of J. L. Spilde and Deanne Lee quoted above are not inconsistent and are found to be and adopted as the findings of fact in this case.

CONCLUSION OF LAW

The action of Deanne Lee or J. L. Spilde in placing the claimant's petition for arbitration in the wrong file was excusable neglect.

ORDER

WHEREFORE, the order of default of August 26, 1983 is hereby set aside. This case is hereby returned to the hearing assignment for the customary post-answer procedures.

Signed and filed at Des Moines, Iowa this 14th day of March, 1984.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. [illegible] Ha[illegible]
At[illegible]

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT E. MEIER,	:	
Claimant,	:	
vs.	:	
JOHN G. CRANE, d/b/a CRANE SIDING & ROOFING CO.,	:	
Employer,	:	File No. 488844
and	:	A P P E A L
MILLHISER-SMITH AGENCY, INC.,	:	D E C I S I O N
Insurance Carrier, Defendants.	:	

By order of the industrial commissioner filed November 15, 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; claimant's exhibits 1, 2, 4, 5, 6, 9, 10 and 11; and defendants' interrogatories, all of which evidence was considered in reaching this final agency decision. Exhibit 3 was an x-ray and exhibits 7 and 8 were shoe inserts. Those exhibits were not retained by the hearing deputy as a part of the record. The transcript consists of two excerpts, the first being the testimony of claimant and his wife and the second being the testimony of David W. Johnson, D.C., and Del Werner. These transcripts will be referred to, respectively, as T1 and T2.

The result of this final agency decision will be the same as that reached by the hearing deputy. This decision will expand upon those findings to cover the issues in defendants' brief.

ISSUES

The arbitration decision awarded claimant healing period for 156 weeks, 3 days, at the rate of $89.36 per week and permanent partial disability payments for a period of 400 weeks at the same rate. It also ordered the payment of a lien of the Veterans Administration in the amount of $1,260 and a lien by the Iowa Department of Social Services in the amount of $17,542.15.

Defendants concisely state the issues on appeal: "1. Weekly benefit of $89.36; 2. Healing period of 156 and 3/7's weeks; 3. Industrial disability of 80 percent."

STATEMENT OF THE CASE

The issue of employment relationship went up to the Iowa Court of Appeals and was determined in claimant's favor in Crane v. Meier, 332 N.W.2d 344, Court of Appeals of Iowa (1982).

Concerning the issue of weekly rate, claimant testified:

> A. There was talk of $5 an hour on Friday, and the it turned to $3 an hour after my accident, and then -- Well, it turned to nothing after my accident, and then -- I don't know where $3 came up.
>
> Q. There was talk, then, of $5 an hour on the Friday before, and wasn't there also some talk of a minimum wage?
>
> A. I don't remember any minimum wage mentioning. We were trying to get Dick Aucutt -- Del wanted somebody to work so that Jerry would give him -- would hire him back on these jobs.
>
> Q. What did they pay Dick Aucutt?
>
> A. $5 an hour, I believe.
>
> ....
>
> A. The discussion with wages was with Del Werner, but not on a firm basis. (T1, pp. 37 and 39 11. 11-23 and 7-8)

Del Werner, who dealt with claimant with respect to the proposed employment arrangement, testified that he did not "believe that there was any agreement between Mr. Meier and myself as to compensation." (T2, 26)

Finally, claimant was asked questions with respect to prior testimony in a civil case. The following appears on page 50 of T1:

> Q. Then on page 56, someone says -- someone questions -- it wasn't me, but the question is, "At the time you were employed by Del Werner on behalf of Crane Siding & Roofing, was there any discussion whatsoever about what your compensation would be for your services?" And what was your answer?
>
> A. "No, I don't believe so. He'd told me on occasions what he had paid."
>
> Q. "Well, what did he say?"
>
> A. "I can't remember."
>
> Q."Did he say that there was a certain rate per hour?"
>
> A. "Two or three dollars per hour, somthing like that. I don't know."

(Following that testimony is some reference to claimant only working to learn the business; however the question of employment relationship has already been established.)

The arbitration decision established three terms of healing period:

> April 12, 1976 - February 28, 1977
> April 22, 1980 - November 13, 1981
> July 20, 1982 - February 8, 1983

There is no question that claimant is entitled to the first term of healing period. The hearing deputy correctly recited evidence from W. J. Robb, M.D., to show that the other two terms were necessitated by a deterioration in claimant's condition requiring some hospitalization and some bedrest at home.

With respect to claimant's industrial disability, Dr. Robb reported on February 24, 1983:

> On this reexamination he describes that he has had about the same degree of pain that he had had following his discharge from St. Lukes Hospital on the 29th of August, 1982.
>
> He has some aching in the back most of the time. Occasionally the pain is sharp. It seems to vary according to weather changes. He still requires Tylenol #3 for pain at times. The pain is largely confined to the low back but occasionally travels down into the posterior right hip and leg. He has some pain with coughing or sneezing. He is better walking than he is with sitting.
>
> This patient, after a period of about a half hour of walking, begins to have some aching in both feet. This not related to the low back but is due to the old fractures of the os calcis with degenerative changes of the subastragalar joint of the feet. This is a traumatic arthritis and is the reason for his wearing special appliances in his shoes.
>
> The patient had a substantial aggravation of his low back pain as noted in my examination of the 20th of July, 1982 concerning which a copy of that report is enclosed. Because of the degree of pain present he was admitted to St. Lukes Hospital on the 24th of August and placed in traction for a period of several days. During this hospitalization additional studies were carried out and a CT scan of the lumbosacral spine was performed. This CT scan revealed extensive degenerative disc disease of the lumbosacral joint, L5-S1 hypertrophy of bone with facets. That is a degenerative change, but in this instance, it is of substantial degree to encroach on the nerve root, thus producing at intervals some radicular pain or pain down the leg.
>
> This patient also has a moderate bulging disc at the L4-5 innerspace. This I feel is of more recent onset or subsequent to his injury, though I can't determine the exact date of its onset.
>
> This patient was reexamined on the 25th of January, 1983 at which time he had been doing some knee exercises and hyperextended his back and produced some soreness in the low back which represents a strain and is of a temporary nature and will subside uneventfully.
>
> On his last reexamination on the 8th of February, 1983 he has improved since his recent strain. However, I advised him that such stresses as stooping, bending and lifting will undoubtedly be accompanied by some low back pain and occasional right leg pain in the future.
>
> Industrial Impairment:
>
> This patient, because of his degenerative changes of the lumbosacral spine and also because of a moderate herniation of the 4th lumbar disc and also because of the post traumatic arthritis in his feet, I consider totally incapacitated as far as performing his previous employment. He would have to be retrained in another occupation. This would have to be largely sedentary, such as would not place an extensive stress on his feet, prolonged

standing or prolonged walking.

Functional Disability:
This patient carries a 50 per cent impairment of function of the body as a whole considering his ability to function as an individual in daily life.

David W. Johnson, D.C., opined that the disc degeneration at , S1 caused a 15 percent disability of the whole person (T2, -15).

APPLICABLE LAW

Section 85.36, Code of Iowa (1975) states in part:

The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had he worked the customary hours for the full pay period in which he was injured, as regularly required by his employer for the work or employment for which he was employed, computed or determined as follows and then rounded to the nearest dollar:

....

6. In the case of an employee who is paid on a daily, or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of said employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury.

....

10. In the case of an employee who earns either no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which he is injured in that locality, the weekly earnings shall be one-fiftieth of the total earnings which the employee has earned from all employment during the twelve calendar months immediately preceding the injury but shall be not less than forty-five dollars per week.

Section 85.34(1), Code of Iowa (1975) 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.

ealing period may be intermittent, that is a healing period start, stop, start again, etc., to the extent that claimant isfies the healing period requirements. See Riesselman v. roll Health Center, Appeal Decision December 28, 1982.

Industrial disability is loss of earning capacity, not mere ctional impairment. Such disability includes considerations functional impairment, age, education, qualifications, erience and claimant's inability, because of the injury to age in employment for which he is fitted. Olson v. Goodyear vice Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Martin v. lly Oil Co., 252 Iowa 128, 106 N.W.2d 95 (1960). See also cksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980) and padden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

ANALYSIS

The issue of the weekly compensation rate. Defendants argue t "there is no credible evidence to support any determination wage." (Brief, 5) Claimant has been found to be an employee Crane Siding and Roofing Company and is entitled to benefits a result of his injury. According to his testimony, his wages e worth between $2 and $5 per hour. At that time, the tewide average weekly wage was $160.09. (See the corrected kers' compensation benefits schedule, July 1, 1975.) In osing a weekly wage of $120, the hearing deputy obviously se $3 per hour which amounted to some $40 per week less than statewide average. Under the circumstances, and considering t §85.36 states that the "basis of compensation shall be the kly earning...at the time of injury," a wage of $3 an hour ily seems unreasonable.

The healing period issue. Defendants argue that the healing iod terminates upon recuperation and, presumably, that a ling period cannot recommence. As stated above, this department ruled that a healing period can be intermittent, and that will be followed here. As for the evidence that the ling period recommenced and ended twice after the initial , the hearing deputy followed the evidence of Dr. Robb, as ed above, and no change will be made in that determination.

The industrial disability issues. Finally, defendants argue the "industrial disability rating of 80 percent under these umstances is excessive and unsupported by any credible ience." (Brief, 7) Claimant is a man of 49 years of age e main prior experience has been selling cars. He had also ed in a bar prior to the injury. Since the injury, his work been minimal and of very short duration. It is obviously that he is a man of some talents, but this is a case where functional impairment is of a very serious nature. Dr. 's opinion of a 50 percent functional impairment is beyond might be termed average impairment. Thus even though claimant has certain abilities, his pain and inability to get about very easily will severely circumscribe his activities. For these reasons, the finding of 80 percent permanent partial disability for industrial purposes will be adopted as a part of this final agency decision.

The order to pay the liens of the Veterans Administration and Iowa Department of Social Services was not appealed and is therefore also adopted as a part of this final agency decision.

FINDINGS OF FACT

1. That the claimant was hurt at work on April 11, 1976.

2. That by reason of the aforesaid injury claimant was unable to perform acts of gainful employment from April 12, 1976 until February 28, 1977 or a period of 46 weeks.

3. That the claimant was again unable to perform work beginning on April 22, 1980 and ending on November 13, 1981 or a period of 81 3/7 weeks.

4. That the claimant was again unable to perform work beginning on July 20, 1982 and ending February 8, 1983 or a period of 29 weeks.

5. That claimant is suffering from leg and back pain; taking some 300 aspirin tablets per month.

6. That the claimant has a functional impairment of 50 percent to the body as a whole.

7. That claimant's attempt to attend regularly scheduled college classes in an attempt to seek retraining have failed due to claimant's inability to sit for more than one hour at a time.

8. That claimant's feet swell after a short four block walk requiring him to sit with his feet propped up.

9. That claimant's feet swell after an hour of sitting requiring him to sit with his feet propped up.

10. The value of claimant's services at the time of his injury was three dollars per hour.

CONCLUSIONS OF LAW

Claimant sustained an injury which arose out of and in the course of his employment on April 11, 1976.

Claimant is entitled to a weekly compensation rate of eighty-nine and 36/100 dollars ($89.36).

Claimant is entitled to a healing period of one hundred fifty-six (156) weeks, three (3) days, as is stated in detail above.

Claimant is entitled to weekly benefits for a loss of earning capacity of eighty (80) percent.

ORDER

WHEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant for a period of one hundred fifty-six (156) weeks, three (3) days, in three (3) different periods of time as analyzed in the body of this decision, for healing period disability at the rate of eighty-nine and 36/100 dollars ($89.36), accrued payments to be made in a lump sum together with statutory interest from the beginning of each term of the healing periods, April 12, 1976, April 22, 1980 and July 20, 1982.

Defendants are further ordered to pay weekly compensation benefits unto claimant for a period of four hundred (400) weeks for the permanent disability at the same weekly rate, with statutory interest at ten (10) percent per year from February 8, 1983.

The lien of the Veterans Administration in the sum of one thousand two hundred sixty dollars ($1,260.00) less attorney's fees of twenty-five percent (25%) shall be paid by the defendants

The lien of the Iowa Department of Social Services under Title XIX in the sum of seventeen thousand five hundred forty-two and 15/100 dollars ($17,542.15) less attorney's fees shall be paid by the defendants.

The unpaid charges related to the treatment of claimant's surgeries by Dr. David W. Johnson are ordered paid by the defendants.

Costs as contemplated by Rule 500-4.33 are charged to the defendants who shall file an activity report within twenty (20) days from the date below.

Signed and filed at Des Moines, Iowa this 8th day of February, 1984.

Appealed to District Court;
Pending

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SOFIA METCALF,	:	
Claimant,	:	
vs.	:	
VAN BUREN COUNTY MEMORIAL HOSPITAL,	:	File No. 650498
Employer,	:	A P P E A L
and	:	D E C I S I O N
ST. PAUL FIRE & MARINE INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

Claimant appeals from a review-reopening decision in which she was denied further benefits from defendants for disability alleged to be related to an injury of September 22, 1980.

The record on appeal consists of the transcript of the review-reopening proceeding together with the deposition of Phillip G. Couchman, M.D.; claimant's exhibits 1 and 2; and defendants' exhibits 1 through 9 and 12.

ISSUES

Claimant states the issue as whether or not claimant sustained a permanent partial disability and the extent thereof. Defendants state the issue as whether or not the deputy should provide more weight to the orthopedic specialist who was the treating physician for the claimant in regard to his opinion that she has no permanent physical impairment secondary to the lifting episode.

While both stated issues may be subissues, the greater issue is whether or not claimant has carried her burden of proof that she has greater disability than previously compensated which is causally related to her injury of September 22, 1980.

REVIEW OF THE EVIDENCE

Review of the record discloses the statement of facts of the deputy to be accurate and is adopted herein.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 22, 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).

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).

ANALYSIS

Claimant tends to posit as evidenced by her statement of the issue that if the claimant now has some disability and if the claimant has at some time had an injury that a fortiori they are related. The deputy did not make any finding of disability as the holding was that any current disability claimant may have had to her back was not causally related to her injury of September 22, 1980.

No reason is found to give weight to the evidence in any manner other than given by the hearing deputy and his decision will therefore be affirmed.

FINDINGS OF FACT

1. Claimant sustained an injury on September 22, 1980 which resulted in temporary disability of 7.286 weeks during December 1980, January and February 1981.

2. Claimant did not return to work when she was released for reasons unrelated to the injury.

3. Claimant returned to work with defendant employer in June 1981 and worked until January 1982 when she took a position with another employer..

4. Claimant passed a preemployment physical conducted by one of her treating physicians which noted the September 1980 injury and indicated no physical limitations.

CONCLUSION OF LAW

Any disability from which claimant suffers is not causally related to the injury of September 22, 1980.

WHEREFORE the review-reopening decision is hereby affirmed.

THEREFORE, claimant will take no further benefits as a result of these proceedings.

Costs of the review-reopening proceeding will be paid by defendants. Costs of this appeal will be paid by claimant.

Signed and filed this 30th day of September, 1983.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERTA G. MEYER,	:	
Claimant,	:	File No. 466851
vs.	:	R E V I E W -
ST. JOSEPH MERCY HOSPITAL,	:	R E O P E N I N G
Employer, Self-Insured, Defendant.	:	D E C I S I O N

INTRODUCTION

This matter came on for hearing at the Cerro Gordo County Courthouse in Mason City, Iowa on June 29, 1983. The case was considered fully submitted at that time although later filings were made.

A review of the commissioner's file reveals that an employers first report of injury was filed on March 11, 1977. A memorandum of agreement was filed on March 28, 1977 calling for the payment of $82.48 in weekly compensation. A final report was filed on August 4, 1982 revealing that claimant had been paid 121 weeks of healing period compensation and 125 weeks of permanent partial disability compensation (based on a 25 percent loss to the body as a whole).

The record consists of the testimony of the claimant, George Tice, M.D., Donald Meyer, Fred Manthey, and Geri Heimdal; the deposition of Miles D. Pothast, Ph.D.; claimant's exhibits 1 through 37; defendant's exhibits A, C and F; and defendant's answers to interrogatories 2, 5, 7, 8, 9, 10, 11, 12 and 20.

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, including healing period;

3) Whether certain medical expenses should be paid; and

4) Whether the "penalty" provisions of section 86.13, Code of Iowa, should apply.

STATEMENT OF THE EVIDENCE

Claimant, age 44, testified that she was married and had four children. She has a ninth grade education and received a GED in 1978. Claimant testified that she had been hospitalized for a number of times for "routine" medical procedure. Of interest to this case, however, is claimant's hospitalization in 1975 for alcohol abuse, suicidal tendencies, and family problems. Claimant testified that she was treated psychiatrically at that time. Claimant testified that she last saw a psychiatrist prior to her injury in July 1976.

Claimant also testified that she had been treated for back strain in 1973. She had been hospitalized. She testified that she was treated again for her back in 1976 when claimant developed pain in her back after lifting at home. She was hospitalized from August 16, 1976 through August 21, 1976.

In the fall of 1976 claimant commenced a part-time job cleaning offices for defendant. In January 1977 claimant became a full-time employee and was assigned to the housekeeping staff. Claimant testified that she hurt her back when she slipped and fell in the employer's parking lot on the morning of March 3, 1977. Claimant testified that she commenced her work but quit after an hour because of pain. Claimant's back had bothered her sufficiently the day before that she sought treatment from George Tice, M.D, who injected her in the sacroiliac region on the left.

Claimant was treated in defendant's emergency room on March 3, 1977. Claimant was hospitalized and was treated by Norman Hoover, M.D., an orthopedic surgeon. A myelogram was conducted on March 9, 1977 when a left partial hemilaminectomy was performed and an extruded L4-5 disc was removed. Claimant was released from the hospital on March 15, 1977 after an "entirely uncomplicated" postoperative course. Claimant continued to be treated by Dr.

Hoover and he noted "slow progress." In a report dated February 2, 1978 (exhibit 6) it was noted that claimant had been depressed. At that time Dr. Hoover estimated permanent partial disability at 50 percent of the body as a whole. Dr. Hoover referred claimant to Sant M.S. Hayreh, M.D., a neurologist, who examined claimant on October 27, 1980. He thought claimant had musculoskeletal type of low back pain. He suspected functional overlay and possible compensation neurosis. He recommended psychiatric consultation. Further examination by Dr. Hoover revealed that claimant had continuing migratory pain which he thought was related to "psychogenic causes." Dr. Hoover recommended that claimant be seen by a rheumatologist, R. Bruce Trimble, M.D.

On February 13, 1981 claimant was involved in an automobile accident. She testified that she did not hurt her back but rather her neck. Claimant was treated by Wayne Janda, M.D., an orthopedist, who referred claimant to Dr. Hayreh. Dr. Hayreh examined claimant on April 22, 1981. He made the following statement:

> Considering the above evaluation, Mrs. Meyer still has musculoskeletal type of low back pain which has remained unchanged from my previous examination of October, 1980, and my recommendations are still the same as mentioned in my previous letter. In addition, at present, she has musculoskeletal type of cervical pain and pain in the right upper extremity. I was unable to document clear evidence of radiculopathy but she may have mild radiculitis. But, I was unable to determine any definite level. I think the diffuse dulling of light touch and pinprick in the right upper extremity and diminished sense of vibration over the right side of the head probably is functional in nature. One should rule out the possibility of mild right carpal tunnel syndrome considering the mildly positive Phalen's test on the right side. Therefore, I have elected to evaluate her further with a nerve conduction and EMG studies. If they are negative, I would recommend to treat her symptomatically with cervical collar, intermittent cervical traction, heating pad, and anti-inflammatory medication such as aspirin or Motrin and may also try biofeedback therapy. But, if there is no significant improvement in her condition with the above treatment, then she may need further evaluation with MMPI and psych consult because of possibility of compensation neurosis.

Dr. Janda was of the impression that claimant sustained minimal, if any, permanent injury" to the neck. Claimant was hospitalized by S. H. Septer, M.D., from October 9, 1981 through October 13, 1981. It appears that the course of treatment was centered on claimant's neck. Claimant partook of physical therapy and took muscle relaxants before being released.

Claimant was evaluated by John Walker, a Waterloo orthopedist, in December 1981. Dr. Walker noted that claimant had multiple complaints relating to the back and neck. He recommended hospitalization. About a year later on December 10, 1982 claimant again saw Dr. Walker. He causally connected a 24 percent impairment to claimant's lower back. He also assigned a 2 percent impairment to the neck. Dr. Hoover, who has since moved to Milwaukee, assigned a 50 percent permanent partial impairment to the back (body as a whole).

Prior to her injury of March 3, 1977 claimant had been experiencing mental/emotional problems. She had a history of alcoholism and depression. Following a prior hospitalization she was referred to the Mental Health Center. Claimant was seen there from November 1975 through July 1976. The initial diagnosis was alcoholism and depressive neurosis, and claimant was treated as an outpatient. Claimant was discharged from this outpatient course in July 1976. She had quit drinking. Claimant was seen again in September 1977. Claimant was experiencing depression and reported becoming gradually more depressed since her injury. She was treated on a weekly basis until November 1979 and was recommended treatment in January 1980. The treatment continues.

Miles D. Pothast, Ph.D., has treated claimant and testified by way of deposition. He stated that claimant's depression predated the injury (p. 23, ll. 10-12). Claimant also was having problems concerning the death of her father (p. 25, ll. 1-7). Dr. Pothast revealed that claimant started drinking in the summer of 1979. Claimant apparently used her continuing pain as an excuse" for resuming alcohol use. Dr. Pothast revealed that claimant had "ups and downs" between September 1977 and November 1979 (p. 29, ll 13-21). Dr. Pothast testified that claimant's inability to work was a cause of the depression (p. 36, ll. 3-5). He testified that the major cause of claimant not working was the work injury of September 1977 and that the injury stopped her from working (p. 53, ll. 20-24).

Claimant testified that she worked for American Crystal Sugar for almost six months each year from 1967 to 1973. In 1973 claimant became employed as a "matron" at the community college. Her duties were closely akin to being a housekeeper. Claimant has been a waitress. Claimant testified that there are jobs available at the hospital within her restrictions. She thinks that working would help her mental state.

Dr. Tice testified at the hearing on this matter. He saw claimant on the date prior to the injury. In regard to causation, he indicated that he would defer to Dr. Hoover.

Claimant's husband, Donald Meyer, testified that claimant's prior mental problems were related to alcohol abuse. He testified that his wife's vocational activities have been hampered.

Fred Manthey, the director of personnel for defendant in 1977, testified that healing period was terminated on June 27, 1979. Geri Heimdal, patient account supervisor, testified that claimant was entitled to be paid on the basis of 50 percent of the body as a whole (she was paid on the basis of 25 percent). She was not sure of the basis for the June 27, 1979 termination of healing period.

APPLICABLE LAW

1. Section 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., 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 March 3, 1977 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. 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. Section 85.34(1), Code of Iowa, provides for a statutory healing period to be paid from the date of injury until claimant has returned to work, returned to similar employment, or it is medically indicated that no improvement is anticipated.

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."

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. * * * *

7. The last unnumbered paragraph of section 86.13, Code of Iowa, became effective on July 1, 1982.

8. Section 85.27, Code of Iowa, provides for the payment of medical expenses.

ANALYSIS

Based on the principles enunciated above, it is found that claimant has established her claim for industrial disability, healing period and medical benefits. She has not established her claim for the sanctions noted at section 86.13, Code of Iowa.

As regards the first issue, it is found that claimant sustained an injury and that that injury (and its effects) materially aggravated claimant's preexisting depressive neurosis. Claimant's back condition, coupled with the medical condition gives claimant a significant industrial disability. Claimant will not, in all likelihood, return to any of her previous employments because of their physical requirements and the injury's effect upon claimant. Claimant is 44 and has a ninth grade education with a GED. Her previous employments are physical in nature. Claimant has shown excellent motivation in seeking to become employed again and obtaining a GED. Based on the principles enunciated it is clear to me that claimant is entitled to be disabled to the extent of 55 percent of the body as a whole.

It follows that claimant's medical expenses should be ordered to be paid.

As far as healing period is concerned it is apparent that it should be extended to December 17, 1979. Claimant was "rated" at that time by the treating physician. In fact, defendant's representatives could not testify as to the reason for the termination and conversion of benefits.

This, in itself, should qualify claimant to benefits for section 86.13 benefits pursuant to the penalty provisions. Since the law became effective July 1, 1982 and the behavior for which the penalty is sought occurred before then, the claimant's prayer for section 86.13 benefits will be denied.

FINDINGS OF FACT

1. Claimant was employed by defendant on March 3, 1977.

2. Claimant slipped and fell on the parking lot at work on March 3, 1977.

3. Defendant filed a memorandum of agreement regarding a March 3, 1977 injury.

4. In addition to the back injury, which was caused by the employment, claimant materially aggravated a preexisting depressive neurosis. This has slowed the healing process.

5. Claimant is disabled to the extent of fifty-five percent (55%) of the body as a whole because of the March 3, 1977 injury.

6. Claimant reached maximum medical recuperation on December 17, 1979.

7. Claimant has incurred medical expenses which are related to the injury of March 3, 1977.

8. The behavior for which claimant seeks additional compensation because of delay in payment (section 86.13) occurred before July 1, 1982.

CONCLUSIONS OF LAW

1. Claimant was employed by St. Joseph Mercy Hospital on March 3, 1977.

2. Claimant sustained an injury arising out of and in the course of her employment on March 3, 1977.

3. Claimant is entitled to a healing period from March 4, 1977 through December 17, 1979, a period of ninety-three and three/sevenths (93 3/7) weeks.

4. Defendant will be ordered to pay unto claimant two hundred seventy-five (275) weeks of permanent partial disability compensation at the stipulated rate of eighty-two and 48/100 dollars ($82.48) per week.

5. Defendant will be ordered to pay the following medical expenses to wit:

Mileage	$269.60
Surgical Associates of No. Iowa	76.50
Drugs	483.95
Mental Health Center (St. Joseph Mercy Hospital)	614.50
Medical Arts Pharmacy	17.75

6. Claimant's action for additional benefits pursuant to section 86.13, Code of Iowa, is denied.

ORDER

IT IS THEREFORE ORDERED that defendant pay unto claimant two hundred seventy-five (275) weeks of permanent partial disability compensation at the stipulated rate of eighty-two and 48/100 dollars ($82.48) per week.

IT IS FURTHER ORDERED that defendant pay unto claimant ninety-three and three-sevenths (93 3/7) weeks of healing period compensation at the rate of eighty-two and 48/100 dollars $82.48 per week.

IT IS FURTHER ORDERED that defendant pay unto claimant the following medical expenses to wit:

Mileage	$269.60
Surgical Associates of No. Iowa	76.50
Drugs	483.95
Mental Health Center (St. Joseph Mercy Hospital)	614.50
Medical Arts Pharmacy	17.75

Defendant is to receive credit for compensation already paid.

Costs are taxed to defendant.

Defendant is to file a final report upon payment of this award.

Interest is to accrue pursuant to section 85.30, Code of Iowa, from the date of this decision.

Signed and filed this 6th day of December, 1983.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERTA G. MEYER,
Claimant,
vs.
ST. JOSEPH MERCY HOSPITAL,
Employer,
Self-Insured,
Defendant.

File No. 466851

NUNC PRO TUNC ORDER

A review-reopening decision was filed on December 6, 1983. Said decision was in error in that it undercalculated healing period by a year and ignored certain medical expenses submitted.

I have reviewed the file and determine that the order at the end of said decision should be changed to read:

IT IS THEREFORE ORDERED that defendant pay unto claimant two hundred seventy-five (275) weeks of permanent partial disability compensation at the stipulated rate of eighty-two and 48/100 dollars ($82.48) per week.

IT IS FURTHER ORDERED that defendant pay unto claimant one hundred forty-five and three-sevenths (145 3/7) weeks of healing period compensation at the rate of eighty-two and 48/100 dollars ($82.48) per week.

IT IS FURTHER ORDERED that defendant pay unto claimant the following medical expenses to wit:

Mileage	$269.60
Surgical Associates of No. Iowa	76.50
Drugs	483.95
St. Joseph Mercy Hospital	614.50
Medical Arts Pharmacy	17.75
North Iowa Medical Center	82.00
Mental Health Center of No. Iowa	179.50

Defendant is to receive credit for compensation already paid.

Costs are taxed to defendant.

Defendant is to file a final report upon payment of this award.

Interest is to accrue pursuant to section 85.30, Code of Iowa, from the date of this decision.

Signed and filed this 6th day of December, 1983.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONNA MILLER,
Claimant,
vs.
IOWA STATE UNIVERSITY,
Employer,
and
STATE OF IOWA,
Insurance Carrier,
Defendants.

File No. 704003

ARBITRATION DECISION

INTRODUCTION

This matter came on for hearing at the offices of the Iowa Industrial Commissioner in Des Moines on August 10, 1983 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 June 9, 1982. The record consists of the testimony of Donna L. Miller, William Hart, Donald Hoffman, Don Lesan and Joe Billingsley; claimant's exhibits 1, 2, 3 and 4; and defendants' exhibits A and B.

ISSUES

The issues for resolution are:

1) Whether the decedent's death arose out of and in the urse of his employment; and

2) Whether proper notice was given pursuant to section .23, Code of Iowa.

STATEMENT OF THE EVIDENCE

Claimant Donna Miller is the surviving spouse of Donald ller. At all times material hereto, decedent was employed by wa State University in the Veterinary Science Building. cedent was employed as a plumber and as lead man of the intenance crew which took care of this large single building mplex (nearly 13 acres). Decedent was 48 years of age on nuary 12, 1982 when he died. The building complex is two ories high and has a mechanical equipment penthouse. At all mes material hereto, four men were employed in the maintenance the building. Decedent was a plumber; Don Lesan was the vironmental systems mechanic (heating-ventilation); Don ffman was the maintenance mechanic; and Bill Hart was the ectrician.

On Monday, January 11, 1982 the weather was cold (a high of n degrees and a low of minus ten degrees). This was during an tremely cold period of the winter of 1981-1982 (see defendants' hibit R). On both January 11 and 12, 1982 waterlines had oken in the building. On January 11, 1982 a waterline broke ortly before noon. The record indicates that the pipe that d broken was associated with the fire sprinkler system. In der to stop the flow decedent and Don Lesan set out to repair is. Decedent went outside and attempted to shut off the valve r the system. Decedent was using a large steel wrench. After e water was shut off decedent and the others worked for about ur hours cleaning up the water and the water damaged material. san testified that the work was "busy." The water was being eaned up by means of a squeegee and vacuum. There was seepage water through the floor and it was necessary to go to the oor below and remove ceiling tile. Don Hoffman testified that ere was some urgency involved in this operation since a mputer was in the area where the water was seeping requiring ick action to prevent damage. Decedent's wife testified that cedent complained of hard work on January 11, 1982 after work.

On January 12, 1982 it was again cold. (Defendants' exhibit of Dr. Grooter's deposition.) The high was ten degrees and low was three degrees. On the morning of January 12, 1982 cedent and Bill Hart started checking the fire alarm wiring ich had been damaged by the water on the prior day. The two gan a process of systematically checking the fire alarm zones the area concerned. After Hart and decedent had been working out an hour, a fire alarm sounded in the building. Hart scribed that the procedure which was initiated at this time sisted of the decedent running the length of the building, mbing the stairs (one flight was a steep set), getting into maintenance penthouse, and determining the circuit from ch the alarm was being sent. Hart testified that decedent t to the sector to see if fire was present or not. If the e was not present, a return to the penthouse was necessary to et the system. Because of the nature of the system, running necessary in order to stop the fire alarm's ringing.

There was no fire on January 12, 1982. The system malfunctioned in later in the morning. Hart stated that the fire alarm nded in the entire building and that students and faculty ressed concern as to whether there was a fire. Hart indicated t the second alarm generated somewhat more exercise since edent and he were on the lower level, thus necessitating the mbing another flight of stairs.

Hart testified that the fire alarm system normally malfunctioned ut once a month. The witness testified that he did not all that two "back to back" false alarms as described had r happened. Hart testified that he and decedent continued ir labors in checking the fire alarm system damaged the day ore. At this point, Hart indicated that he took over the job self.

Shortly after the luncheon break at about 12:30 p.m., ther waterline was reported to have broken. The evidence icated that a domestic hot waterline had ruptured and covered floor. Additionally, the water was seeping through the or into a lower area where medical records were kept. Again ntenance personnel took it upon themselves to use squeegees, s and vacuums to correct the damage. Hart testified that it k about an hour to clean up the immediate area. The individuals olved then went downstairs and moved records and started to card the damaged wet ceiling tiles.

Both Hart and Hoffman testified that the activities provided igher work requirement than was normal. Hoffman testified t decedent then said that he felt hot and was going to sit n. It was about 3:00 to 3:15 p.m.

Mr. Hart saw decedent in the office about 3:45 p.m. Decedent plained of pain in his side when he was putting on his boots. about 4:00 p.m. the decedent and Hart left. Decedent had n in his office for about fifteen minutes prior to departure. was cold outside and decedent was wearing what appears to e been a hooded windbreaker or sweatshirt. He wore no hat. t and decedent started to clear the snow from their cars. t testified that he heard decedent fall, turned and saw edent on the ground, initiated CPR, and had someone call an ulance. The ambulance took decedent to the hospital where he pronounced dead shortly after arrival. (The medical aspects the case will be described later.)

After decedent died on January 12, 1982 claimant's counsel t the following letter, dated March 22, 1982, to Iowa State's roll department:

> Please be advised that the undersinged represents the Estate of Donald Miller. I would appreciate it if you could forward to the undersigned information concerning the earnings of the decedent, including his hourly rate, his average weekly pay and average monthly pay.
>
> This information is being sought pursuant to the Iowa Worker's [sic] Compensation laws which require you to answer this.

Defendant replied in a letter dated April 6, 1982.

Joe Bill Knous was the manager of building maintenance, and as such, was decedent's supervisor. He testified that he got word of decedent's collapse almost immediately. He went to the hospital.

On cross-examination, he testified that he had heard that a compensation claim was to be filed at a time that "could" have been within three months after decedent died.

After decedent's death an autopsy was performed by L.C. Pang, M.D. The heart was moderately enlarged. Multiple sections of the left ventricular wall and intraventricular system revealed a focal zone of old myocardial infarct and a small focal zone of recent acute myocardial infarct. The coronary arteries revealed moderate to severe atherosclerosis with focal calcification. Microscopic examination of the heart revealed a focal zone of acute recent hemorrhage with coagulation necrosis of the myocardial fibers and a few neutrophilic leukocytes infiltrating. Some zones revealed myocardial infarct of about two months. Some zones revealed all myocardial infarct with scar formation. Hypertrophy of the myocardial fibers was also noted. A section from the anterior descending branch of the left coronary artery revealed severe atherosclerosis with focal calcification and recent thromboemboli with complete occlusion.

Dr. Pang made the following diagnoses:

1. Severe atherosclerotic coronary heart disease with cardiomegaly.

2. Severe atherosclerosis with focal calcification and recent thromboemboli with complete occlusion, anterior descending branch of the left coronary artery.

3. Recent acute myocardial infarct, left ventricular wall and interventricular septum, focal.

4. Old myocardial infarct, left ventricular wall and interventricular septum.

5. Left ventricular hypertrophy, moderate.

6. Congestion of the internal organ, moderate to severe.

7. Moderate fatty metamorphosis, liver.

Dr. Pang indicated that the cause of death was attributed to coronary occlusion with recent acute myocardial infarct and cardiorespiratory arrest.

The record indicates that in 1970 lab tests were taken indicating that decedent had elevated cholesterol and lipids. There were indications that decedent was pre-diabetic. He was 6'2" tall and weighed 285 pounds. It appears uncontroverted that decedent was a hard worker, fitting the "A" type personality mold.

Liberato A. Iannone, M.D., is a Des Moines cardiologist and testified on behalf of claimant. He testified that decedent's condition was advanced and that decedent had a preexisting cardiovascular disease. He testified that decedent had severe atherosclerotic coronary heart disease for several years preceding death. He noted that decedent had had prior infarcts. He testified that in the overwhelming majority of cases, it appears that the underlying pathology is atherosclerosis and that the acute inciting event appears to be a thrombus which occurs at the site of the atherosclerosis. He testified that since the thrombus is laid down in layers, clotting could not have occurred quickly. He described the severity of decedent's cardiovascular disease on January 12, 1982 as "bad, very bad" and "severe." He thought decedent was probably more susceptible to myocardial infarction which would cause death.

Dr. Iannone testified that there "may" be a causal relationship between the work and the activities performed on the day of death. He further testified that his opinion was based upon a reasonable medical certainty. He also stated that there was a probable cause for a relationship between decedent's activities and death. He thought that if claimant's decedent had not been involved in the particular stresses of work, he probably would not have met his death. (p. 24) He stated that he had yet to see a case of coronary heart spasm causing a heart attack. He thought that there was an extremely low probability that coronary artery spasm caused by exposure to cold weather in light clothing being the cause of decedent's attack.

On cross-examination, Dr. Iannone indicated that decedent had hypertension, hypercholesterolemia and was overweight. He did not smoke. He drank about a six pack of beer a day. Dr. Iannone testified that thirty percent of heart attacks are not known to the person when they occur, thus explaining why decedent did not seek medical attention for prior attacks.

Ronald K. Grooters, M.D., is a Des Moines heart surgeon who testified on behalf of the defendants. He reviewed the medical records as did Dr. Iannone. He opined that the heart attack was related to the fact that claimant's decedent had gone outside, had a coronary artery spasm and died. He testified that he routinely tells heart patients to stay out of the cold and hot weather. He thought decedent was a fairly good prospect for having a heart attack since he possessed a number of the risk factors commonly associated with the incidence of heart attack.

On cross-examination, Dr. Grooters indicated that decedent had coronary artery disease for 20 or 30 years. He described the "recent" heart attack as from five to seven days prior to death. (Dr. Iannone testified that the infarct was two months prior to death.)

In answer to a lengthy hypothetical regarding the events of the day, Dr. Grooters conceded that the events prior to the attack could have stressed decedent's heart. He did not, however, feel that the events prior to quitting time contributed to the formation of the thrombus. He testified that there was, in his opinion, a recovery from the possible stresses of the day when claimant sat down at day's end and that the stress occurred when decedent went out of doors where the attack occurred. Dr. Grooters testified that he assumed the events which occurred were normal activity for decedent's occupation. Dr. Grooters indicated that decedent's death could have been caused by employment activity. Dr. Grooters indicated that thrombus formation occurred much more quickly than Dr. Iannone indicated.

APPLICABLE LAW

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

2. Claimant has the burden of proving by a preponderance of the evidence that the decedent received an injury on January 12, 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).

3. 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).

4. "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).

5. The case of Sondag v. Ferris Hardware, 220 N.W.2d 903, 905 stated:

> II. 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. See Littell v. Lagomarcino Grupe Co., 235 Iowa 523, 17 N.W.2d 120 (1945). 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." Olson v. Goodyear Service Stores, 255 Iowa 1112, 1116, 125 N.W.2d 251, 254 (1963); Jacques v. Farmers Lumber & Supply Co., 242 Iowa 548, 552, 47 N.W.2d 236, 239 (1951); Almquist v. Shenandoah Nurseries, 218 Iowa 724, 729, 254 N.W. 35, 38 (1934).
>
> Iowa's Littell rationale is paralleled in a portion of Professor Arthur Larson's attempt to fashion a logical working rule in heart cases. See 1A Larson's Workmen's Compensation Law §38.83 p. 7-172:
>
> "But when the employee contributes some personal element of risk--e.g., by having * * * a personal disease--we have 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."
>
> See also Beck v. State, 184 Neb. 477, 168 N.W.2d 532 (1969).
>
> 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. See Guyon v. Swift & Co., 229 Iowa 625, 295 N.W. 185 (1940).

6. Section 85.23, Code of Iowa, provides:

> Unless the employer or his representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on his behalf or a dependent or someone on his behalf shall give notice thereof to the employer witnin ninety days from the date of the occurrence of the injury, no compensation shall be allowed.

7. Section 85.33, Code of Iowa (1980), provides:

> 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.

8. Section 85.27, Code of Iowa, provides for the payment of medical expenses:

9. Section 85.31, Code of Iowa, provides in pertinent part:

> 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.

ANALYSIS

Based on the foregoing principles, it is found that claimant has sustained her burden of proof that decedent's heart attack was caused by employment and that decedent's death resulted therefrom. It appears to be undisputed that considering the medical evidence submitted decedent had a previously weakened or diseased heart. Although Dr. Grooters testified that the cold was the proximate cause of decedent's death, Dr. Ianonne's opinion with regard to the arterial constriction and the experienc level upon which it rests makes cogent sense in that it assumes that clotting is a slower process.

The evidence also shows me that the work activity in which decedent engaged on the date of his death was greater than the exertion required in normal unemployment life of this decedent or any other person. The characteristic nature of decedent's job appears to have been routine with occasional spurts of activity. But on January 12, 1982 a series of events occurred which were of such magnitude and concentration to have caused unusual exertion in comparison with decedent's or any other person's non-employment. The plumbing problems, the fire alarm problems and the flooding were abnormal.

The issue of notice pursuant to section 85.23, Code of Iowa, has been raised by the pleadings and the facts. Claimant herself testified that she knew of the possible compensability of the claim shortly after decedent's death. (Defendants' exhibit A; deposition, p. 17.) In late March 1982 the above quoted letter was sent to the employer's business office indicatin that the payroll information being sought was being requested pursuant to the Iowa Workers' Compensation laws. This is sufficient to inform the prudent employer that a claim was being made pursuant to law. It therefore is concluded that adequate notice pursuant to law was made.

FINDINGS OF FACT

1. Claimant's decedent was employed by defendant employer on January 12, 1982.

2. On January 12, 1982 claimant's decedent died in the employer's parking lot following work.

3. On January 12, 1982 decedent was engaged in extremely strenuous work of such a nature that it required exertions greater than the normal non-employment life of decedent or any other person.

4. Claimant's decedent had a previously diseased heart.

5. The work activity caused decedent's death in that it materially aggravated the preexisting condition and accelerated decedent's death.

6. Decedent's death was caused by work activity.

7. The employer's business office received notice of the possible pendency of a workers' compensation claim in late March 1982.

8. Claimant is the surviving spouse of decedent. She has not remarried.

9. The parties stipulated that the rate of compensation is two hundred twenty and 47/100 dollars ($220.47) per week.

10. The funeral bill of two thousand, eight hundred forty-tw and 20/100 dollars ($2,842.20) has been submitted. It represents the fair and reasonable charges for the services rendered.

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties and the subject matter.

2. Claimant's decedent, Donald Miller, was employed by defendant Iowa State University on January 12, 1982.

3. Edward Miller sustained an injury arising out of and in the course of his employment on January 12, 1982.

4. This injury caused Edward Miller's death.

5. The rate of compensation is two hundred twenty and 47/100 dollars ($220.47) per week.

6. Death benefits will be awarded to claimant commencing January 13, 1982.

7. Defendants will be ordered to pay unto claimant the one thousand dollar ($1,000.00) death benefit.

8. Claimant gave notice of injury pursuant to section 85.23, Code of Iowa.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant death benefits at the rate of two hundred twenty and 47/100 dollars ($220.47) per week commencing January 13, 1981 until claimant is disqualified from receiving same.

IT IS FURTHER ORDERED that defendants pay unto claimant the statutory burial benefit of one thousand dollars ($1,000.00).

IT IS FURTHER ORDERED that defendants pay the Second Injury Fund two thousand dollars ($2,000.00) pursuant to section 85.65, Code of Iowa.

Interest is to accrue on this award pursuant to section 85.30, Code of Iowa, from the date payments became due.

Costs of this proceeding are taxed against defendants.

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

Signed and filed this 27th day of January, 1984.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

YMOND W. MILLER,	:	
Claimant,	:	
.	:	
TY OF MONMOUTH,	:	File No. 713632
Employer,	:	
d	:	A R B I T R A T I O N
MMERCIAL UNION INSURANCE MPANIES,	:	D E C I S I O N
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Raymond W. Miller, ainst City of Monmouth, employer, and Commercial Union Insurance mpanies, insurance carrier, for benefits as a result of an jury on June 28, 1982. On June 13, 1983 this case was heard the undersigned. This case was considered fully submitted on completion of the hearing but the parties were given until ly 5, 1983 to file briefs.

The record consists of the testimony of Orin Brokaw, Leitha kford; exhibits A through D; and defendants' exhibit 1.

ISSUES

The only issue presented by the parties at the time of the e-hearing and the hearing is whether defendants' insurance rrier provided workers' compensation insurance coverage on the leged date of injury.

FACTS PRESENTED

Orin Brokaw testified that he is the mayor for the City of nmouth, Iowa and has been since January 1, 1982. Mr. Brokaw ated that the city clerk receives all mail for the City of nmouth and would receive any insurance papers sent to the city. . Brokaw revealed that he went to the clerk's home and reviewed l the city documents but could not locate an insurance policy vering the date of claimant's injury. Mr. Brokaw disclosed at he was able to locate insurance papers indicating prior verage for workers' compensation but was unable to find any idence that would indicate the employer paid for workers' mpensation coverage for the year 1982. Mr. Brokaw indicated was under the impression that the city was covered by a fferent company.

Leitha Bikford testified that she is the clerk for the City Monmouth, receives all mail, and is custodian of the records the city. Ms. Bikford stated that she received the city's cords and was unable to find any document which indicated the ty paid for or had a policy covering workers' compensation for e year 1982. Ms. Bikford disclosed she was able to find cords and payments for prior years covering workers' compensation. . Bikford indicated she was under the impression that the ployees' general comprehensive policy covered injuries. Ms. Bikford stified she never received a notice that the policy was due or uld lapse but knew that insurance policies lasted for a period one year.

APPLICABLE LAW

The industrial commissioner has the power to determine if an surance policy is in effect at a particular time. Travelers Insurance Company v. Sneddon, 249 Iowa 393, 86 N.W.2d 870 (Iowa 1957).

ANALYSIS

The question before the undersigned is not whether the defendant-employer should have had coverage at the time of claimant's injury but whether defendant-employer had insurance coverage with defendant-insurance carrier at the time of claimant's injury.

No evidence has been presented which would indicate that the city had insurance coverage with Commercial Union Insurance Companies on June 28, 1982. The lack of evidence supports a conclusion that the city did not renew any policy. It is interesting to note that the city was able to locate evidence of prior coverage and payment for prior coverage.

Exhibit A discloses that defendants' prior policy was for a period of one year, which is also supported by defendants' exhibit number 1.

Exhibit B is similar to defendants' exhibit 1 but is for the period including the date of claimant's injury.

Defendants contended that they never received exhibit B. It is apparent to the undersigned that neither the mayor or clerk would have an independent recollection of the exhibit if they had received it. Both the mayor and clerk's demeanor as well as there testimony indicated they relied totally on information which they could find in the city's records.

Exhibit B also indicates an increase in the premium rates which were going to be charged to the city. Such an increase may have been reason enough for the city not to renew their policy.

Since no policy with defendant-insurance carrier was in effect at the time of clamant's injury, defendant-insurance carrier is entitled to be dismissed from the action.

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. No time during the year 1982 did the defendant-employer have workers' compensation insurance with defendant-insurance carrier.

Finding 2. The prior insurance policy expired September 20, 1981.

Finding 3. Defendant-employer was mailed a notice that a premium was due on July 10, 1981.

Finding 4. Defendant-employer did not pay for the renewal of their policy for the period after September 20, 1981.

Finding 5. Claimant alleges an injury date of June 28, 1982.

Conclusion A. Defendant-insurance carrier is not liable to defendant-employer or claimant for any injury in June of 1982.

Conclusion B. Defendant-insurance carrier is entitled to a dismissal.

ORDER

THEREFORE, this action as against Commercial Union Insurance Companies is dismissed.

This case is placed back in the assignment so that claimant may prove up his default which was entered on December 6, 1982.

Signed and filed this 15 day of July, 1983.

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TROY L. MILLER,	:	
Claimant,	:	
vs.	:	
CIVIL CONSTRUCTORS,	:	File No. 641918
Employer,	:	A P P E A L
and	:	D E C I S I O N
UNITED STATES FIDELITY AND GUARANTY COMPANY,	:	
Insurance Carrier, Defendants.	:	

On July 15, 1983 a review-reopening decision was filed in this contested case. On August 5, 1983 claimant filed an appeal. On September 6, 1983 defendants filed a motion to dismiss claimant's appeal.

The essence of this matter is that claimant's appeal was filed twenty-one days after the review-reopening 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 July 15, 1983 decision of the deputy industrial commissioner was Thursday, August 4, 1983.

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 were 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 to prescribe the power and duties of the commissioner. It must be conceded that the commissioner himself cannot extend or diminish his jurisdiction to act under this law.

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 July 15, 1983. The twenty-day period prescribed in Iowa Industrial Commissioner Rule 500-4.27 expired on August 4, 1983. Thus, the proposed decision became, by operation of law, the final decision of the agency on August 4, 1983. 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 30th day of September, 1983.

Appealed to District Court;
Reversed and Remanded
Appealed to Supreme Court;
Pending

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD MOORE,	:	
	:	File No. 677342
Claimant,	:	
	:	A P P E A L
vs.	:	
	:	D E C I S I O N
DES MOINES METRO TRANSIT AUTHORITY,	:	
	:	
Employer,	:	
	:	
and	:	
	:	
BITUMINOUS INSURANCE COMPANY,	:	
	:	
Insurance Carrier,	:	
Defendants.	:	

By order of the industrial commissioner filed September 19, 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 review-reopening decision.

The record on appeal consists of the transcript; claimant's exhibits 1, 2, 3 and 4; and defendants' exhibit A, all of which evidence was considered in reaching this final agency decision. (The depositions of James D. Bell, D.O., and David Spreadbury, Ph.D., were claimant's exhibits 3 and 4 respectively.)

The result of this final agency decision will somewhat modify the review-reopening decision.

FACTS PRESENTED

The facts, which are not basically in dispute, were well summarized by the hearing deputy, and will be recited here only briefly. Claimant, who had had some prior low back problems, sustained an injury at his work as a bus driver for the Des Moines Metro Transit Authority. While driving a bus on July 2, 1981, he sought to avoid a truck and in so doing the bus hit a rut and the steering wheel was whipped from claimant's hand. This action caused claimant to strain his low back, and he sought medical treatment.

The principal treating physician was James Bell, D.O., to whom claimant gave a history which conformed to the version testified to in the transcript. (pp. 4-5, Bell Dep.; pp. 14-15,

.) Dr. Bell's impression was that claimant had a herniation the L4 and L5 disc which created either an L5 or S1 radiculopathy.

At that time, claimant was very obese, weighing some 400 unds, and surgery was inadvisable. Therefore, beginning bruary 1, 1982, claimant was put on a weight reduction program th David Spreadbury, Ph.D., a nutritionist at the Des Moines llege of Osteopathic Medicine and Surgery. Dr. Spreadbury's idence showed that a plan was devised for claimant whereby he uld lose between two and three pounds per week until he got s weight down to about 250 pounds, at which time surgery would feasible. Dr. Spreadbury saw claimant at regular intervals tween February and September 21, 1982 at which time claimant's ight was 342 pounds. A letter of October 30, 1981 from the rkers' compensation insurance carrier to the claimant showed at claimant's compensation benefits were terminated November , 1981 because of claimant's failure to keep an October 16, 81 appointment with Dr. Bell and because some ability to work s anticipated in a four to six week period of time.

With respect to whether or not the injury caused claimant's obable ruptured disc, Dr. Bell testified:

A. Not having any foreknowledge of any condition associated with Mr. Moore and believing that this person is honest, the onset of his symptoms and the historical reference to the injury would lead one to believe that this is his precipitating cause.

Q. Based on the history is basically what you are going on in terms of anything preexisting, is that correct?

A. That is correct. (Bell dep., p. 6 ll 5-13)

fendants introduced documentary evidence from the Central Iowa dical, P.C., that claimant had back problems in July 1980 and ne 1981.

At the hearing, the hearing deputy sustained an objection on basis of hearsay concerning a conversation between Dennis erson, an official of the Metropolitan Transit Authority, and Spreadbury. Defendants made the following offer of proof, Mr. erson testifying:

Q. Tell me about the conversations you had with Doctor Spreadbury concerning Mr. Moore's appointments and weight loss.

MR. PRATT: So as to not interrupt, I ask the record I made at the time this was initially asked made applicable now as if I made it in full.

THE DEPUTY COMMISSIONER: Yes, definitely.

Q. Go ahead.

A. Initially about the missed appointments Doctor Spreadbury had relayed information to me stating that Ron had said that he had missed several appointments with Doctor Bell because Doctor Bell just did not show up.

He also at that time stated that he had missed several appointments with himself, Doctor Spreadbury. This initial conversation is really what triggered the letters to Doctor Bell about inquiring about missing appointments.

Q. Did Doctor Spreadbury say anything about Mr. Moore telling you why he had missed his appointments or anything like that?

A. No, he didn't.

MR. SCHERLE: That concludes my offer of proof. (Tr., pp. 58-59 l. 24 and ll. 1-22)

ISSUES

The review-reopening decision, in holding there was a causal tionship between the injury and claimant's impairment, ded running healing period benefits from July 10, 1981 ard. Defendants state the issues on appeal:

I. Is the claimant entitled to a continuaation [sic] of temporary-total/healing period benefits under section 85.29 [sic], Code of Iowa, after abandoning the medically supervised weight-loss program established by the employer-insurance carrier?

II. Does there exist adequate medical evidence for the Deputy Industrial Commissioner to find that a causal connection exists between the alleged injury of July 2, 1981 and the claimant's present condition?

III. Did the Deputy Industrial Commissioner err in refusing to admit hearsay evidence contra to the holdings of the Iowa Supreme Court in McConnell v. Iowa Department of Job Service, 327 N.W.2d 234 (Iowa 1982)?

APPLICABLE LAW

Claimant has the burden to show the extent of his disability. n v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 3). "The incident or activity need not be the sole proximate e, if the injury is directly traceable to it." Holmes v. e Motor Freight, Inc., 215 N.W.2d 296, 297 (1974); Langford ellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971). ause is proximate if it is a substantial factor in bringing t the result." Blacksmith v. All-American, Inc., 290 N.W.2d 354 (Iowa 1980). Matters of causal relationship are ntially within the realm of expert testimony. Bradshaw v. Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

A claimant's actions in not following an employer-chosen weight loss program (which was a part of the treatment for a compensation injury) would be judged by a test of reasonableness. See Stufflebean v. City of Fort Dodge, 233 Iowa 438, 9 N.W.2d 281 (1943).

ANALYSIS

The issue of causal relationship will be covered first. Except for the mention of two back complaints as recited above, claimant's real back problems began on the date of the injury. Although Dr. Bell was not told of these complaints, they do not appear to have been of sufficient magnitude to have contributed to claimant's present condition. Further, nothing refuted the evidence of Dr. Bell to the effect that he felt there was a causal relationship between the injury and the impairment. Thus, one does not believe that the history Dr. Bell took was faulty enough to make his opinion invalid.

The test of claimant's responsibilities in the weight loss program should be one of reasonableness. He began the program on February 1, 1982, weighing in at about 400 pounds. On April 13, 1983, just five days prior to the hearing, he weighed 305 pounds. Thus in one year, two and one-half months, he had lost some 95 pounds which is only fair progress when compared to the two pounds per week recommendation by Dr. Spreadbury.

Claimant should either follow the recommendation of the expert or come up with an effective program of his own. Looked at another way, Dr. Spreadbury expected claimant to lose about 100 pounds within a year from September 21, 1982 so that claimant's weight would be at about 250 pounds, making it possible for claimant to have surgery. It seems reasonable, therefore, that claimant should be allowed compensation for approximately one year between September 1982 and September 1983. To give claimant some benefit of the doubt, compensation will be ordered paid until November 1, 1983.

As for defendants' offer of proof concerning the hearsay conversation, other portions of the record show similar evidence; that is, since the record shows otherwise that claimant did miss the appointments, defendants sustained no prejudice against their position by the hearing deputy's ruling. That ruling will therefore stand.

The findings of fact of the review-reopening decision will be adopted; the conclusions of law will be modified. The order will be modified to show that healing period will end November 1, 1983 instead of running indefinitely.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Finding 1. On July 2, 1981 claimant was injured while driving a bus for defendant.

Finding 2. Claimant's back was injured as a result thereof.

Finding 3. At the time of his injury claimant weighed over 400 pounds.

Finding 4. Claimant's injury has improved only slightly.

Finding 5. If claimant gets his weight down to around 250 pounds surgery on his back is contemplated.

Finding 6. Claimant will not reach mixiumum recovery until after his surgery or when he discontinues to lose weight.

Finding 7. At the time of hearing claimant weighed 305 pounds.

Conclusion A. Claimant has met his burden in proving his back condition is causally connected to his injury On July 2, 1981.

Conclusion B. Claimant's healing period disability or temporary total disability extends to November 1, 1983.

THEREFORE, defendants are to pay unto claimant healing period benefits from July 10, 1981 to the date of hearing at a rate of one hundred fifty-three and 54/100 dollars ($153.54) per week and continue to pay the same until November 1, 1983.

Defendants are to be given credit for benefits previously paid.

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

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 at Des Moines, Iowa this 21st day of December, 1983.

Appealed to District Court;
Reversed and awarded running award of healing period
Appealed to Supreme Court;
Remanded for full commutation

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GEORGE M. MOORE, Claimant, vs. POSTERS 'N THINGS, LTD., Employer, and LUMBERMENS MUTUAL CASUALTY, Insurance Carrier, Defendants.	File No. 686119 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from a proposed decision on a rate issue wherein the deputy found that claimant's applicable rate of compensation benefits is based on yearly earnings pursuant to section 85.36(5), Code of Iowa. The record on appeal consists of the transcript of the rate issue hearing; claimant's exhibit A; defendants' exhibit 1; portions of the deposition of Lana C. Acty; the first ten amended replies to the Request for Admissions; and the briefs and filings of all parties on appeal.

ISSUE

Defendants state the sole issue on appeal as: "What is the Claimant's proper rate of weekly compensation?"

As a caveat it should be noted that the parties have made joint application under section 85.35, The Code, for authorization of a compromise special case settlement of the claim, subject to a determination of applicable rate. As a settlement under section 85.35 is made under a denial of the compensability of the claim under the workers' compensation act it is inconsistent that any portion of the claim be determined by a contested case proceeding. If the entire matter is to be settled under a denial of liability, the rate of compensation if the claim were compensable, is irrelevant.

REVIEW OF THE EVIDENCE

The first report of injury filed July 26, 1982 indicates claimant fell backward from a ladder on July 30, 1981 while working at his place of employment. Following the injury, claimant did not return to work.
the injury, claimant did not return to work.

Claimant is employed by defendant employer as sales manager of the wholesale division of the company. (Transcript, pages 7-8) He testified that he had an employment contract which covered the period of January 1, 1981 to December 31, 1981 and provided for a salary of $57,500 per year. Claimant was to receive $50,000 in wages and the remaining $7,500 was to be paid into a SEP IRA on his behalf. (Tr., pp. 8-9) It was claimant's practice to draw varying amounts up to $3,000 a week against the $50,000 guaranteed by his contract. (Tr., pp. 9-12) Claimant explained he took whatever he needed each week for living expenses. (Tr., pp. 26-27) For the year 1981, claimant received $20,500 in salary plus the $7,500 which was deposited in the IRA. The balance of his contract salary was not paid to him by defendant employer. (Tr., pp. 13-14)

Lana C. Acty, president of defendant company, testified by deposition that the agreement was that whatever salary claimant had not taken during the year would be paid to him at the end of the year. (Acty Deposition, p. 14) Claimant's weekly draws on his salary were to some degree contingent upon the company's cash flow. (Tr., p, 34; Acty Dep., p. 18) Ms. Acty stated that she did not pay claimant the balance of his 1981 salary because he quit working following his injury, and she would not pay him for the period he didn't work. (Tr., pp. 33-34; Acty Dep., p. 17)

Claimant's employment contract provides for a bonus plan based on gross sales and states he will receive $50,000 as salary and 15 percent of his salary will be paid into a SEP IRA. (Claimant's Exhibit A) Defendant employer's payroll record indicates claimant was paid quarterly totals of $4,400, $6,100, $8,000 and $2,000. For the 13 week period prior to the July 30, 1981 injury, claimant was paid $6,000, but he did not draw on his salary the last week of May. (Def. Ex. 1)

APPLICABLE LAW

Section 85.61, Code of Iowa, provides in part:

Gross earnings means recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits.

Section 85.36, Code of Iowa, states in part:

The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had he worked the customary hours for the full pay period in which he was injured, as regularly required by his employer for the work or employment for which he was employed, computed or determined as follows and then rounded to the nearest dollar:

1. In the case of an employee who is paid on a weekly pay basis, the weekly gross earnings.

....

5. In the case of an employee who is paid on a yearly pay period basis, the weekly earnings shall be the yearly earnings divided by fifty-two.

ANALYSIS

Defendants contend on appeal that claimant's pay, while varied, falls within the weekly pay basis addressed by subsection 1 of 85.36, The Code. They argue that subsection 1 should be construed as applying only to a one-time basis of pay and further contend that claimant is not entitled to the full value of his $57,500 salary as he did not complete the full year of work.

Claimant's employment contract entitled him to a yearly salary of $57,500. Had he received set equal payments of that salary on a weekly or monthly basis, other provisions of section 85.36 would govern, depending upon the pay period to which his contract adhered. But in a situation where an employee receives a portion of his contractual salary in a form other than wages, as the IRA, and then draws against the base salary a variable weekly wage that is at least partially influenced by the employer's cash flow, annual earnings as the basis of computation is the correct method of obtaining a rate representative of the employee's contracted remuneration for his services. The fact that claimant took less than he was entitled to in the period prior to his injury will not penalize him in determining his rate of compensation. Nor is such compensation dependant upon whether he completed his contract or was later paid full value for the 1981 year. Section 85.36, The Code, addresses the employee's weekly earnings solely at the time of injury. Had claimant's yearly guaranteed salary of $57,500 been paid on a weekly basis, at the time of his injury claimant would have been receiving $1,105.77 in gross weekly wages. Claimant's rate of compensation is, therefore, $501.00 per week.

FINDINGS OF FACT

1. Claimant was employed by defendant employer as sales manager of the wholesale division.

2. Claimant had a contract with defendant employer to receive a remuneration of $57,500 for the period of January 1, 1981 to December 31, 1981.

3. A portion of claimant's salary in the amount of $7,500 was put into an IRA on his behalf.

4. Claimant would make weekly draws against his salary for his living expenses.

5. Claimant's draws were limited to $3,000 a week maximum, and were determined, in part, by the employer's cash flow.

6. Claimant suffered an injury at work on July 30, 1981.

7. Claimant has not returned to work.

8. Claimant's rate of compensation is computed on a yearly earnings basis.

9. Claimant's gross weekly wage was $1,105.77 at the time of injury.

CONCLUSIONS OF LAW

Under the provisions of section 85.36(5) claimant's rate of computation is $501.00 per week based on gross weekly wages of $1,105.77.

The parties have made joint application under section 85.35, The Code, for authorization of a compromise special case settlement of the claim, subject to a determination of applicable rate. The findings of this appeal are confined to the issue of rate and may not be construed as a ruling regarding the pending application for settlement.

WHEREFORE, the proposed decision of the deputy filed November 28, 1983 is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant be compensated at the rate of five hundred one dollars ($501.00) per week.

That the costs of this action are taxed to defendants.

Signed and filed this 21st day of June, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

REUBEN MURPHY,

Claimant,

vs.

SYLVAN FAAS,

Employer,

and

GREAT WEST CASUALTY COMPANY,

Insurance Carrier,
Defendants.

File No. 670003

D E C L A R A T O R Y

R U L I N G

On August 29, 1983, claimant filed for a declaratory ruling as follows:

1. That on April 21, 1981, the claimant while employed by Sylvan Faas was operating a semi-trailer owned by Sylvan Faas and that the claimant was involved in a motor vehicle accident with a third party, Geraldine Baker, in Allamakee County, Iowa, and that the claimant suffered injuries as a result thereof.

2. Sylvan Faas's workmen's (sic) compensation carrier is Great West Casualty Company.

3. That the third party's insurance carrier is Grinnell Mutual Insurance Company.

4. That on April 14, 1983, the claimant, Reuben Murphy, in Allamakee County District Court initiated a negligence action against Geraldine Baker and James Baker regarding the motor vehicle accident occuring (sic) April 21, 1981 in Allamakee County.

5. That attached hereto and made a part hereof and marked Exhibit A is a notice of workmen's (sic) compensation lien filed on behalf of Sylvan Faas and the Great West Casualty Company.

6. That attached hereto, made a part hereof and marked Exhibit B dated December 4, 1981, is a release of all claims signed by the Great West Casualty Company regarding the accident of April 21, 1981 and letter dated December 4, 1981 signed by Brian Heacock, legal counsel Great West Casualty Company.

7. That the claimant requests a declaratory ruling regarding the applicability of Chapter 85.22, The Code, 1983 and subparts as they are affected by Exhibit B, the release of December 4, 1981 signed by the Great West Casualty Company.

8. The claimant raises the following questions:

(a) Does the release cause the lien filed by Great West Casualty Company to be noneffective and inapplicable against any judgments rendered in plaintiff's favor or amonts paid in settlement or compromise of the subject law suit?

(b) Does the release dated December 4, 1981, estop and preclude Great West Casualty company from enforcing the provisions of 85.22, The Code, 1983?

(c) Does the release of December 4, 1981, under the provisions of 85.22(3), The Code, 1983 constitute a consent of the employer or insurer for any settlement that would become effective between the third party and employee?

9. Claimant contends that the release dated December 4, 1981, is binding on the insurance carrier and employer and constitutes a barr (sic) to any rights that the insurance carrier may have had under 85.22, The Code, 1983 regarding subrogation and indemnification. That by the execution of said release, Great West Insurance Company is estopped and precluded from seeking funds from any judgment rendered in plaintiff's favor or amount paid in settlement or compromise of this lawsuit and that said release constitutes a consent of the employer and insurer under Chapter 85.22(3).

WHEREFORE, claimant prays that the Commission issue a declaratory ruling regarding the applicability of 85.22, The Code, in light of the release signed by Great West Casualty Company dated December 4, 1981.

The employer's rights created by §85.22(1) and (2) are in indemnity and subrogation. See Armour-Dial, Inc. v. Lodge & Shipley Co., 334 N.W.2d 142 (Iowa 1983) Obviously, the questions of indemnity and subrogation come under the jurisdiction of the district court. Therefore, questions 8(a) and (b) cannot be answered by the industrial commissioner.

With respect to question 8(c), §85.22(3) states:

> Before a settlement shall become effective between an employee or an employer and such third party who is liable for the injury, it must be with the written consent of the employee, in case the settlement is between the employer or insurer and such third person; and the consent of the employer or insurer, in case the settlement is between the employee and such third party; or on refusal of consent, in either case, then upon the written approval of the industrial commissioner.

In essence, then, if either the employer or employee enter into an agreement with a third party and the other party (employer or employee) refuses to consent to that settlement, then the industrial commissioner may make an approval of the agreement. Further, the code section states that the agreement cannot be effective unless the employer, the employee and the third party all agree to it or the industrial commissioner approves it.

It is clear in this case that the industrial commissioner did not approve the release as an agreement under §85.22(3). The import of that fact would affect the employer's right to indemnity or subrogation; however, the precise effect of the facts surrounding the release would be a matter for the district court to determine since the rights of indemnity and subrogation are within its jurisdiction.

WHEREFORE, the undersigned deputy industrial commissioner refuses to rule on claimant's petition for declaratory ruling.

Signed and filed at Des Moines, Iowa this 12thday of September, 1983.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TERRY D. MUSSELMAN,

Claimant,

vs.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY,

Employer,
Self-Insured,
Defendant.

File No. 682400

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 Terry Musselman, the claimant, against his employer, Iowa-Illinois Gas and Electric Company, to recover benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on May 15, 1981. This matter came on for hearing before the undersigned at the Webster County Courthouse in Fort Dodge, Iowa on January 11, 1983. The record was considered fully submitted on the same date.

On October 5, 1981 defendant filed a first report of injury concerning the May 15, 1981 injury.

The record consists of the testimony of the claimant and of Gordon Stiles; claimant's exhibits A and B, employee progress reports; and defendant's exhibits 1 through 27 (with cover sheet identifying the contents).

ISSUES

At the outset of the hearing the parties stipulated that the May 15, 1981 injury arose out of and in the course of employment. The issues to be determined are whether there is a causal connection between the injury and the alleged disability; the nature and extent of the disability; and whether claimant is entitled to 85.27 benefits.

REVIEW OF THE RECORD

Claimant began his probationary employment with defendant on January 12, 1981. He was assigned to do security and janitorial duties. On May 15, 1981 as he was "walking the clock," claimant slipped off a 6-8" high platform and struck the outside of his right knee against a transformer. Claimant continued to work despite some swelling over the lateral knee and numbness below the area of contact. Claimant first sought medical care from Daniel J. Cole, M.D., the company doctor, on May 19, 1981. (Claimant mentioned visiting his family doctor at some point in time. Neither a report nor bill documents such care.)

Dr. Cole, board certified family practitioner, testified that upon examination he noted claimant had no loss of muscle tone nor weakness in the extremity. It was his impression that claimant had bruised the peroneal nerve, and he anticipated claimant's condition would return to normal when the swelling went down and the nerve regenerated.

When Dr. Cole saw the claimant one month later, claimant reported ongoing numbness. Pinprick testing suggested a deficiency in the area supplied by sensory L5 on the right. Dr. Cole explained that such finding was consistent with either pressure in the knee or in the spinal cord region. On June 22, 1981 x-rays were taken of claimant's cervical and dorsolumbar spine and of his right knee. All findings were normal. After claimant called on July 6, 1981 to complain about his persistent symptoms, Dr. Cole prescribed Tolectin for inflammation and Tylenol #3 for pain.

Dr. Cole referred the claimant to Michael J. Kitchell, M.D., a neurologist, who examined the claimant on July 30, 1981. Dr. Kitchell reported that claimant's neurological examination was entirely normal and recommended that claimant resume normal activity. However, on August 6, 1981 claimant complained to Dr. Cole of his knee being weak and giving way, and thus, Dr. Cole referred the claimant to Paul Stitt, M.D., an orthopedic surgeon. Dr. Cole also prescribed Medrol Dosepack, a very potent anti-inflammatory drug, on that date.

Dr. Cole did not receive a report from Dr. Stitt. Claimant continued to complain of knee pain on September 28, 1981, so Dr. Cole referred him to Robert J. Weatherwax, M.D., another orthopedic surgeon. Dr. Cole also observed that claimant had obtained some relief from using a transcutaneous nerve stimulator for approximately a month.

Dr. Weatherwax examined the claimant on October 6, 1981. In a report dated the same day, he stated:

> Diagnosis: No pathology identified
>
> Subjective: This 40-year-old male in May, 1981, fell on the job to left knee, injuring proximal tibia area and area about knee laterally. Since then incapacitated with pain, paresthesias, in stocking-type fashion, weakness of leg, and marked dysfunction. Symptoms have persisted despite repeated evaluation and conservative treatment. He presents for further evaluation. Has been unable to regain functional status to return to work since injury in May. Describes no locking or swelling in knee but notes some giving-way. Has decreased sensation in lateral aspect of calf down to foot. These symptoms aggravated by activities.
>
> Objective: Normal full arc of motion with normal ligament stability of left knee. No evidence of effusion. Slight decrease in quadriceps tone. Muscle strength otherwise intact. No meniscal signs. Tenderness about patella out of proportion with degree of findings. Tenderness over the lateral tibial plateau and metaphysis laterally. Negative Tinel's sign over peroneal nerve. Sensation decreased in stocking-like fashion over right lower extremity from knee distal. Feigned weakness of ankle and foot, not due to nerve damage. In watching patient ambulate, there is markedly distorted gait pattern with flexed knee posture, not consistent with typical antalgic or foot-drop steppage type gait. Deep tendon reflexes symmetric.
>
> Recommendations: I have confronted the patient with the fact that there is no objective evidence and there are no findings which would explain the basis for his severe disability and apparent loss of function in left lower extremity. This patient either demonstrates a frank malingerer or a hysterical conversion reaction. I find no evidence of serious organic pathology and have confronted him so. On observing him from the office, his gait pattern changed dramatically from what it was while I was observing him. No follow-up recommendations made, as no pathology was identified and nothing at this point is treatable. This gentleman should either be made to return to full duty or eliminated from Workers' Compensation system if he is presently on such.

(Defendants' exhibit 15.)

During direct examination, Dr. Weatherwax elaborated upon his objective findings in a manner consistent with his impression that claimant was either a malingerer who needed to return to work or was suffering a hysterical conversion reaction and needed psychological care.

Upon cross-examination, Dr. Weatherwax acknowledged that he had not received any other medical reports. Despite the above-quoted statement in his report, Dr. Weatherwax testified that he did not know if claimant had worked between the time of injury and October 6, 1981. He did not know if claimant had received any workers' compensation benefits but clarified that such fact was not critical to his determination that claimant did not need orthopedic care. He agreed that the slight decrease in quadriceps tone would be consistent with the history of the injury insofar as claimant favored the extremity over a number of months. He agreed that pain thresholds vary and are perceived as real to the patient regardless of actual source. Dr. Weatherwax seemingly agreed that he was not concluding claimant was a malingerer or had a conversion reaction.

Upon cross-examination, Dr. Cole testified that he received Dr. Weatherwax's report. He observed that the persistence of claimant's complaints were not consistent with the type of injury described, and that the longer such symptoms continue without objective physical reason, the more likely he is to attribute the complaints to a psychological component and to defer the matter to one trained in psychiatry.

Claimant testified that he was discharged from employment on June 19, 1981 for sleeping on the job and failure to walk the clocks at the prescribed time. Claimant explained that his wife had cancer and he had to drive her to Rochester, Minnesota for treatment on a number of occasions. (Much of the testimony during cross-examination dealt with altercations and disagreements claimant had with management. Since this case turns mainly on the medical evidence, claimant's testimony on such matters will not be reviewed herein.) Claimant noted that he was successful in applying for unemployment compensation over defendant's resistance. Claimant became employed with a commercial exterminator in December of 1981. Claimant testified that he has trouble doing the climbing required in such job. Claimant suggested he was unsuccessful in obtaining employment between June 19, 1981 and December 1981 because of his knee. He wore his TNS unit on interviews. Claimant testified that his condition had improved but he still experienced soreness in the injured area. He is not under a doctor's care and takes only Tylenol and aspirin for his discomfort. Claimant testified that he still wears the TNS unit when his knee really bothers him.

Gordon Stiles, who has worked for defendant for 34 years, testified that he was claimant's supervisor. He emphasized that claimant was discharged on the basis of a six month cumulation of problems and that the injury had no bearing on claimant's termination. (The rest of Mr. Stiles' testimony dealt with claimant's altercations and disagreements with management.)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 15, 1981 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).

Section 85.33(1), Code of Iowa, 1983, 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 occurs first.

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).

ANALYSIS

Claimant has failed to prove by a preponderance of the evidence that he sustained any disability as a result of the May 15, 1981 work injury. The record is devoid of evidence establishing that claimant suffered any resultant injury that extended to the body as a whole, that was permanent in nature or that amounted to temporary total disability.

The doctors seemingly agree that there is no physical involvement of the body as a whole. The reference to sensory deficiency in the L5 area is inconclusive. That Drs. Cole and Weatherwax mention conversion reaction as a possible reason for claimant's persistent complaints does not satisfy claimant's burden of establishing a psychological injury. Neither doctor felt qualified to draw such conclusion. Obviously, this trier of fact is not qualified to do so. Indeed, the record reviewed as a whole by a non-medical expert tends to support the alternative possibility mentioned by both doctors.

None of the medical experts conclude that claimant has any residual impairment to his right lower extremity. Claimant's testimony regarding ongoing pain and weakness does not satisfy his burden of proof. It should be noted here that any deficiencies in Dr. Weatherwax's history or his confusion between the left and right extremity could not ipso facto add anything to claimant's burden of proof.

Claimant continued to perform the same work he was doing on the date of injury until he was discharged for reasons not related to any alleged disability. While claimant may argue that even though he pursued unemployment benefits and otherwise held himself out as employable there were jobs he could not perform because of his knee condition, the fact remains that he, both medically and as demonstrated, was capable of performing the same or substantially similar work at and after the time of his discharge.

Claimant is entitled to reimbursement of mileage expenses incurred in obtaining the examination by Dr. Kitchell as described by the claimant at the time of the hearing. Defendant admitted liability for an injury arising out of and in the course of employment at the time of the hearing. Authorization would not have been a viable issue for the time period prior to admission of liability. The examination was an extension of Dr. Cole's treatment of the injury and therefore comes within the purview of 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. On May 15, 1981 as claimant was "walking the clock" as part of his security duties for defendant, he slipped off a 6-8" high platform and struck the outside of his right knee against transformer.

FINDING 2. The parties stipulated that the May 15, 1981 injury arose out of and in the course of claimant's employment.

FINDING 3. Claimant complained of pesistent numbness, pain and

eaknesses in the knee even after the swelling subsided but ontinued to work until June 19, 1981, when he was discharged or a cumulation of problems and not because of the work injury.

INDING 4. Claimant has sustained no permanent impairment as a esult of the work injury, and his ongoing complaints are not upported by objective clinical findings and are not consistent ith the described injury.

INDING 5. Whether claimant suffered a conversion reaction as a esult of the work injury cannot be determined.

ONCLUSION A. Claimant has not sustained his burden of proving hat he suffered any disability as a result of the May 15, 1981 ork injury.

INDING 6. Dr. Kitchell's examination was reasonable and ecessary.

ONCLUSION B. Pursuant to Code section 85.27, claimant is ntitled to reimbursement of mileage expenses incurred in btaining Dr. Kitchell's examination.

ORDER

THEREFORE, IT IS HEREBY ORDERED that claimant take nothing n the way of weekly benefits from this proceeding.

Pursuant to Code section 85.27, defendant is ordered to eimburse claimant for mileage incurred in obtaining Dr. Kitchell's xamination: 120 miles x .22 = $26.40.

Costs of the proceeding are taxed to the defendant. See ndustrial Commissioner rule 500-4.33.

Signed and filed this 28th day of September, 1983.

LEE M. JACKWIG
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ALPH O. NEWMAN,	:	
Claimant,	:	File No. 632017
s.	:	A P P E A L
OHN DEERE OTTUMWA WORKS,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

STATEMENT OF THE CASE

Defendant appeals from a proposed decision in arbitration herein claimant was awarded 300 weeks of permanent partial isability and medical expenses.

The record on appeal consists of hearing transcript volume I corded May 18, 1981 and containing the testimony of claimant, n Hedlund, Larry Blomme, Dean Sylvester, Sam Wright, Harold rtis, Dennis Ray Force, and John Harry Pierson; hearing anscript volume II recorded July 7, 1981 and containing the stimony of claimant; hearing transcript volume III recorded ptember 10, 1981 and containing the testimony of claimant, ed Donovan Propp, and Robert Weirback; claimant's exhibits 1 rough 9; defendant's exhibits 1 through 6, 7-A, 7-B, 8, 9-A, B, 10 through 15, 16-A, 16-B, and 17 through 25; the deposition claimant; the deposition of Walter E. Herrick, M.D. (including position exhibits 1-A through D, 2-A through 2-I, and 3); the position of Thomas R. Wolf, D.O. (including deposition exhibits and 2); the deposition of Hal Bates Richerson, M.D. (including position exhibits 1 through 4); the deposition of J. C. N. Brown, D. (including deposition exhibit 1); the deposition of Todd F. nes, Ph.D. (including claimant's deposition exhibits 1 and 2, d defendant's deposition exhibit 1); the deposition of Michael trick Goheen (including claimant's deposition exhibits 6 and and defendant's deposition exhibit 11); the deposition of arles A. Peterson (including claimant's deposition exhibits 1 d 2); the deposition of Daniel Broghammer (including deposition hibits 4-A through D and 5-A and B); the deposition of John den Bloodsworth (including deposition exhibit 1); and the iefs and filings of both parties on appeal.

ISSUES

The issues on appeal as set forth by defendant are as llows:

1. Whether the deputy erred in that the decision was not pported by substantial evidence and, in fact, was contrary to e evidence presented.

2. Whether the deputy erred in finding that claimant had stained his burden of proof that some employment incident or tivity was a proximate cause of any health impairment on which bases his claim.

3. Whether claimant failed to sustain his burden of proof at he received any injury arising out of and in the course of s employment.

In addition to the issues stated by defendant, claimant's reply brief sets forth additional issues as follows:

1. Whether the deputy erred by finding that claimant failed to sustain his burden of proving a physical injury to his throat and chest as a result of the incident of March 1, 1979 and subsequent exposure to fumes while working for defendant.

2. Whether the deputy erred by finding that examinations conducted by Dr. From and Dr. Hines were §85.39 exams.

REVIEW OF THE EVIDENCE

Claimant, 37 years old at the time of his hearing, is a high school graduate and has received some mechanical training at Universal Trade Schools and General Motors Training Center in Omaha. Upon leaving school claimant's first employment involved doing mechanical work for Roy Lewis in Linby, Iowa, rebuilding tractor and automobile engines. He next worked for a Ford tractor dealership where his duties included overhauling and steam cleaning tractors. Claimant also became familiar with the operation of welding equipment while working for the Ford dealership. His next place of employment was Dickey Transport in Packwood where he worked full-time as a truck mechanic until 1966, when he switched to part-time status and began to aid his father in farming 600 acres. Claimant left his employment with Dickey entirely in 1970, and purchased a 160 acre farm upon which he constructed a mechanics workshop of his own. Between 1972 and 1978 claimant farmed his own land plus 135 rented acres and performed an estimated 30 to 35 (average) hours of mechanical work each week. He also raised sheep and cattle from 1972 until 1976. Claimant went to work full-time as a welder for defendant in 1978. (Transcript, Vol. I, pp. 111-120)

Claimant testified to having suffered emotional trauma from 1972 to 1976, mainly as a result of frequent confrontations with his neighbors. In 1976 he accidentally ran over his neighbors' mailbox, resulting in criminal charges being filed (and later dropped) against claimant. Claimant in turn filed suit against his neighbors alleging malicious criminal prosecution and intentional infliction of emotional harm, and testified at the arbitration hearing that his mental condition caused him to have to sell his livestock in 1976. He denied having any problems performing the duties required by his farming operation in 1977 and 1978, but noted that he had to hire some extra help following his divorce in 1977. Claimant's abilities to operate welding equipment and diesel powered farm equipment prior to March, 1979 were much emphasized. (Tr., Vol. I, pp. 121-130; Defendant's Exhibit 8)

Claimant also testified that he suffered from numerous head colds and sinus problems through 1976. (Tr., Vol. I, pp. 122-131) Thomas R. Wolf, D.O., testified that claimant has been one of his patients since 1966. Dr. Wolf treated claimant mainly for colds, coughs, and sore throats, but noted during his deposition testimony that claimant had been diagnosed in 1973 as suffering from manic depressive illness which had required Lithium Carbonate therapy on an ongoing basis. (Wolf Deposition, pp. 47-48) Claimant was seen by Dr. Wolf on August 8, 1976, at which time he complained of post nasal drip, a sore throat, and burning in his chest. He was admitted to the hospital where he was diagnosed as suffering from acute bronchitis. (Wolf Dep., p. 7; Claimant's Ex. 1) In a November 29, 1976 letter to the University Hospital Internal Medicine Department confirming further tests of claimant, Dr. Wolf suggested further evaluation by the Department of Psychiatry. (Wolf Dep. Ex. 2)

Claimant was admitted to the Psychiatric Hospital at the University of Iowa Hospitals on December 9, 1976. A psychiatric history dated December 10, 1976 states in part:

> PATIENT IDENTIFICATION: This is the first Psychiatric Hospital admission for Ralph Newman, a 33 year old white married farmer from Hedrick, Iowa. The patient was referred by Thomas Wolf, D.O. of Richland to the Department of Internal Medicine for evaluation of chronic respiratory symptoms. The patient is referred to Psychiatry from Internal Medicine for evaluation of manic symptoms. Many of the details of the history as obtained from Mr. Newman are difficult to evaluate and outside records will be obtained.
>
> CHIEF COMPLAINT: The patient desires help with his manic depressive disease.
>
> PRESENT ILLNESS: Mr. Newman states that he has had many periods of high moods and low moods since 1972, with the low moods being much more predominant. The patient describes his high mood which lasts from a few minutes to never more than one day, has periods when he is full of energy, sleeps only several hours per night, makes many plans and is generally euphoric. During these high periods he states that he talks very much and friends have noted his quick change in subject. The patient describes his low mood as lasting from one week up to six to eight weeks and says that during these periods he often will stay in bed for two to three days, is withdrawn, has decreased concentration, decreased appetite, decreased interest in work, but denies any crying spells or suicidal ideation. The patient notes that his mood may swing very quickly. One moment he will make many plans and then in a minute he will be in a depressed mood. For the last several weeks the patient states that he has had several episodes of his high mood. At present considers himself normal.
>
> The patient states that his mood swings began suddenly in 1972, at which time he felt "out of balance", was more irritable and he went to a general practitioner for evaluation of some stomach distress. The patient was then referred to a Dr. Mahanna, a psychiatrist in Bloomfield. At this time Valium and Librium up to 20 mg. a day of each did not help the patient and he reacted to the medication with shakiness and jitters. The patient continued to see Dr. Mahanna, approximately for

about every three months, no apparent improvement. In January of 1973, the patient states that he began to have a ringing in his ear which often sounded like a freight train going from one ear to the other. In July of 1973, when the patient was hospitalized for ulcers, Navane was given to the patient and the ringing in his ears stopped. Later on 25 mg. of Tofranil was substituted for the Navane and this also controlled the ringing in the ears. The patient has noted intimate [sic] ringing in his ears since that time. The patient was began on 900 mg. a day of Lithium in January of 1974, and continued on this dosage for approximately two years until June of 1976, when his blood levels of Lithium were finally checked and the dosage was raised to 1200 mg. a day. Since that time the Lithium dosage has been adjusted repeatedly between 900 and 1200 mg. per day. The patient is currently taking Lithium 1200 mg. a day and Tofranil 25 mg. per day.

....

PAST MEDICAL HISTORY: Is remarkable for a number of allergies as a child which caused hives and skin rash. He said he was tested and positive for nearly everything. These allergies abated with age and currently he is only allergic to cigarette smoke, hog dust and corn dust. These cause a generalized coughing spell which lasts for one hour. Other respiratory problems by the patient include an episode of histoplasmosis in 1965 which was combined with infectious mono at the same time. The patient also had an episode of acute bronchitis and in September of 1976, which was treated with Ampicillin. The patient is being evaluated by an Internal Medicine for his respiratory problems. The patient denies any trauma to his head. He suffered the loss of the distal phalange on the left index finger in an accident 10 years ago. In the summer of 1976, the patient tore some muscles in his back and has been quite limited in his ability to work since.

REVIEW OF SYSTEMS: Is positive for a numbness in the patient's feet and hands which he says began in early November. During this time he has had episodes where both of his hands totally blanch as do the heels of his feet. The patient also notes chills during this time for which he would often stay in the bathtub for 10-12 hours before relief would be obtain [sic]. He also has had several episodes of profused sweating during this time. The patient says that when the numbness in his feet started it felt as if he was walking on corn kernals [sic] in his boots.

MENTAL STATUS EXAM: Revealed a smiling, cooperative, casually dressed white male with hyperactive motor activity. Stream of thought and speech showed circumstantiality, loss of goal and flight of ideas. The patient's mood was happy and his affect was appropriate. Content of thought revealed no delusions, hallucinations, phobias, compulsions, or obsessions. The patient was oriented X3. Memory of remote, past, recent past and immediate and five minute recall were all intact. The patient was informed to general information and was able to carry out calculations without difficulty. The patient has good insight into his illness and realizes that he needs medical attention.

PHYSICAL EXAMINATION: The patient exhibited a fine resting tremor of his hands and also tongue. His neurological exam was unremarkable otherwise.
IMPRESSION: Bipolar affective disorder. The patient is currently in a hypomanic state. (Cl. Ex. 1, University of Iowa records for 1976)

Claimant was discharged on January 17, 1977 with the recommendation that his progress be monitored as an outpatient at the Psychiatric Department. The discharge summary dated January 25, 1977 states in part:

> Hospital Course: Uneventful. Patient was discontinued of all the medications like Librium, Valium and Tofranil. He was started only on Lithium Carbonate which was increased up to 2100 mg but patient had a problem with variable Lithium levels which ranged anywhere from .8 to 1.4 so his Lithium was gradually decreased. At the time of discharge he had Lithium level of .86 and he was taking about 1200 mg of Lithium. He had no other problems other than the development of acute bronchitis and patient complains of this and says it is because he is allergic to smoke and the ward is full of smoke. So we referred him to the Allergy Clinic whose impression was that there was no objective evidence of allergy, so patient may be having rhinitis. If it continues and needs control, patient should have decongestant and antihistamine, something like Actifed. He was also referred to Psychology for relaxation since patient had problems sleeping and constantly complained about tension. Patient was shown relaxation of his muscles and at the time of discharge patient stated that it really helped him. (Cl. Ex. 1, University of Iowa records for 1977)

Claimant was seen periodically at the Department of Psychiatry in Iowa City with complaints of thought racing, restlessness, insomnia, and unsubstantiated physical discomforts. Clinical notes indicate that claimant sometimes raised his dosage of Lithium Carbonate, or in the alternative would discontinue its use. Clinical notes dated August 28, 1978 indicate that claimant had stopped using Lithium Carbonate. That report identified claimant as being chronically hypomanic and urged him to resume the use of medication. (Cl. Ex. 1, University of Iowa records for 1977 and 1978)

Claimant began working full-time as a welder for defendant in November, 1978 with no initial difficulty in performing his job. He testified that he did piecework welding on the night shift and that on March 1, 1979, he was working with his face relatively close to the weld when there was an explosion at the point of the weld. Claimant experienced a scalding sensation in his throat and after welding a few more pieces he began to assist another employee bore holes into pipes. He returned to his welding post the following night and continued to weld throughout March and April. Claimant testified, however, that his throat would become sore when he worked, with the condition worsening through the week, but clearing up over the weekends. (Tr., Vol. I, pp. 139-143)

Claimant first sought medical help for his complaint on May 5, 1979 with Dr. Wolf. At that time Dr. Wolf made a diagnosis of acute bronchitis due to industrial asthma which he described as a tightness and burning in the chest brought on by exposure to fumes or toxic vapors. Dr. Wolf admitted, however, that there are no tests which may be administered in reaching such a diagnosis. (Wolf Dep., pp. 50-51)

Claimant attempted to return to work on the night of May 5, 1979, but was unable to finish his shift due to the pain in his throat while he welded. He visited the plant's first aid department that evening where the nurse on duty expressed her concern that claimant visit a doctor, but refused to refer a doctor at defendant's expense. (Tr., Vol. I, p. 147; Tr., Vol. II, pp. 5-6) Claimant then returned to see Dr. Wolf who on May 12, 1979 prepared a note which stated: "Mr. Newman has industrial asthma caused by welding fumes. He must be removed from these fumes or areas of high industrial gases. A relocation in a different area in the plant with lower levels of industrial fumes is necessary." (Herrick Dep. Ex. 2-A)

Claimant was given a brief exam on May 14, 1979 by Walter E. Herrick, M.D., who is employed part-time by defendant to perform preemployment exams and conduct sick call for employees. Dr. Herrick testified that while he found no physical abnormalities with claimant and would not have placed any restrictions upon him based upon his own examination, it is his normal procedure to at least initially honor any requests for restrictions which are made by an employee's personal physician. Based upon the May 12, 1979 note from Dr. Wolf requesting a duty transfer for claimant, a company doctor's permit restricting claimant from welding was issued by Dr. Herrick until such time as claimant could be examined by a specialist for pulmonary disfunction. Dr. Herrick noted, however, that in his examination of claimant none of the telltale signs of an asthmatic condition were present, and that he diagnosed claimant as suffering from a hyperventilation syndrome caused by tension or stress which may or may not have been employment related. (Herrick Dep., pp. 26-30, 35-37; Herrick Dep. Ex. 2-C) Claimant also visited Dr. Herrick upon his return to work on May 29, 1979, at which time it was again noted that there was no evidence of an asthmatic condition. (Herrick Dep., pp. 33-34)

Dr. Herrick's records from the two visits with claimant in May, 1979 do not indicate that claimant was having throat or chest problems at that time. He noted that he was told of no pulmonary problems or psychiatric problems at either of the two visits or during his preemployment examination of claimant. Dr. Herrick suggested that had claimant checked yes to inquiries about nervous or mental disorders on a preemployment questionnaire additional inquiries would have been made concerning his employability. (Herrick Dep., pp. 23-25) Claimant testified that he specifically described soreness and blisters which were in his throat and the burning in his chest, but Dr. Herrick refused to look at his throat. (Tr., Vol. II, pp. 8-9)

Claimant returned to work on May 29, 1979 pursuant to a release by Dr. Wolf (see Herrick Dep. Ex. 2-B), and was assigned to an assembly line post where belts were installed on bailers. He testified that the bailers were pulled out of painting booths to the area where the belts were installed. Claimant was required to climb into the bailer to install the belts, after which the bailer was then tested. He testified that the combination of paint fumes, diesel fumes, and welding fumes (welders were apparently stationed as close as 25 feet away) caused blisters in his mouth and throat to start bleeding and his chest to burn. Claimant returned to first aid on June 1 and again on June 4, at which time Dr. Herrick issued a new permit which restricted claimant from working around welding, dust, or fumes. (Tr., Vol. II, pp. 13-17; Herrick Dep. Ex. 2-D and 2-E)

On June 4, 1979, claimant was assigned to a pool of disabled workers who performed general yard work, and after impressing upon a supervisor that he could tolerate dust despite the restrictions issued by Dr. Herrick, he was assigned to the sheet steel shed. Claimant testified that his initial work in the steel shed involved sweeping and general cleanup, and he denied having any problems tolerating excessive dust. (Tr., Vol. II, pp. 18-21)

Defendant arranged for claimant to visit Kenneth R. Kingsbury, M.D., an internal medicine specialist, on June 5, 1979. In a letter dated July 3, 1979, and addressed to Dr. Herrick, Dr. Kingsbury first reviewed claimant's history and then stated: "Examination did not disclose any significant abnormalities. Routine laboratory studies which included arterial blood gases, routine blood count, sedimentation rate, pulmonary function tests and chest x-ray were all normal. I felt that the patient did not have obstructive airways disease." (Cl. Ex. 1, Dr. Kingsbury's records; Def. Ex. 2)

Claimant testified that when he visited Dr. Kingsbury, the blisters in his throat were extremely bad and he was not able to take a pulmonary function test that same day because exhaling air was too painful. Claimant testified as follows:

> Q. Did Dr. Kingsbury look at your throat?
>
> A. Yes, he did after I pleaded with him long enough.
>
> Q. Did he indicate anything when he looked at your throat?
>
> A. Kind of laughed. "You are going to have to keep out of those fumes. We are going to run some tests and see if there is anything wrong with you." (Tr., Vol. II, pp. 24-25)

Dr. Herrick's records show that he next examined claimant on
e 12, 1979, when he complained of a rash in his throat. Dr.
rick testified that claimant's lungs were clear, there were
wheezes, and there were no abnormalities in his mouth or
oat. (Herrick Dep., pp. 39-40)

Claimant testified in late June, 1979 he was assigned to a
outside spraying iron with a rust preventive. Prior to
inning the job claimant asked for, and was refused, a respirator
the plant nurse and safety supervisor. He experienced
ediate pain in the throat and had to be reassigned to work
ide the steel shed after two and one-half hours of spraying.
imant testified that he was transferred back to welding on
y 9, 1982. After welding for two days, he sought treatment
m John J. Finneran, M.D., of Bloomfield who arranged for
imant to undergo testing at the Department of Internal
icine at University Hospitals in Iowa City. (Tr., Vol. II,
30-35) On July 12, 1979, Dr. Herrick issued a new doctor's
it which again restricted claimant from welding or working
nd dust and fumes per Dr. Finneran and until a report from
Iowa City testing could be obtained. (Herrick Dep. Ex. 2-G)

In a letter dated July 24, 1979, addressed to Dr. Finneran
a carbon to Dr. Herrick, Kenneth Nugent, M.D., from the
sion of Pulmonary Diseases at University Hospitals, wrote:

> Your patient was seen in the Pulmonary Clinic on July 19, 1979. The diagnosis was recurrent left chest pain.
>
> Mr. Newman gave a history of a [sic] intermittent, burning left sided chest pain which occurs after exposure to welding fumes and paint fumes. These symptoms have occurred during the last four months; and the symptoms have not been associated with severe cough or dyspnea. The patient denied cigarette smoking, asthma and hemoptysis.
>
> The physical examination revealed a blood pressure of 130/84, pulse 64, respirations 16, weight 87 kg and height 177 cm. The HEENT examination was unremarkable. The lungs were clear to auscultation and percussion.
>
> Pulmonary function tests done in Ottumwa, Iowa were reviewed and felt to be normal. Chest x-rays reviewed and felt to be normal. A methacholine challenge test was performed today and was negative.
>
> Assessment - Mr. Newman does not have any evidence of chronic or permanent pulmonary disablity. His symptoms of recurrent left chest pain are associated with exposure to welding fumes and paint spray and he is not free of these symptoms since his job responsibility was changed. I am unable to explain to [sic] mechanism for this pain. The negative Methacholine test rules out significant bronchial hyperreactivity. Mr. Newman should avoid welding and paint exposure at work when ever possible. No further evaluation or therapy is indicated at this time.
>
> We will gladly reevaluate Mr. Newman in the uture if necessary. (Cl. Ex. 1, University of owa Hospital records, 1979)

n July 20, 1979, claimant resumed working at the steel shed
was in the process of being remodeled. Claimant testified
he again experienced burning in the chest and breaking out
e throat after painters and welders began to work on the
ation project. Claimant began missing work on August 15,
and was examined again by Dr. Herrick on August 16, 1979.
(Tr. Vol. II, pp. 39-45; Vol. III, pp. 4-6) Dr. Herrick
tes fied as follows concerning the August 16, 1979 examination
of laimant:

> . Did you examine his throat?
>
> . I examined his throat at----
>
> Now, did you do that----
>
> --with a light and a tongue blade.
>
> What did you see, if anything?
>
> No abnormalities. He had a normal appearing roat.
>
> Did you examine his neck?
>
> Yes, sir, for lymph nodes and any enlargement any glands.
>
> Doctor, based on that August 16, 1979 examination, could you find anything of a physical nature ong with Mr. Newman?
>
> I never found anything on any examination wrong th Mr. Newman and----
>
> MR. HANSSEN: I would object to that question. 's not responsive to the--I would object to that swer; it's not responsive to the question. The ctor is going far beyond what the scope of the estion was.
>
> (By Mr. Johnson) I asked you with reference to August 16, 1979 examination.
>
> My examination of August 16, 1979, revealed no sical abnormalities.
>
> What did you do following that August 16, 1979 mination of Mr. Newman, if anything, relative to and his status at John Deere?
>
> After I examined Mr. Newman on the 16th of ust, '79 and found no abnormalities, and having t report from Dr. Kingsbury indicating no monary disfunction, and having waited a month to be given some form of report from Iowa City or from someone relative to some physical abnormality of Mr. Newman, and having been supplied none, I talked with the Personnel Department and said I could see no reason why this man's restriction should be continued.
>
> Q. And did you at that time release the restriction previously issued by you?
>
> A. I did. I inferred it to be removed in my conversations with the Personnel people, that I could find no physical reason for them to be continued, nor could Dr. Kingsbury, nor had I received a report that I felt reliable from any other medical source. (Herrick Dep., pp. 47-49)

Claimant immediately contacted Dr. Nugent in Iowa City who arranged for claimant to be examined by Dr. Roffman, an ear, nose and throat specialist, on August 17, 1979. Dr. Roffman's report stated:

> SUBJECTIVE: Ralph Newman is a 35 year old single welder who is referred from the Pulmonary Clinic for evaluation of oral ulcers. The patient was evaluated in the Pulmonary Clinic for burning left-sided chest pain which occurs after exposure to welding fumes and pain [sic] fumes. He was evaluated with chest x-ray, pulmonary function test and methacholine challenge test; all of which were negative and it was their recommendation that the patient avoid welding and paint exposure at work. He also complains of a chronic sore throat during this time which burns, with a history of hoarseness and development of red papules in the back of his throat which enlarged and coalesced. These have now resolved. There was no oral bleeding or respiratory distress and in particular the patient's story changes from one minute to the next.
>
> PHYSICAL EXAMINATION:
> EARS: Rinne test was positive at 256, 512 and 1024 Hz forks. Weber midline. Patient heard a soft whisper voice AU. The TMs were clear and mobile.
> NOSE: There was septal deviation to the left without pus or other masses noted.
> ORAL CAVITY: No intraoral ulcerations or masses.
> OROPHARYNX: There was residual tonsilar tissue in the inferior pole and superior pole on the left. This was not inflammed [sic] and there were no purulent crypts. The oropharynx was not inflammed [sic].
> NASOPHARYNX: Clear.
> HYPOPHAYRNX: The left true vocal cord was moderately erythematous and thickened. No areas of ulceration, leukoplakia or exophytic could be appreciated.
> NECK: Supple without palpable adenopathy.
>
> DIAGNOSTIC IMPRESSION: Chronic laryngitis secondary to industrial toxic fumes. The patient may indeed have had a pharyngitis in the past on the same basis.
>
> RECOMMENDATIONS: Agree with Pulmonary Medicine, that patient should avoid welding and paint exposure at work and certainly if he needs to continue to work in this type of environment, to wear a mask. In addition, humidification at night would be helpful. The larynx should be re-examined in three months' time. (Cl. Ex. 1, University of Iowa Hospital records, 1979)

Claimant did not return to work for defendant following August 14, 1979. Medical records kept by defendant's first aid department indicate that on August 20, 1979 claimant reported that the doctors in Iowa City told him not to return to work until he had seen Dr. Finneran. On August 21, 1979, claimant reported that he would not be able to see Dr. Finneran until the following day. On August 23, 1979, claimant reported that his appointment with Dr. Finneran the day before had been cancelled because the doctor had had an emergency. (Cl. Ex. 1, Dr. Herrick) On August 22, 1979 claimant was sent a three-day quit letter by defendant's personnel department. Michael Patrick Goheen testified that under the labor agreement in effect, if an employee is absent from work for three days without a satisfactory reason, he is considered to have quit his employment. Mr. Goheen, who is the industrial relations administrator at John Deere Ottumwa Works, testified that a reinstatement hearing was held at the request of claimant. In attendance at the hearing which was held August 23, 1979 were claimant, Mr. Goheen, and two union representatives. When a satisfactory reason for his absence was requested from claimant, he produced a handwritten note from F. C. Perkins, M.D., which stated: "It is my opinion that Ralph Newman is sensitive to welding. Therefore, this exposure at anytime will probably bring about an acute reaction. Would endorse a total absence from such exposure." (Cl. Ex. 1, Sigourney Clinic; Def. Ex. 11)

Mr. Goheen refused to accept as satisfactory the note from Dr. Perkins because it did not state whether or not claimant was unable to work or when he could return to work. Mr. Goheen testified that the hearing was recessed until the following day to allow claimant time to secure documentation of treatment or care from Dr. Finneran. When the hearing reconvened at 1:00 p.m. on August 24, 1979, claimant indicated that he had been unable to reach Dr. Finneran, but offered another note from Dr. Perkins signed August 24, 1979. Mr. Goheen again refused to accept a note from Dr. Perkins, explaining to claimant that because Dr. Finneran had been designated as his treating physician, some documentation would be required from that source. Mr. Goheen testified that claimant left the hearing to seek out Dr. Finneran that afternoon so as to be able to present records of his medical problems and care on the same day. Claimant returned at 3:00 p.m. that afternoon without having obtained any record or correspondence from Dr. Finneran, and offered to terminate his employment voluntarily if defendant would pay him for accumulated earned bonus hours. (Goheen Dep., pp. 5-15) Claimant was paid for the balance of his accumulated hours and signed a voluntary termination of employment form on August 24, 1979. (Def. Ex. 7-A, 7-B)

Claimant testified that on both days of the reinstatement hearing Mr. Goheen told him that if he did become reinstated then it would be back into the welding departments. (Tr., Vol. III, pp. 12-14)

Claimant testified that after leaving his employment with defendant he found a short term job hauling dry fertilizer during October or November of 1979, but was forced to leave the job due to his inability to work around gasoline or solvents. He then attempted to do tractor repair work in his garage, but again was forced to abandon his projects due to problems associated with breathing solvent fumes. He also attempted to do some farm work, but testified that the exhaust fumes from diesel farm equipment seemed to cause greater burning and irritation than other fumes. Claimant stated that the roof of his mouth will "fire up" immediately upon exposure to fumes, but the burning in his chest usually takes a few days to start. Depending upon the severity of his exposure to fumes, it sometimes takes up to three or four weeks for the burning and irritation to subside. Claimant testified that he sold his equipment in October, 1980, so that he would not be tempted to continue trying to work in an environment that is detrimental to his well-being. (Tr., Vol. III, pp. 15-21)

Claimant continued to see Dr. Wolf periodically from December, 1979, until the date of his testimony, September 1981. On December 12, 1979, claimant complained about not being able to keep warm and losing track of time. On January 21, 1980, he complained of nausea and dizziness. On April 2, 1980, claimant complained to Dr. Wolf about being allergic to vapors, soreness in the roof of his mouth, and inflamed vocal cords. Dr. Wolf's notes for claimant's visit of May 31, 1980 show continual multiple complaints concerning problems in his throat and chest caused by vapors. On March 30, 1981, claimant was again seen for nausea and dizziness. On April 6, 1981, claimant was diagnosed by Dr. Wolf as having a simple head cold. On April 28, 1981, claimant again complained of burning in the throat caused by exposure to diesel fumes. On July 10, 1981, Dr. Wolf recorded having seen light colored vesicles on the soft palate of claimant. Dr. Wolf was unable to rupture the vesicles, and referred claimant to Dr. McMillan who is an eye, ear, nose and throat specialist in Ottumwa. (Wolf Dep., pp. 24-26; Cl. Ex. 1, Wolf records)

In a letter addressed to Dr. Wolf and dated August 6, 1981, Dr. McMillan reported on his examination of claimant:

> I have had the pleasure of seeing Ralph in the clinic with a mild to moderate atrophic pharyngitis and nasal obstruction. This high-strung gentleman does note exposure to fumes, several years ago, that I believe significantly affected his mucosal membrane and he has an atrophic pharyngitis and palate similar to that seen with radiation exposure. I have advised salt and soda gargles and intermittent use of water on the membranes which seems to help people with injured throats. If he is having significant mouth breathing problems, I have advised him that straightening his septum and opening up his nose will allow him to have more normal respiration and less drying affect on his throat. He will be returning to my office 8-31-81, where we will discuss the effects of his therapy.
>
> Again, thanks very much for sending him along. I was unable to advise a toxicologist to see if there is further toxic affects from the problem he had so many months ago.
>
> Again, thanks for sending him along. (Wolf Dep., Ex. 1; Richerson Dep. Ex. 4; Hines Dep. Ex. 2)

Dr. Wolf opined that claimant has had an allergy since 1966 which was aggravated when he was placed in an environment of high air pollution. He referred to the August 6 letter from Dr. McMillan as evidence in support of his foregoing statement. Dr. Wolf stated that claimant's sensitivity to various types of fumes is consistent with the findings of Dr. McMillan and himself. He recommended that claimant permanently avoid dust and welding, diesel, gasoline, and paint fumes, and anticipated that claimant might be able to work in a filtered, air-conditioned environment. (Wolf Dep., pp. 29-30, 33-35)

After spending several months in Texas and Montana during summer, 1980, claimant returned to Iowa and was seen at the Pulmonary Clinic in Iowa City. In a clinical summary dated September 8, 1980, Dr. Nugent reported:

> Ralph Newman was seen in the Pulmonary Clinic on August 28, 1980. Diagnoses were: 1) chronic laryngitis and pharyngitis, and 2) recurrent left chest pain, etiology unclear.
>
> Mr. Newman continues to develop left chest pain following exposure to fumes (diesel, welding, smoke, etc). He enjoys good health when he can avoid these exposures and in fact was well for two months in Montana. He does not have any new or other medical problems.
>
> On physical examination the chest was clear to auscultation and percussion without rales or wheezes. The heart revealed a regular rhythm without murmurs, gallops or edema. The abdomen was soft without masses or organomegaly. The extremities showed no cyanosis or clubbing.
>
> Chest x-ray showed normal bones, clear lung fields, and normal cardiac size and shape. Pulmonary function tests revealed an FVC of 4800 and FEV 3600, no change since July, 1979.
>
> Mr. Newman continues to have symptoms related to fume exposure. He does not have any obvious heart or lung diseases and is generally healthy when he can avoid these exposures. No medical therapy except avoidance is necessary now. We advised him we would gladly see him in follow-up as necessary. (Cl. Ex. 1, University of Iowa Hospital Records, 1980)

At the request of claimant's counsel, Paul From, M.D., evaluated claimant on October 6, 1980. His examination findings were expressed in an October 13, 1980 letter addressed to claimant's counsel and included the following history and remarks:

> He has had a long and involved past history which basically indicates that he has been employed as a welder for John Deere of Ottumwa works. On March 1, 1979, he was welding a piece coated with an oil or coolant and each time he welded one of these pieces, there would be a small explosion and fumes would be emitted. He then began to experience a burning in the roof of his mouth and a sensation of a big marble in his throat and a sensation that this had been filed with a rough file. He stated he developed goosebumps on the roof of his mouth and these subsequently evolved into "pus pockets". Since this exposure, he has experienced a sensitivity to industrial fumes which causes problems with mouth, throat and chest on exposure. Among the fumes he has noticed an increased sensitivity are paint, diesel, welding fumes. He experiences no difficulty with dust.
>
> ....
>
> A great deal of past information was reviewed in connection with this case, and this did include office notes from his physicians, including Dr. T. R. Wolf, Dr. Kenneth R. Kingsbury, Sigourney Clinic, Dr. Finneran, and the University of Iowa Hospital notes. These notes did contain a letter from Dr. Kenneth Nugent, and a report from Drs. Olson and Swartz, and a report from Dr. George Hoffman.
>
> Following a thorough examination of all material, including my physical examination of Mr. Newman, it does appear to me that Mr. Newman has, as his most pressing problem, a tendency to inflammation of the buccal mucosa, pharynx and larynx secondary to industrial toxic fumes. He has many other diagnoses, including those of a bipolar affective disorder, mainly a manic-depressive type, and post operative state for knee surgery and removal of umbilicus. He has had questionable mononucleosis in the past. He has lost a portion of the left index finger. Previous thorough studies have failed to document any bronchial mucosal hyper-reactivity.
>
> Mr. Newman does appear to have a hypersensitivity pharangitis [sic] and inflammation of the buccal mucosa. This seems to be aggravated by exposure to any welding, diesel, or paint fumes, and these fumes should be avoided at all times in the future. I believe his hypersensitivity will be permanent and it seems very definitely to be causally related to exposure of fumes at the John Deere plant in the spring of 1979.
>
> No therapy seems to be needed for Mr. Newman at this time, other than for avoidance to fumes to which he has developed hypersensitivity. He does require active therapy of his bipolar affective disorder. He is not otherwise industrially disabled, except for the avoidance of fumes as described. (Cl. Ex. 1, From records)

Hal Bates Richerson, M.D., is director of Allergy-Immunology at the Department of Internal Medicine at the University of Iowa Hospitals and Clinics. Dr. Richerson has a specialty in internal medicine with a subspecialty in allergy and immunology and was retained by defendant to examine claimant. In a letter dated January 8, 1981, and addressed to Dr. Herrick, the results of Dr. Richerson's examination were expressed:

> Your patient was seen in the Allergy Clinic on January 5, 1981 with the diagnoses of 1) bipolar affective disorder and 2) recurrent pharyngitis of unclear etiology.
>
> This 37 year old white male is referred from John Deere with a history of recurrent bouts of throat soreness, hoarseness, chest burning and oil exuding from his chest, each precipitated by exposure to welding fumes or other fumes. These symptoms are attributed to being exposed to certain welding fumes in March of 1979 at work. He is totally asymptomatic when not exposed to the offending gases and is able to work around dust and pollen. He has no cough, rhinorrhea or wheezing. He is on no medications, but has been on Lithium in the past for bipolar affective disorder.
>
> The physical exam reveals a robust white male in no acute distress with pressure of speech and flight of ideas. The HEENT exam revealed nasal septal deviation to the right and a small amount of yellow drainage in the left naris. The oropharynx was within normal limits with residual left tonsil. The neck was non-tender with full range of motion. The lungs were clear to auscultation and percussion. The cardiac exam was normal. The abdomen was flat, non-tender, and had no organomegaly. The extremities were without edema.
>
> We find no allergic basis for this patient's symptoms, which he dates to occupational exposure. He is to be seen by the Department of Industrial Medicine today to get a complete history of toxin exposure. He is also scheduled to see a psychiatrist soon; consideration needs to be given for treating his near-manic status. One consideration for possible further evaluation would be to see the patient after he purposely inhales diesel fuel. It is unclear if there would be any objective signs after such a challenge, however. No return appointment is scheduled.

P.S. Dr. Donald P. Morgan, Department of Preventive Medicine, is to send a separate report concerning likelihood of symptoms being related to environmental exposure. (Cl. Ex. 1, University of Iowa Hospital records, 1981; Def. Ex. 3)

J. C. N. Brown, M.D., who specializes in psychiatry, evaluated aimant on January 30, 1981 and March 10, 1981 at the request Dr. Herrick. He reviewed claimant's records from the University spitals Department of Psychiatry concerning the period from cember 1976 to January 1978. In a letter dated March 12, 1981 d addressed to Dr. Herrick, Dr. Brown reported his evaluation ndings and diagnosis:

> Patient dates the onset of his present complaint to the spring of 1979. He stated that he became very susceptible to "colds" while working. These "colds" cleared on weekends when not working. He then stated that he began to have a sore throat which caused a "burning in my chest" and he was exhausted. He stated that all these symptoms were brought about by exposure to welding fumes. Towards the end of May of 1979 patient developed "blisters" and a burning sensation in his mouth. "The blisters broke and blood came out my mouth". He gave a list of names of physicians, nurses and other personnel many of whom made dramatic comments on his condition. One physician he stated "looked at my throat, jumped back and said 'you're going to have to stay out of those fumes'". Another person, a nurse, the patient stated said "where did they put you? Its not clean back there. We've got two men in the hospital right now". Another physician, he stated "chewed me out for not wearing a respirator". He felt that there was quite a conspiracy by plant medical personnel against his getting any benefits or consideration for what he feels was a work related problem. He stated that he has consulted with his brother "a smoke doctor in the armed forces" about his condition and he has received much literature from his brother concerning "welding fumes". That he is quite preoccupied with this condition and ruminates on it at length is indicated by the fact that the first interview of two hours was spent only on the present complaint.
>
> Past psychiatric history reveals the patient was seen by Dr. Mahanna, a psychiatrist in Bloomfield, Iowa from 1972 to 1976. The patient states that his diagnosis by Dr. Mahanna was that of "Manic Depressive Disease" and he was treated with various medications including Lithium Carbonate.
>
> The patient was admitted to University Psychiatric Hospital on December 9, 1976 and spent five weeks there. Admitting and discharge diagnosis was that of Bipolar Affective Disorder, Hypomanic State. The patient was treated there with Lithium Carbonate. He was again seen there on an outpatient appointment on January 17, 1977.
>
> In May of 1977 the diagnosis was that of Hypomania. In January, 1978 the patient was again seen. His diagnosis was Hypomanic and he was noted to have many somatic complaints such as right sided abdominal burning, chest burning, dyspnea and cough and an axillary adenopathy. The patient strongly disputes the diagnosis of Manic Depressive Disease and has refused to take medication.
>
> Past medical history reveals the patient had a number of allergies in childhood which caused hives and skin rash.
>
> He has been allergic to smoke, hog dust and corn dust for many years he states. The patient had histoplasmosis and infectious mononucleosis in 1965. He was recorded as having bronchitis in September of 1976 and has been worked up for respiratory problems at the University of Iowa Department of Internal Medicine and, indeed, in many other places. The patient lost the left index distal phalanx in 1966.
>
> Significant past and family history was not discussed in our sessions because of the patient's intensity of preoccupation with this present problem. It is, however, well documented in his previous charts and I shall not reiterate this.
>
> Mental status evaluation revealed Mr. Newman to be a 37 years old caucasian male who looked his age. He was conscious and oriented, sensorially and apperceptually intact. The patient was regarded to have a normal to above normal intelligence quotient, (gross estimate without psychological tests). He was warm, friendly and affable in the interview situation, but certainly felt that he was being interviewed by an adversary. The mood was mildly euphoric. The affect was very intense and was for the greater part devoid of modulation. Thought processes revealed excessive thought production, rapid associational tempo with flight of ideas at times. The patient was quite tangential and circumstantial and, at times, had difficulty making goal ideas. Thought content reveals gross preoccupation with his bodily health and much in the form of hypochonriasis [sic]. He described an infection he had some time ago which "came up out of my lungs, went into my jaws and made my teeth loose". Much, though not all, of his hypochonriacal [sic] preoccupation centers on his upper respiratory system. His apparent inability to leave the subject matter of what he terms his "welding fume" induced upper respiratory problem reveals a frank overdetermined idea in this area. I believe it is significant that the patient apparently appeared for his first appointment and left when he saw some workmen working on part of my office as he felt the air would be unclean. Perception was within normal limits. No unusual mannerisms, grimaces or postures were noted.
>
> Diagnosis:
>
> Three distinct Axis I diagnoses are registered here.
>
> 1. Cyclothymic Disorder, Hypomania (301.13)
> 2. Somatoform Disorder, Hypochondriasis (300.70)
> 3. Biplar [sic] Disorder by history (296)
>
> Recommendations for treatment were not made because of the patient's suspiciousness of this examiner, his unshakable belief that his problem is "physical" and his lack of motivation for treatment. (Def. Ex. 6)

Dr. Brown described a cyclothymia disorder or hypomania as a disorder in mood changes. Hypochondriasis was described as a disorder of bodily preoccupation with the belief in the existence of physical symptoms despite medical evidence which does not substantiate those symptoms. The diagnostic criteria for hypochondriasis, taken from the Diagnostic and Statistical Manual III of the American Psychiatric Association, were identified as: 1) the predominate disturbances is an unrealistic disturbance of physical signs or sensations as abnormal, leading to preoccupation with the fear or belief of having a serious disease; 2) thorough physical evaluation does not support the diagnosis of any physical disorder that can account for the physical signs or sensations or for the individual's unrealistic interpretation of them; 3) the unrealistic fear or belief of having a disease persist despite medical reassurances and causes impairment in the social or occupational functioning (Dr. Brown cited as an example an instance of claimant arriving at his office, but immediately leaving upon seeing workmen and fearing the presence of fumes); and 4) the condition is not due to any other mental disorder such as schizophrenia affective disorder, or somatization disorder. Dr. Brown noted that the diagnosis of bipolar disorder was made strictly by reference to the University of Iowa records, and that claimant did not appear to be psychotic during the evaluation. (Brown Dep., pp. 19-27)

Dr. Brown noted that claimant had admitted to symptoms indicating hypomania since at least 1972, and was of the opinion that claimant had had hypochondriacal symptoms since 1976 or earlier. He stated that while claimant's exposure to welding fumes should not be considered an etiological factor in causing the hypochondriasis condition to exist with claimant, it certainly could enhance, intensify, or precipitate the condition (as could other stresses such as the mail box incident or a divorce). Dr. Brown testified that he did not observe indications of malingering or conscious manipulation on the part of claimant. At one point Dr. Brown stated "but it should be remembered that Mr. Newman, although very genuine and non-malingering has absolutely a one-track mind when it comes to his condition. This man is convinced that exposure to welding fumes caused all of his physical condition." (Brown Dep., pp. 35-39, 47-49) When questioned as to the permanency of claimant's perception that welding fumes have caused his problems, the following exchange took place between Dr. Brown and counsel for claimant:

> A. We have no indication that the patient has documented diagnosis of allergies to hog dust and other such fumes. But he is still quite preoccupied with those. It is my opinion that the patient will likely continue to have a preoccupation with diesel fumes and continue with what he feels is the absolute--with absolute certainty that the relationship between those fumes and the cause of his physical symptoms were continued but will diminish with intensity as time goes by but will continue.
>
> Q. Would you say that it will continue for an indefinite period of time, Doctor?
>
> A. I think that is likely. Certainly, that is a possibility.
>
> Q. Would Mr. Newman be a difficult patient to treat?
>
> A. Yes.
>
> Q. Why is that?
>
> A. Because of his lack of motivation of treatment based upon his being thoroughly convinced that he is mentally and emotionally well balanced and that any physical symptoms that he has are caused by diesel fumes and exposure to the atmosphere where he felt he was made to work.
>
> Q. And is this real to him?
>
> A. This, I believe, is very genuinely held by him and contentiously held by him. It's real. It's real to him.
> (Brown Dep., pp. 71-72)

Todd F. Hines, Ph.D., a clinical psychologist, evaluated claimant on April 25, 1981 and April 28, 1981 at the request of claimant's counsel. In addition to interviewing claimant, Dr. Hines administered a standard test battery designed for accident and injury situations. Dr. Hines indicated that psychological testing was of somewhat greater benefit in evaluating a patient such as claimant, who is difficult to interview and get a history from. He reviewed the extensive medical records compiled at the University Hospitals in Iowa City and obtained a history from claimant of exposure to welding fumes with the subsequent arisal of respiratory problems and blisters in the throat. Claimant indicated to Dr. Hines that he was no longer able to

work in situations where there might be fumes. (Hines Dep., pp. 3-8) Dr. Hines summarized his findings:

> I think it is clear that psychologically there is a preexisting condition involved here. He has a history of what has been called by various diagnostic labels essentially manic episode dating from at least 1972, which may also involve a kind of bipolar either manic or depressive phases, so I think it it clear that there has been a preexisting psychological condition.
>
> It is also clear to me that that psychological condition has been aggravated or intensified by this situation that occurred in 1979 that involved his work. This gentleman is still, in my opinion, very anxious and very agitated by this particular set of circumstances. It is almost exclusively his focus. It is very difficult on occasion to get Mr. Newman to talk about anything other than his disability and what happened to him at John Deere.
>
> He is very strongly preoccupied with that series of events and his concern about that series of events. It is of interest to me that he does show in the testing some reactive depression. He does not show at this point the kind of -- what is often referred to as endogenous depression, the kind of depression that is related often to some kind of bipolar swing but rather shows reactive depression that I feel is certainly related to his concern and his preoccupation with the incidents at John Deere and the fumes and the strong anxiety and concern of the depression that he has in relation to his future.
>
> He is very, very concerned about his future, believes strongly that he has been disabled and that his activity is constrained. Mr. Newman is of better than average intelligence. He is very work-oriented. The vocational testing that was done is clear in indicating that he has derived a great deal of his self-image and self-worth from his ability to work, and this injury -- if we would call it that -- certainly this set of circumstances that has impacted on his health he believes has basically robbed him of the ability to work, and out of that it is causing him not only a very high anxiety level and some reactive depression, I think it is heightening his manic activity.
>
> I think it has left him in a position where his sense of worth and self-image has certainly been damaged. One of the concerns that I have about Mr. Newman is that I think it is going to be very difficult for him to ever return to an industrial situation, and as nearly as I can tell, it may be very difficult for him to return to an agricultural situation, at least to be involved directly in farming because of his very great concern about fumes.
>
> I am not sure what this man is going to do vocationally, and I'm very concerned that he is not going to be able to do very much vocationally which could have a great deal of impact on him psychologically. (Hines Dep., pp. 8-11)

Dr. Hines discussed the interaction between claimant's physiological conditions and psychological conditions, noting that if an individual genuinely believes that something is true, then, in fact, it becomes true for them. Dr. Hines found no indications of conscious manipulation or secondary gain in his evaluation. He stated:

> The point that I think is cogent here in this situation is that Mr. Newman genuinely believes and, in fact, is preoccupied in large measure by his belief that he has been injured at work, that he has been injured by these fumes that issued from that welding process and that that disability is permanent and it is something from which he cannot escape.
>
> He has in his mind genuinely sought relief and continues to seek relief, and he cannot find it. That kind of manipulation is not conscious and does not have secondary gain associated with it. In other words, Mr. Newman, as nearly as I can tell, not just from the knowledge that I have of the situation but from him, his reaction is he has much more to lose by being injured than he has to gain.
>
> There is certainly no profitability here associated with his disability. He is genuinely concerned about his loss of work capacity which may, I think, in his mind be permanent. (Hines Dep., pp. 13-14)

Dr. Hines stated that the nature of claimant's preexisting condition, the basic manic condition, will be very difficult to treat therapeutically. He opined that claimant's preoccupation with exposure to fumes is permanent, and further, that claimant's perceived disability and the cause thereof has generated such intense psychological and emotional reactions that he could potentially become dangerous to himself or others if exposed to noxious fumes. Dr. Hines had reviewed the report of Dr. Brown and found his diagnostic statements to be consistent with the test data. (Hines Dep., pp. 11-12, 17-18)

Dr. Hines conceded that any event which claimant determined to be traumatic could trigger or aggravate his preexisting condition. When questioned as to the possible effect of divorce or the mail box incident upon claimant's preexisting condition, Dr. Hines related that those matters were not discussed and that his strong focus was on his disability and what he believed to be the cause thereof. At one point Dr. Hines stated:

> In simplest terms Mr. Newman was able to work prior to his situation in 1979 involving the fumes, and Mr. Newman was work-oriented and felt good about his ability to work and described himself and believed himself to be a hard worker and a productive worker, and subsequent to this industrial situation in 1979 he sees himself as unable to work. (Hines Dep., p. 19)

Dr. Hines testified that claimant tested slightly above average on an IQ test, but that it is unlikely that he could at this time successfully complete a college education due to his emotional condition. (Hines Dep., pp. 40-41)

Claimant called a number of lay witnesses to corroborate his complaints. Dan Hedlund, a farmer, testified that he has known claimant since 1969. He recalled seeing white blisters in claimant's throat and on his tongue. He also testified to having observed claimant holding a hand over his mouth and nose while standing near a running diesel tractor. (Tr. Vol. I, pp. 4-10) Larry Blomme, a farmer and friend of claimant, testified that before 1979 claimant repaired his farm equipment. After leaving his job claimant attempted to work on three of Mr. Blomme's tractors, but had to stop when he was unable to tolerate solvent fumes. (Tr. Vol. I, pp. 15-32) Dean Sylvester, a welder and mechanic, testified that he had known claimant for ten years and that he and claimant had done some mechanical work in the past. He testified that he observed large blisters and redness in claimant's throat on several occasions following December of 1979. (Tr. Vol. I, pp. 34-41) Harold Curtis, a farmer and friend of claimant, testified that claimant had done the majority of his equipment repair work prior to December of 1979. He also testified that he has observed white pus pockets the size of peas in claimant's throat. (Tr. Vol. I, pp. 56-77)

Fred Donovan Propp, defendant employer's manager of mechanical services and plant engineer, testified as to the ventilation system in the building wherein claimant worked. He outlined the building's ventilation system in a report dated May 11, 1981:

> Building C-5 is 27' high under the roof which provides a large volume for welding fumes to rise upward away from the welding personnel.
>
> The welding area is enclosed from 10' above the floor to the roof to contain the smoke. There are three separate areas over the welding booths.
>
> Within the curtained areas we supply 55,000 cubic feet per minute of fresh outside air that is heated if needed through the makeup air units. Roof exhausts are provided which exhaust 64,000 CFM. Also, there are 14 electrostatic precipitators within these enclosures which remove 70,000 CFM of air, clean it and discharge it outside of the curtained areas.
>
> The combination of fresh air and recirculated air within these curtained areas provides a complete change of air in each of these enclosed areas as shown on the attached chart ranging from 3.6 minutes to 4.5 minutes per air change.
>
> Allowable OSHA iron oxide concentration is $10mg/m^3$. This design provides for a calculated contamination of 1/2 the allowable, or 5 mg/cubic meter.
>
> Approximately 2,500 CFM of air per welder is required to maintain an iron oxide level of 5 $mg/meter^3$ which is provided with the equipment installed.
>
> Also, each welder is provided with a 20 inch pedestal fan to move the smoke away from his face as he welds.
>
> The area was OSHA inspected (Ambrose Claus and Jerri Wilkerson) at 3:15 p.m. on 13 Februar/ 1975 before the curtains and electrostatic air cleaners were installed and no citation was issued. Everett Loy inspected the welding department 1-6 December 1976 - no citation was issued. It was again inspected by Loy on 11 July 1979 and no citation issued. (Def. Ex. 13)

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).

In Cedar Rapids Community School v. Cady, 278 N.W.2d 298, 299 (Iowa 1979), the Iowa Supreme Court discussed the meanings of "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 v. 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).

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.

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

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.

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, 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.

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).

The opinion of the supreme court in Olson, 255 Iowa 1112, 1121, 125 N.W.2d 251, 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. * * * *

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), 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 Code section 85.39 provides in 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. The physician chosen by the employee has the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination.

ANALYSIS

The first issue stated on appeal by defendant is whether the deputy erred in that the decision was not supported by substantial evidence and was contrary to the evidence presented. The argument presented under this broad heading essentially is that it is unconscionable to require defendant to bear responsibility for claimant's psychological condition after March of 1979, when claimant's history documents numerous psychological problems since at least 1972. It is also asserted that claimant's failure to note on a preemployment medical questionnaire that he had received treatment for a mental disorder should operate as a bar to defendant's responsibility. As noted in the applicable law section of this decision, an employer takes an employee subject to any active or dormant impairments which he may have. A work related aggravation of such a condition or impairment may be compensable under the workers' compensation laws of Iowa. When asked during a preemployment medical examination if he had ever been or was presently being treated for a mental disorder, claimant answered negatively. Such an inaccuracy or misrepresentation, however, is not a defense to an employee's action under the Iowa workers' compensation laws.

The second issue stated by defendant is whether the deputy erred in finding that claimant sustained the burden of proving that an employment incident or activity was a proximate cause of any health impairment on which he bases his claim. Defendant denies that any incident or activity of employment proximately caused claimant's disablement, rather that the disablement was the culminating result of a long history of psychological problems which first manifest themselves many years prior to his employment with defendant. The medical records in this case indicate that claimant had indeed demonstrated psychological problems since at least 1972. Furthermore, the testimony of Dr. Brown and Dr. Hines confirm that claimant had existing psychological problems in March of 1979. Both noted claimant's preoccupation with the incident of March 1, 1979 wherein he claims to have had his throat scalded with welding vapors, and the inability to rid himself of that fixation. Dr. Hines testified that despite there being no medical evidence of physical impairment, claimant genuinely perceives himself to be unable to function in areas where industrial fumes exists. Simply put, claimant was able to work as a welder and farmer prior to the March 1979 incident, and subsequent to that incident he sees himself as unable to work. Both Dr. Brown and Dr. Hines believe that claimant's psychological impairment concerning his ability to work is permanent, and found no indications of malingering or profit motive. For the foregoing reasons it is held that the alleged scalding to the throat which claimant received on March 1, 1979, whether it be real or merely imaginary, was the proximate cause of the disability upon which he now bases his claim.

The third issue stated by defendant is whether claimant sustained his burden of proving that he received an injury arising out of and in the course of his employment. It has already been established that claimant's causative injury was the welding incident of March 1, 1979. The element of "in the course of" refers to the time, place, and circumstances of the injury. Claimant's fixation with industrial fumes manifested itself following a welding incident while claimant was performing a job for defendant during his regular work hours. As such, claimant's injury is found to have been in the course of his employment. The element of "arising out of" refers to the cause and origin of an injury. The injury must have been a rational consequence of a hazard connected with the employment. There is little doubt that the explosion which claimant claims to have occurred at the point of the weld while he worked was derivative from the ordinary performance of his work, i.e., a hazard connected with the employment. As such, claimant's injury is found to have "arisen out of" his employment with defendant.

In addition to the issues set forth by defendant, claimant has asserted that the deputy erred by finding that claimant failed to sustain his burden of proving a physical injury to his throat or chest as a result of the March 1, 1979 incident and subsequent exposure to fumes while working for defendant. A number of physicians have examined claimant since March of 1979, but none of these build a strong case for finding a causal relationship between claimant's work and abnormalities in his throat or chest.

Dr. Herrick believed claimant to be suffering from a hyperventilation syndrome caused by stress or tension, and noted none of the telltale signs of an asthmatic condition. On none of the several occasions that Dr. Herrick examined claimant from March to August of 1979 did he record any abnormalities in claimant's mouth or throat. He also found claimant's lungs to be clear and no wheezing was evident.

Dr. Nugent put claimant through pulmonary function tests in July of 1979. He concluded that claimant does not show any evidence of chronic or permanent pulmonary disability. Dr. Nugent further stated that while symptoms of recurrent chest pains are associated by claimant with exposure to welding and paint fumes, he was unable to explain any mechanism for the pain's existence.

Dr. Roffman suggests that claimant suffered from chronic laryngitis secondary to toxic industrial fumes, but apparently reaches his conclusion on an unsubstantiated history provided by claimant. Dr. Roffman's August 1979 report stated that claimant complained of a sore throat while at work, hoarseness, and the development of red papules in the back of his throat which have enlarged and coalesced, all of which had resolved prior to the examination. Dr. Roffman's report stated that there was no respiratory distress, and that claimant's story changed from one minute to the next. As noted by the deputy, Dr. Roffman appears to be acknowledging a stimulous-response relationship without establishing, with any degree of medical certainty, the origin or development of the sensitivity.

Dr. Kingsbury examined claimant in June of 1979 and reported no significant abnormalities and that arterial blood gases, blood count, sedimentation rate, pulmonary function tests, and chest x-rays were all normal.

Dr. From examined claimant in October of 1980 after reviewing office notes from Dr. Wolf, Dr. Kingsbury, Dr. Finneran, Dr. Nugent, and University Hospitals. Dr. From noted that previous thorough studies failed to document any bronchial mucosal hyper-reactivity. He concluded however, based upon claimant's description of "pus pockets" in on the roof of his mouth and a sensation of a "big marble" in his throat, that claimant's most pressing problem was a tendancy to inflammation of the buccal mucosa, pharynx and larynx secondary to industrial toxic fumes. We must agree with

the deputy that the history relied upon by Dr. From in concluding that claimant's problems were causally related to his exposure is dubious at best. Claimant's description of "pus pockets" in his mouth is uncorroborated by the record. Furthermore, the fact that none of the previously compiled medical reports at Dr. From's disposal documented bronchial mucosal hyper-reactivity further detracts from his diagnosis.

Dr. Richarson diagnosed claimant in January of 1981 as suffering from recurrent pharyngitis of unclear etiology. He did not, however, draw any clear conclusions as to the relationship between the symptoms described by claimant and industrial fumes. Dr. Richarson suggested that claimant be evaluated after purposely including diesel fumes, but was not ready to admit that there would be any clear and objective signs after such testing.

Dr. Wolf diagnosed claimant in May of 1979 as suffering from acute bronchitis due to industrial asthma, but knew of no tests which would verify his diagnosis. We agree with the deputy that the testing performed in Iowa City, which did not indicate acute bronchitis, was more credible as concerns accuracy and extensiveness. Dr. Wolf examined claimant a number of times between March of 1979 and September of 1981, but did not observe any abnormalities in claimant's mouth or throat until June 10, 1981, when 30 to 35 hardened vesicles were discovered on the soft palate. At no other time during the previous 27 months, however, did Dr. Wolf observe similar vesicles in claimant's mouth. The doctor's testimony gave no clear indication, nor do we find any indication, that the vesicles in claimant's mouth in June of 1981 were related to the March of 1979 welding incident.

Dr. McMillan examined claimant in August of 1981, finding an atrophic pharyngitis and palate similar to that seen with radiation exposure. It is noted, however, that this exam took place over two years after the welding incident upon which claimant's action rests, and following the first documentation of vesicles in claimant's throat (by Dr. Wolf one month earlier). Dr. McMillan also mentions no history other than claimant's exposure to fumes in 1979. Because of the time lapse between the incomplete history and the fact that the examination took place following the discovery of vesicles in the throat which have not been causally related to the exposure to industrial fumes, the report of Dr. McMillan is given little weight.

Review of the medical testimony and evidence in this case indicates that the deputy was correct in finding that claimant did not establish that his physical complaints are directly traceable to his exposure to welding fumes (the testimony of the lay witnesses has been given no weight as concerns this issue due to their lack of medical training).

The final issue which must be decided is whether the deputy erred by finding that the examinations of Dr. Hines and Dr. From came within the purview of Code section 85.39. Both examinations were for evaluation purposes only, and neither doctor provided further treatment following the examination. Inasmuch as both exams were at the request of claimant's counsel and subsequent to exams arranged by defendant, we find both to fall within the purview of section 85.39.

FINDINGS OF FACT

1. Claimant was first employed by defendant in November of 1978 as a welder.

2. Claimant was doing piecework welding on March 1, 1979 when a coating substance on the metal ignited at the point of the weld.

3. Claimant inhaled smoke from the ignition, and experienced a scalding sensation in his throat.

4. Claimant continued to weld for defendant throughout March and April of 1979, experiencing soreness in the throat through the work week which would clear up over weekends.

5. Claimant was unable to tolerate welding after May of 1979 due to the problems he related to the inhalation of welding fumes.

6. Claimant was assigned to a job spraying rust preventative on steel in June of 1979 and experienced symptoms similar to those experienced while welding.

7. Claimant terminated his employment with defendant in August of 1979 after being told he would have to return to the welding department.

8. Claimant has had a preexisting psychological condition since at least 1972 (diagnosed as cyclothymic disorder, hypochondriasis, and bipolar disorder).

9. Claimant's preexisting psychological condition was materially aggravated by the March 1, 1979 inhalation of fumes while doing piecework welding.

10. Claimant has developed a permanent preoccupation with the avoidance of exposure to industrial fumes.

11. Claimant was 38 years old at the time of hearing with a high school education and some formal mechanical training.

12. Claimant's prior work history was primarily farming and mechanical work.

13. Claimant was able to perform jobs not related to exposure to fumes.

14. Claimant is no longer able to weld, farm, or do mechanic work because of his preoccupation with fumes.

CONCLUSIONS OF LAW

Claimant has met the burden of proving a permanent psychological impairment as a result of the welding incident of March 1, 1979 or subsequent exposure to industrial fumes.

Claimant has established a permanent industrial disability to the extent of 60 percent.

WHEREFORE, the deputy's decision filed August 24, 1982 is affirmed and it is ordered that:

Defendant pay the claimant three hundred (300) weeks permanent partial disability commencing from the date of injury.

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

Defendant is further ordered to pay unto the claimant the following medical expenses:

85.27:

University of Iowa Hospitals	$105.00

85.39:

Dr. From	$150.00

Mileage:

(after July 1, 1974)	.15	$ 30.60
(after July 1, 1979)	.18	$133.20
(after July 1, 1980)	.20	$183.20
(after July 1, 1981)	.22	$ 37.40

The following costs of the proceedings are taxed to defendant pursuant to Industrial Commissioner Rule 500-4.33:

Dr. Wolf deposition	$281.25
Dr. Wolf witness fee	150.00
Dr. Hines deposition	173.00
Dr. Hines witness fee	150.00
University of Iowa Hospitals (reports)	94.00
Dr. From (report)	75.00

Interest shall run in accordance with Code section 85.30.

A final report shall be filed by the defendant when this award is paid.

Signed and filed this 27th day of July, 1983.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

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

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VIVIAN ORR, Claimant, vs. DALE McNAIR d/b/a McNAIR PLUMBING, a/k/a DALE McNAIR PLUMBING, INC., Employer, and MILWAUKEE MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 702608 A P P E A L D E C I S I O N

By order of the industrial commissioner filed March 8, 1984 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; the deposition of Vivian Orr; claimant's exhibit 1 through 3, 7 and 8; and defendants' exhibits A through I and J, all of which evidence was considered in reaching this final agency decision. There were no exhibits 6 and K, and objections to numbers 4 and 5 were sustained.

The outcome of this final agency decision will be the same as that reached by the hearing deputy.

ISSUES

The case was bifurcated and only the issue of the applicability of Iowa law to an out-of-state accident was heard. The arbitration decision held that under the provisions of §85.71, The Code, Iowa does not have the necessary extraterritorial coverage to award death benefits.

Claimant states the issues in her brief:

1. Did the Deputy Industrial Commissioner consider

the entire record made in this case?

2. Did the Deputy Industrial Commissioner promulgate and apply an evidentiary standard which is both too stringent and improper?

3. Is the Iowa Industrial Commissioner vested with subject matter jurisdiction in this case and thus empowered to apply the Iowa Workers' Compensation Act?

4. Is the insurance carrier estopped from denying both coverage and the jurisdiction of the Iowa Industrial Commissioner?

5. The workers' compensation law is to be interpreted liberally in favor of the working man.

EVIDENCE PRESENTED

The arbitration decision contains a good summary of the acts, but they may be recapitulated here to some extent.

The defendant employer, McNair Plumbing, was incorporated as a Iowa corporation on November 1, 1976 under the provisions of apter 496A of the Iowa Code. As work became more scarce, Dale cNair, the president of the company, went to Oklahoma in ebruary of 1981 in an attempt to obtain work for the company. was successful and found a number of jobs. During March of 981, the employer began moving vehicles to Oklahoma. Dale cNair tended to employ Iowans while in Oklahoma; however, cedent was not hired in Iowa.

The McNair family moved to Oklahoma in August of 1981 and e family home at 700 Pleasant Street in Van Meter, Iowa, which s the company business address, was rented. By that time, all the officers, directors and shareholders of the corporation re in Oklahoma.

Dale McNair filed a personal income tax return and a corporate come tax return in Iowa in 1981. All vehicles were licensed Iowa in 1981. An Iowa retail sales tax return shows McNair umbing went out of business (in Iowa) as of September 1, 1981. quarterly report for Job Service in each of the states shows ree quarters of contribution in Iowa and one in Oklahoma. The rporate vehicles licensed in Iowa in 1981 were licensed in lahoma in 1982.

In August 1981, McNair Plumbing purchased real estate in Elk ty, Oklahoma for business purposes. Any remaining work in wa was completed by September 1981.

The decedent, William Orr, went to Oklahoma in search of rk and entered into an oral employment contract with McNair umbing. Decedent was from Winterset, Iowa, and never changed dresses. His spouse remained in Iowa, and Iowa income and operty taxes were paid in 1981. There is really no dispute at decedent was domiciled in Iowa at the time of his death on tober 22, 1981 and that he had no intention to remain in lahoma.

Decedent worked in Oklahoma for the employer as a heavy uipment operator on some five jobs. He visited Iowa twice ring his period of employment and was of some help to the ployer in loading some equipment and draining brakes on one casion and looking at some equipment for potential purchase on e second visit to Iowa. He was not paid wages for working in wa but was given gas money by the employer. It is clear that e great bulk of his work was performed in Oklahoma.

Decedent was killed on October 22, 1981 in Oklahoma while erating heavy equipment for the employer.

APPLICABLE LAW

Section 85.71, The Code, states:

If an employee, while working outside the territorial limits of this state, suffers an injury on account of which he, or in the event of his death, his dependents, would have been entitled to the benefits provided by this chapter had such injury occurred within this state, such employee, or in the event of his death resulting from such injury, his dependents, shall be entitled to the benefits provided by this chapter, provided that at the time of such injury:

1. His employment is principally localized in this state, that is, his employer has a place of business in this or some other state and he regularly works in this state, or if he is domiciled in this state, or

2. He is working under a contract of hire made in this state in employment not principally localized in any state, or

3. He is working under a contract of hire made in this state in employment principally localized in another state, whose workers' compensation law is not applicable to his employer, or

4. He is working under a contract of hire made in this state for employment outside the United States.

Two Iowa cases have interpreted that code section. The ustrial commissioner had initially held that only Iowa icile would be necessary in order to entitle claimant to erage under the Iowa law. The supreme court held otherwise st in Iowa Beef Processors v. Miller, 312 N.W.2d 530 (Iowa 1). In that case, the court said, inter alia:

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. "

....

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 boundaries of the State of Iowa or that such services be attributable to the employer's business 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....There must be some meaningful connection between domicile and the employer-employee relationship.

Then, in the case of George H. Wentz, Inc. v. Sabasta, 337 N.W.2d 495 (Iowa 1983), the court said, inter alia:

Claimant may recover only if his employment was principally localized in Iowa, under subsection 85.71(1)....We must determine whether a meaningful relationship existed between claimant's Iowa domicile and the employer-employee relationship.

In Iowa Beef Processors, Inc., we held the claimant's response to an employer's advertisement in an Iowa newspaper did not constitute the requisite meaningful relationship....Leaving open the question how substantial the relationship need be, we noted, but did not adopt, the model act definition:

....

Based on the enacting clause of section 85.71(1), we ascribed to the legislature an intent that "the employee must perform the primary portion of his services for the employer within the territorial boundaries of the State of Iowa or that such services be attributable to the employer's business in this state," 312 N.W.2d at 533;...We think the facts of this case illustrate the need for the threshold contained in section 7(d)(4)(2) of the model act.

ANALYSIS

Under the first issue, claimant argues that exhibits 4 and 5 should have been admitted into the record; however, those exhibits related only to a dispute in insurance coverage and had nothing to do with the bifurcated issue of extraterritorial coverage. Therefore, no determination of that issue is necessary here.

The second issue is, of course, the main one. The precise question is whether or not the Iowa Workers' Compensation Act extends to Oklahoma and covers the death of decedent in that state on October 22, 1981. Claimant argues that the Iowa cases interpreting §85.71, discussed above, do not apply to the present case. Claimant argues that decedent's domicile in Iowa is an important factor. That may or may not be true, but both claimants in the Iowa Beef Processors case and the Wentz case were from Iowa also.

More importantly, perhaps, is the fact that McNair Plumbing was an Iowa corporation that had been transplanted to Oklahoma, while the employers in the two Iowa cases were not Iowa corporations. In her brief, claimant quotes from §491.13 of the Iowa Code which provides that the principal place of business of an Iowa corporation must be in this state; however, defendants point out that McNair Plumbing was incorporated under chapter 496A which does not require a corporation to designate a principal place of business. Claimant also points out that the president of the defendant employer, Dale McNair, testified that the move to Oklahoma was not intended to be permanent, and that he intended to return to Iowa. However, that testimony (Tr., 70-72) referred to the witness' earlier intentions, before he brought property

and moved all of his equipment to Oklahoma. The record really does not show that Dale McNair had any hope of returning to Iowa by the fall of 1981.

Claimant also argues that McNair Plumbing had a corporate presence in Iowa during the year 1981. It is true, of course, that the move to Oklahoma did not begin until, at the earliest, March 1981. It is only logical that certain indicia of the corporation's presence in Iowa would be in evidence. For example, the McNair family home, which doubled as a business address, was used as the corporate headquarters in 1981, but only until August of that year. Likewise, the corporation did work in Iowa but only through September of 1981. It is likewise true that the corporation maintained a business checking account in Earlham, Iowa but the corporation also had a business checking account in Elk City, Oklahoma. Tax returns were naturally filed in Iowa because income was earned in Iowa. Likewise, vehicles were licensed in Iowa in 1981, but the record also shows they were licensed in Oklahoma in 1982.

When all of these facts are put together, they show that, by the end of September 1981, McNair Plumbing had effectively moved its total operation to Oklahoma.

Next, claimant argues that there was a meaningful connection between decedent's domicile and the employer-employee relationship, citing all of the Iowa connections to the case. Then, claimant cites a "domicile plus" test from 32 Drake Law Review 145, 155 where author E. J. Kelly states: "Perhaps the model act nexus might be phrased in terms of a domicle plus test. That is, domicile plus substantial time serving the employer in Iowa." Claimant points out that the model act, which was referred to by the supreme court with approval, adopts such a test. Claimant argues that "out-of-state work which is attributable to the employer's business in the state as qualifying." (Claimant's brief, 15-16)

Considering the meaningful connection problem, it should be noted that the Iowa court in the Iowa Beef Processors case emphasizes on page 533 that the employment should be "principally localized in this state" and that the "services be attributable to the employer's business in this state." (emphasis added) Clearly, neither of these requirements are fulfilled in this case: Decedent's two trips to Iowa even though they provided some benefit to the employer, were of a minor nature and were incidental to the business in Oklahoma, not the business in Iowa.

Further, decedent would not qualify under the language of the model act quoted above in the applicable law: The employer had no place of business in this state and the decedent did not regularly work from a place of business in this state; also, domiciled in Iowa, he did not spend a substantial part of his time working in Iowa.

It is within the context of these factors that one looks at whether or not there is a meaningful relationship between the domicile and the employer-employee relationship, and here the fact that the employer had moved to Oklahoma negates that meaningful relationship.

As a third issue, claimant argues that the insurance carrier should be estopped from denying Iowa jurisdiction and coverage under their policy in this case. As stated above under the discussion of the first issue, the only issue in this bifurcated case is the extraterritorial jurisdiction of the Iowa Workers' Compensation Act. Therefore, no ruling will be made because that issue is not relevant.

Finally, claimant argues the well known proposition that the workers' compensation law should be liberally construed in favor of the claimant. That proposition, of course, needs no citation. In this case, the facts simply do not end up in claimant's favor, and, given the confines of the court's interpretation of §85.71 and the Iowa Beef Processors and Wentz cases, no construction within reason could support claimant's case.

The findings of fact, conclusions of law and order of the arbitration decision are adopted below:

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant was married to decedent on April 4, 1942.

That decedent entered into an oral argeement in Oklahoma to work for defendant employer.

That decedent died in Elk City, Oklahoma on October 22, 1981.

That domicile of decedent at the time of his death was Iowa.

That decedent was temporarily in Oklahoma to obtain work with no intent to remain there.

That decedent assisted defendant employer with loading equipment, draining brakes, and looking at equipment for potential purchase while he was visiting in Iowa.

That the work decedent did in Iowa benefited the business in Oklahoma.

That decedent was not paid for working in Iowa, but was given gas money.

That decedent did substantially more work in Oklahoma.

That decedent's work for defendant employer in both Iowa and Oklahoma benefited the employer.

That at the time of decedent's death defendant employer had a policy of workers' compensation which restricted its coverage to Iowa.

That defendant employer was incorporated in Iowa on November 1, 1976.

That Dale McNair went to Oklahoma in February of 1981 to find work for his company.

That defendant employer did a number of jobs in Oklahoma.

That beginning in March 1981 defendant employer began moving vehicles to Oklahoma.

That defendant employer employed Iowans in Oklahoma and paid wages subject to Oklahoma taxes.

That McNair's family moved to Oklahoma in August of 1981 and the family home at the company business address of 700 Pleasant, Van Meter, was rented.

That the move to Oklahoma resulted in all officers, directors and shareholders of the corporation being in Oklahoma.

That in August of 1981 property was purchased in Oklahoma.

That Ed McNair completed work in progress in Iowa in September 1981.

That defendant employer employed an Iowa accountant.

That no contributions were made to the Iowa Department of Job Services in the fourth quarter of 1981.

That unemployment contributions were made in Oklahoma in the final quarter of 1981.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That tne Iowa Workers' Compensation Act cannot be applied to the injury to decedent in Oklahoma thereby entitling claimant to workers' compensation benefits in Iowa.

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 at Des Moines, Iowa this 21st day of June, 1984.

Appealed to District Court;
Affirmed

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD W. OSBORNE,	:	
Claimant,	:	FILE NO. 691942
vs.	:	R E V I E W -
CITY OF COUNCIL BLUFFS,	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
ARGONAUT INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Donald W. Osborne, claimant, against City of Council Bluffs, employer, and Argonaut Insurance Companies, insurance carrier, for the recovery of further benefits as the result of an injury on December 27, 1981. Claimant's rate of compensation as agreed by the parties is $183.27. A hearing was held before the undersigned on March 31, 1983. The case was considered fully submitted upon completion of the hearing.

The record consists of the testimony of claimant, Tim Thomas Watts and Mary Ann Osborne; claimant's exhibits 1-22 and defendants' exhibit A, which is the same as claimant's exhibit 19.

ISSUES

The issues presented by the parties at the time of 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 a question as to 85.27 benefits. The parties stipulated that claimant's healing period ran from December 27, 1981 till June 14, 1982.

FACTS PRESENTED

Claimant testified he was injured while working for defendant on December 27, 1981 when, while picking up a lady who had slipped and fallen and broken her leg, he had a "squashy warm" feeling in his back. Claimant stated he finished loading the

lady into the ambulance, but his pain became worse. That evening claimant was admitted to the hospital. Claimant disclosed that in 1980 he received back injuries as the result of a motor vehicle accident and had been off work 6 months.

Claimant testified that after the auto accident he had no problem performing his duties with defendant and felt good. Claimant stated that after the December 27, 1981 injury he has problems sitting, standing or bending over for a long time and has numbness down his left leg. Claimant indicated that the other member of his team has to cover for him.

On cross-examination claimant revealed that he had a settlement of $10,000 for the accident which occurred in August of 1980. As a result of the auto accident, claimant had back surgery. Claimant testified that he returned to work on June 14, 1982 and has not missed any work since. Claimant also disclosed that on December 25, 1982 he had an accident where he twisted and snapped his back.

Tim Thomas Watts testified he works with claimant for defendant. Mr. Watts stated that he worked with claimant after his auto accident and did not notice that he was having any difficulty performing his tasks or complaining of pain. Mr. Watts disclosed that he was working with claimant when he was injured on December 27, 1981. Mr. Watts stated that claimant was in a very awkward position when he heard claimant's back make a sound. Mr. Watts indicated that claimant froze and then said he had a problem with his back. Mr. Watts stated he noted claimant was having problems after that. Mr. Watts testified that there are days when claimant really has problems and even limps.

Mary Ann Osborne testified that she is claimant's wife and that after his auto accident claimant would be involved with sports, even though he may have had a little pain. Mrs. Osborne stated that since his injury on December 27, 1981 she has noticed that claimant has a problem getting up in the mornings, lays around a lot and uses a heating pad.

Bernard L. Kratochvil, M.D., who testified by way of deposition, indicated that he saw claimant regarding an auto accident which occurred on August 27, 1980. Claimant complained of pain shooting down his left leg. A myelogram was performed and in April of 1981 claimant had a herniated disc removed at L5, S1. Dr. Kratochvil revealed that after the operation claimant continued to have left leg pain. On December 27, 1981 Dr. Kratochvil saw claimant who complained of acute pain after lifting a patient and after examination of claimant, gave a diagnosis of acute lumbar strain. Claimant was hospitalized from December 27, 1981 until January 7, 1982. Because claimant lacked any improvement he was again hospitalized in March of 1982 and another myelogram was performed. Claimant also had a nerve conduction study performed which was unremarkable. Dr. Kratochvil disclosed that claimant continued with conservative treatment. In June of 1982 claimant returned to work. Dr. Kratochvil continued to see claimant and on November 15, 1982 claimant was seen and complained of low back pain with radiation into the left lower extremity. Dr. Kratochvil opined that claimant did injure himself at work. Dr. Kratochvil stated:

Q We do have a report from you that is dated December 21, 1982, and if you have that, you can follow along.

(Pause.)

Q (By Mr. Dahl, continuing) And you say that Donald W. Osborne has persistent lower back pain with radiation into the left lower extremity. "It is my opinion that he has a fifteen per cent permanent partial disability as the result of his injury." Now, my first question is, he's had a serious car accident that resulted in surgery, according to you, and I suppose my question is, are you talking about that he has this fifteen per cent disability as a result of that injury?

A Yes. A disability rating was not -- apparently was not given following his automobile accident.

Q What would you assume that it would be for the type of surgery and the residuals that you observed?

A Following a back surgery with a good result, you're looking at five to ten per cent disability. Again, with his back strain, the fifteen per cent, I think, when I wrote that, included both conditions. And I think that the amount of disability as a result of the incident which occurred at work would be in the range of five to ten per cent.

Q Is there any way that you can even tell that he does have any permanent impairment or disability from that, as opposed to the car accident and the surgery for it?

A There really isn't any way to separate the two. The only thing I can say is that following his injury at work, he didn't have neurologic findings. If he had another herniated disc or something like that, I would have expected him to have some neurologic deficit, loss of reflexes and so forth, and he didn't have those.

Q The fifteen per cent that you're talking about, is that impairment or disability of the leg?

A It's of the body as a whole.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of e evidence that the injury of December 27, 1981 is causally lated to the disability on which he now bases his claim. dish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). ndahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A ssibility 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).

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). 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).

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, 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 his injury of December 27, 1981 aggravated a preexisting back condition. Such a conclusion is supported by the testimony of Dr. Kratochvil and all the lay testimony introduced. No evidence was introduced to the contrary.

Dr. Kratochvil opined that claimant had a 5-10 percent functional impairment to the body as a result of the December 27, 1981 injury. Contrary to defendants' argument, the undersigned does not find the testimony of Dr. Kratochvil to be speculative. Furthermore, the testimony of Mr. Watts supports the fact that claimant has changed since December 27, 1981 and continues to have difficulty doing certain duties. However, functional impairment is only one of the factors in determining a person's industrial disability.

Claimant is 45 years old and a high school graduate. Claimant also has training as an emergency medical technician. Claimant has worked as a mechanic and as a service station attendant. Claimant has worked for defendant since 1968 as a ambulance driver. Since his injury claimant has returned to his former position and has not missed additional time since. Claimant has changed the manner in which he does some of his duties and is helped by his co-worker, but he does perform his duties. It is noted that although claimant appeared to be less

than candid during part of his testimony, the other evidence received supported claimant's testimony. It is determined that claimant has an industrial disability of 12 percent as a result of his injury on December 27, 1981.

The only medical bill that has been presented to the undersigned is the bill from Dr. Kratochvil. It would appear that $755.00 of Dr. Kratochvil's bill is causally connected to this injury.

FINDING OF FACTS 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 27, 1981 claimant was injured while working for defendant.

Finding 2. Claimant's injury aggravated a preexisting back condition.

Finding 3. As a result of the injury of December 27, 1981, claimant has a functional impairment of 5-10 percent of the body.

Finding 4. Claimant is 45 years old.

Finding 5. Claimant is a high school graduate.

Finding 6. Claimant has training as an emergency technician.

Finding 7. Claimant has worked as a mechanic and a service station attendant.

Finding 8. Claimant has worked for defendant since 1968 as an ambulance driver.

Finding 9. Claimant has returned to the position he held at the time of his injury.

Finding 10. Claimant has changed the manner in which he does some of his duties but has continued to perform the duties required.

Finding 11. Claimant's co-worker in some ways has helped claimant.

Conclusion A. Claimant has proved that a portion of his back problems are causally connected to his injury with defendant on December 27, 1981.

Conclusion B. As a result of his injury of December 27, 1981, claimant has a permanent partial disability of 12 percent.

Finding 12. As a result of his inury on December 27, 1981, claimant has incurred doctor bills in the amount of $755.00.

Conclusion C. Claimant is entitled to reimbursement of doctor bills in the amount of $755.00.

WHEREFORE, defendants are to pay unto claimant twenty-four and two sevenths (24 2/7) weeks of healing period benefits at a rate of one hundred eighty-three and 27/100 dollars ($183.27) per week and sixty (60) weeks of permanent partial disability benefits at a rate of one hundred eighty-three and 27/100 dollars ($183.27) per week.

Defendants are to reimburse claimant the sum of seven hundred fifty-five and no/100 dollars ($755.00) for medical expenses.

Defendants are to reimburse claimant forty-eight and 96/100 dollars ($48.96) for mileage.

Defendants are to be given credit for benefits previously paid.

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.

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 22 day of August, 1983.

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MRS. FAYE J. PALMER, as Executor of the Estate of RICHARD L. PALMER, Deceased, and as surviving spouse of RICHARD L. PALMER, Deceased,	:	File No. 732625
Claimant,	:	A R B I T R A T I O N
vs.	:	D E C I S I O N
JOHN SABIN,	:	
Employer, Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Faye J. Palmer, the claimant, against her husband's employer, John Sabin, to recover benefits under the Iowa Workers' Compensation Act as a result of the death of her husband on September 3, 1982.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Dubuque Building in Dubuque, Iowa on August 31, 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 June 17, 1983. There are no other official filings.

The record in this case consists of the testimony of Faye Palmer, John Sabin, Tom Scheckman, Clyde Palmer, Mike Zearley, Orville Fensterman, Lyle Culper, Charles Gull; claimant's exhibits A through F, inclusive; and defendant's exhibit 1.

ISSUES

The issues to be resolved include whether there existed an employer-employee relationship between Richard Palmer and John Sabin on the date of claimant's death, and whether that death arose out of and in the course of his employment. There is an additional issue of the applicable rate in the event of an award.

REVIEW OF THE EVIDENCE

The parties agreed that the date of Mr. Palmer's death was September 3, 1982.

Faye Palmer, age 45, and Richard Palmer's spouse, testified in this case. Faye and Richard Palmer were married on June 21, 1974 and remained continually married up until the date of his death.

This witness' version of the facts is that her husband had worked for John Sabin "off and on" during 1982. He did odd jobs such as shelling corn or other chores. He was always paid in cash. She describes Richard as a handyman with an ability to perform many different jobs. Richard farmed and ran a sawmill from his property. He occasionally cut wood in the sawmill for neighbors. Mrs. Palmer denied her husband was going to use the timber he was cutting on the Sabin property for his own use. She also denied that he cut timber for other people. She conceded that Richard always did his own farm work first before he did odd jobs for neighbors. In contrast, she denied he set his own hours when working for neighbors. She confirmed he did many odd jobs for numerous people in the area. This witness does not know if John Sabin directed claimant's actions on the date of his death. She confirmed claimant used his own tools and trailer when logging for John Sabin.

She denied claimant ever cut timber on a shares basis.

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

John Sabin was called as an adverse witness by the claimant. Mr. Sabin is a farmer by trade. He confirmed that Richard Palmer was killed on his property while cutting timber. Mr. Sabin was present on the date of the incident. This witness stated that Richard was to cut and mill the timber and he and Mr. Sabin would then share the lumber. He described this as cutting on shares. Mr. Sabin was also interested in clearing the land in question and had two bulldozers working in the same vicinity on the date of claimant's death. Mr. Palmer commenced cutting on the morning of his death. This witness indicated he had not worked eight days. This witness then testified regarding the facts of claimant's death. Mr. Sabin confirmed that Richard had assisted him with numerous odd jobs since 1980. Prior to that he had helped Sabin build a home in 1973. This witness denied Richard was to receive $8.00 per hour for his labor. He reiterated that the work was being done on a shares basis.

Mr. Sabin confirmed that on the date of claimant's death he was using his own chain saw, trailer, gas, oil, and other lumbering equipment. This witness did not direct Richard on the manner of cutting the trees; he simply wanted them cut down and milled.

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

Tom Schreckman, a local farmer, testified in these proceedings. This witness helped Richard and John Sabin load logs on or about the date of injury. He confirmed claimant's trailer was used in this procedure. This witness was told by Richard that the lumber he was going to cut from John Sabin's property was done on a shares basis.

Clyde Palmer, Richard's son, testified in this case. He is married and does not live at home. However, he saw his father

regularly. He confirmed that claimant did a variety of tasks for John Sabin.

Mike Zearley testified that he was present on the date of injury. He was assisting in clearing the land when claimant was killed. He confirmed the facts of claimant's death. He also confirmed that on the date of injury Richard was using his own equipment and was not being supervised by John Sabin.

He indicated claimant told him the wood was being cut on shares.

Orville Fensterman, a retired farmer, confirmed that Richard had milled some lumber for him. He directed claimant in the milling process.

Lyle Culper, a retired farmer, testified that Richard had done odd jobs for him since 1980.

Charles Gull, a local farmer, also testified that Richard had performed a variety of odd jobs for him over the years. Richard always used his own tools and equipment to perform these jobs.

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

The exhibits submitted at time of trial and contained in this record have also been reviewed and considered in the final disposition of this case.

APPLICABLE LAW

The factors by which to determine whether an employer-employee relationship exists are (1) the right of selection, or to employ at will; (2) responsibility for the payment of wages by the employer; (3) the right to discharge or terminate the relationship; (4) the right to control the work; and (5) is the party sought to be held as the employer the responsible authority in charge of the work or for whose benefit the work is performed. In addition to the five above named elements is the overriding element of the intention of the parties as to the relationship they are creating. Henderson v. Jennie Edmundson Hospital, 178 N.W.2d 429, 431 (1970). Standing alone, this intention of the parties as to the relationship created may be somewhat misleading. However, community custom in thinking that a kind of service is rendered by employee is of importance. Nelson v. Cities Service Oil Co., 259 Iowa 1209, 1216, 146 N.W.2d 261, ___ (1967).

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

The fact that a stated commission is paid in lieu of wages is not in any sense controlling. Mallinger v. Webster City Oil Co., 211 Iowa 847, 858, 234 N.W. 254 ___ (1931). The cases also indicate that the test of control is not the actual exercise of the power of control over the details and methods to be followed in the performance of the work but the right to exercise such control. Lembke v. Fritz, 223 Iowa 261, 266, ___ N.W.___, ___ (1937).

ANALYSIS

The primary and most important issue in this case concerns whether on September 3, 1982 Richard Palmer was an employee of John Sabin as contemplated by the Iowa Workers' Compensation Act. After examining the entire record and closely reviewing all the testimony, and applying the applicable case law, the undersigned is of the opinion that there was no employer-employee relationship between the aforementioned individuals.

At best, the parties' relationship might be described as a joint venture. Richard and John were operating jointly to cut, mill and eventually share the lumber. No wages were paid one to the other. Richard used all of his own equipment in the endeavor. John Sabin did not exercise control over the work as contemplated by the law.

Counsel for the claimant argues for liberal interpretation. This concept appears to the law of the case, not the facts.

FINDINGS OF FACT

That Richard Palmer was killed on September 3, 1982 while cutting timber on property owned by John Sabin.

That timber was to be cut and milled by Richard in his own mill and then shared with Sabin.

That Richard used his own tools and equipment in the cutting project.

That John Sabin did not exercise control over the project.

That claimant set his own hours to work.

That claimant was primarily a farmer and did numerous odd jobs for other farmers.

That on September 3, 1982 there did not exist an employer-employee relationship between Richard Palmer and John Sabin.

CONCLUSIONS OF LAW

That claimant failed to establish by a preponderance of the evidence the existence of an employer-employee relationship on September 3, 1982.

ORDER

THEREFORE, IT IS ORDERED:

That claimant shall take nothing from these proceedings.

That the costs of this proceeding are taxed to the claimant pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this ____ day of November, 1983.

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JON A. PATCHIN,	:	
Claimant,	:	
vs.	:	
KROBLIN TRANSPORTATION,	:	FILE NO. 685669
Employer,	:	A R B I T R A T I O N
and	:	D E C I S I O N
GREAT WESTERN CASUALTY CO.,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Jon A. Patchin, against Kroblin Transportation, employer, and Great West Casualty Co., insurance carrier, for benefits as a result of an injury on October 25, 1981. On December 13, 1982 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, Jeane Patchin, and Norman G. Young; claimant's exhibits 1-24; and defendants' exhibits A-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; and the extent of temporary total benefits he is entitled to. At the beginning of the hearing defendants stipulated that claimant's injury arose out of and in the course of claimant's employment.

FACTS PRESENTED

Claimant testified that he drives a truck for defendant and on October 25, 1981 received an injury as a result of a motor vehicle accident. Prior to the accident claimant had not been feeling well and was on medication for high blood pressure as well as a diabetic condition. Claimant stated he did not remember what happened at the time of the accident but remembers being placed in the ambulance and was taken to a hospital. Claimant revealed that the left side of his head was injured as well as some ribs. Claimant evidently also suffered a punctured lung. While hospitalized claimant also developed pneumonia. Claimant indicated that while at the hospital the doctors cut his Diabinese, to treat his diabetes, in half.

Claimant disclosed that he was released and his parents brought him back home. He remained under the care of R. D. Buckles, M.D., and took 6 to 8 aspirin a day for his pain. On December 8, 1981 claimant was again hospitalized, but claimant indicated he did not remember much else. After 3 or 4 days in the hospital claimant was again released and again started taking aspirin for the pain caused by his ribs. Claimant again became confused and was hospitalized. Claimant disclosed that he was taken off Diabinese and aspirin.

Claimant indicated that Dr. Buckles referred him to Marvin F. Piburn, Jr., M.D., who ran tests and indicated claimant's condition could affect his driving. Claimant indicated he never went back to see Dr. Buckles after December of 1981. Claimant stated he felt he could have driven in February of 1982 if he had been given back his license. Through the help of his attorney, he got his license back on July 30, 1982. Claimant testified he was fired because of the accident, but became reinstated in August of 1982.

On cross-examination claimant stated that he has been driving full time since August 26, 1982 and felt he was physically able to drive after January 1, 1982.

Claimant's wife, Jeannie Patchin, testified that after leaving the hospital claimant took aspirin to relieve his pain and that she brought claimant back to the hospital because of his confused state. Mrs. Patchin disclosed that claimant received workers' compensation benefits until the first week of January 1982, but has not received them since.

Marvin F. Piburn, Jr., M.D., who testified by way of deposition indicated he has a pain management and psychiatric practice and first saw claimant on December 23, 1981. Dr. Piburn stated:

> A. Okay. Well, he was initially referred because he was acting very peculiarly and he was having pain in his chest and he was hyperventilating and having very strange-looking spells where he didn't seem to be completely alert. On one occasion

he was noted to be stiffened out. On other occasions he was more alert -- more awake, rather, but still not normally alert. And they weren't sure what they were seeing, so they asked me to come over and talk to him and see if I could tell if it was a mental problem or a physical one.

And I came over. I discovered that he had a truck accident October 25, 1981, a very serious accident. He had extensive rib fractures. He had a flailed chest. He had an infection in his chest. And then when they finally got that cleared up to a reasonable degree, they sent him home.

....

Q. Did his record, either history or the records that were provide you, indicate if he had injury other than the chest area?

A. Certainly. He had laceration of the left side of his forehead. I always take note of head injuries because when you have someone that behaves abnormally, you want to know about earlier head injuries. Now, in this case we have an individual who very nearly died in a truck wreck. It was a very serious set of injuries. And even though the head injury was overshadowed at the time because of the immense amount of trouble he had with his chest, it was still noted that he had head trauma.

Dr. Piburn disclosed that claimant's aspirin level was way too high and that he was hyperventilating because he was being poisoned by the aspirin. Dr. Piburn indicated that on December 24, 1981 claimant's blood chemistries had returned to normal. However, the sleep study during an EEG indicated that claimant might have a predisposition to seizures. Dr. Piburn opined that claimant's reaction to aspirin was a personal peculiarity rather than an overindulgence. Dr. Piburn instructed claimant that he could not drive and notified Dr. Buckles. On July 8, 1982 Dr. Piburn examined claimant again. Dr. Piburn determined claimant was seizure free for an eight month period. Dr. Piburn stated:

Q. Okay. Now, Doctor, based upon your examination of Mr. Patchin and based upon the medical history he gave you together with the medical history from Medical Records and what other physicians provided to you and the examinations done at your request, do you have an opinion based on reasonable medical certainty as to what was the cause of these conditions that you have described that Mr. Patchin suffered?

A. Well, I feel that the --

Q. Do you have an opinion, Doctor?

A. Yes, sir. I have an opinion.

Q. And would you indicate what that is?

A. Well, I think it's clear-cut sequence of events. He had a truck accident sustaining a head injury and a chest injury. He was discharged from the hospital. He was still not completely well. He takes aspirin and experiences an adverse reaction to aspirin provoking hyperventilation.

Q. Do you know why he took the aspirin, what he was treating for the aspirin?

A. He told me his right chest hurt, and I can understand that. And then when he hyperventilated, he had a series of spells which terminated as soon as he stopped overbreathing. And then since that time he's gone on to heal fairly uneventfully and has had no more spells. So that's my impression of the course of events.

Q. So it's your opinion that they all stem from the accident of October 25th?

A. I think that was what started off his problems and I think all of them followed from that.

Q. And the reason why you certified to the Department of Transportationthat he had had a seizure and was unable to drive for a prescribed period of time?

A. I believe the chest pain and the abnormality of the EEG relate to the accident, and I think the aspirin use relates to the chest pain and I think that provoked a seizure. They all hang together in one piece.

On cross examination Dr. Piburn indicated that Iowa City was not aware of an abnormal EEG when they made their report.

In a report dated January 19, 1982 Dr. Piburn stated:

My patient Mr. Jon A. Patchin showed me a letter from you dated January 4, 1982. This referred to his Workman's Compensation claim, file #W 11022 through his employer Kroblin Refrigeration Xpress, Inc. in Waterloo.

Mr. Patchin had a trutk accident October 25, 1981. At that time, he sustained a blow to the left front part of his head that resulted in a laceration plus rib fractures and a rather serious crush injury of the chest that resulted in his needing a machine to breathe for him for awhile and also in a rather bad case of pneumonia that was very hard to clear up. He eventually was discharged to the hospital and sent home to Waterloo. His accident was out of town. At the time he returned home from Waterloo he was not feeling all that well and he was continuing to have some breathing problems and chest discomfort.

Twice, during the month of December, 1981, this man had to be hospitalized at Schoitz Hospital for acute spells of confusion and hyperventilation. These were very peculiar spells. His breathing would increase. The appearance on the chest x-ray would deteriorate and his blood chemistry would alter. The calcium would drop during these episodes and his electrolytes would go out of alignment. No one could figure out exactly what was going on[.] Because [sic] of the extreme confusion that was associated he had an E.E.G. and two computerized head scans. We could find no site of bleeding in the skull. We did find a non-specific abnormality of the E.E.G. during the first study and finally, after a second hospital stay he was transferred to St. Francis Hospital for further observation and while we had him at St. Francis Hospital we did a sleep E.E.G. which is a higher quality study. This second E.E.G. was clearly abnormal. There was a spike wave focus in the left frontal region. This exactly cooresponds [sic] to the region that was injured during his automobile accident.

As far as I can tell, this man breathes rapidly because of the rib injury and because he has a tendency to get infiltrate in the chest. This infiltrate comes and goes. It is a very peculiar thing. The last thing that brought it on was taking too much aspirin for his chest pain. He started to overbreathe and then he had an appearance of infiltrate in the chest x-ray that vanished spontaneously three or four days later when we gave him bed rest and removed the aspirin. His breathing rate, even when he is relatively well is faster than normal. He still has some chest discomfort. I think his breathing difficulties started after he had the chest crushed and the ribs broken in his automobile accident and can be clearly related to the accident. The abnormal E.E.G. in the left frontal region appeared after he had a blow to the head with laceration in the left frontal area. I believe his E.E.G. changes are post-traumatic and are related to the accident. His confusional states represent a psychomotor seizure equivalent.

There was no change at all that this gentleman is going to have a license to drive a motor vechicle [sic] for at least 12 months because it is not acceptable to give a drivers' license to an individual with seizures or spells unless they remain free of seizures, spells and blackouts for at least 12 consequetive [sic] months. Mr. Patchin is a truck driver. This means that he is deprived of his usual and customary livlihood [sic] and as far as I know he is not trained to do anything else. Accordingly, he has not been given a release to his usual job and he will not get the release to his usual job before January of 1983 at the earliest. The injuries and medical problems that led to his work absence are directly related to the accident of October 25, 1981. Despite the statements that were made in your letter of January 4th indicating "you have currently had treatment for several ailments which are not related to your accident". All of the treatment that he has had in November, December and January has been directly related to the accident. He has not had any treatment that was unrelated. The letter that you sent implies that benefits will be cut off. I feel as a physician that cutting off this man's benefits after he has been deprived of his usual and customary employment is not justified. Since the accident on October 25th, 1981 was the result of his loss of employment this will leave him without a job and without an income. I would ask you to review the medical evidence that I have submitted and change this decision. If you find yourself unable to do so please contact me in person and explain your reasons for this decision.

In his report of July 14, 1982 to claimant's attorney Dr. Piburn stated:

I examined Jon Patchin on July 8, 1982. As you know, he suffered an accident October 25, 1981 with crush injury to the chest and he fractured enough ribs to have what we call a flail chest. He deveoped some infection and some infiltrate of the chest at that time, which took quite some time to heal. During the accident he also had a laceration over the left frontal region of his head and he suffered a pretty hard blow to the head on that side. For a period of time he had an abnormal E.E.G. with spike wave focus on the left side. He also proved to be intolerant of aspirin and suffered toxic symptoms from a rather low dose. He hyperventilated for awhile and had metabolic abnormalities. It seemed to me on a clinical basis that he had several episodes of psychomotor seizure. His E.E.G. was abnormal, even after the hyperventilation stopped and all the metabolic changes were gone and also after the aspirin in his system had been eliminated.

Mr. Patchin has now been free of any further seizure-like events for seven months. I x-rayed his chest July 12, 1982. I failed to find anything more than the old fractures of the ribs which are now healed and some degree of fibrosis of the chest. This does not seem significant. Eventhough [sic] Mr. Patchin was told that he might have a diabetic tendency on diet, on July 12th his fasting blood sugar was 129, his non-fasting 11 o'clock a.m. blood sugar was 114 and his non-fasting 4 p.m. blood sugar was 108. These values are pretty normal. The highest blood sugar I documented on him was when we did a blood chemistry profile and this was 132. As far as I was concerned, the blood chemistry profile was normal, except for this borderline

blood sugar. This man will do quite well with his blood sugar as long as he follows a strict 1,500 calorie ADA diet. None of the metabolic changes seen earlier are present now. The University of Iowa repeated his E.E.G. May of 1982 and this is reported to be normal so the E.E.G. changes have also gone away.

SUMMARY: I find no evidence that this man has any residual chest problem or any residual metabolic problem or any persistent E.E.G. changes. His elevation of blood sugar is mild and can be controlled with diet, as far as I can tell. Since the Iowa law allows a person to return to driving after a period of six months free of any seizure-like activity. I see no contraindication to his being given a release to return to work and a release to drive again. He should, of course, follow his diet. He should not take unauthorized medication and he should strictly limit any intake of alcohol.

Donald Bolin, M.D., who testified by way of deposition indicated he specializes in internal medicine and gastroenterology and saw clamant on four occasions the first being on February 1, 1982. Dr. Bolin opined that claimant's hospitalizations after returning to Iowa were caused by excess levels of aspirin in his bloodstream.

In his report dated March 10, 1982 Dr. Bolin stated:

Jack Patchin is a 44-year-old former truck driver for Kroblin. His past medical history is significant in that at the age of 20 he had a non-healing peptic ulcer which resulted in ulcer surgery being peformed at Schoitz Hospital. Apparently for some time after that he did receive vitamin B-12 shots for a mild macrocytic anemia, but it should be noted that he was also consuming a fair amount of alcohol at that time, which could also cause a macrocytosis. His heavy alcohol consumption continued later with amphetamines, and in 1974 he was hospitalized for drug detoxification, under Dr. Della Madellena. At that time he was consuming about a twelve pack of beer daily. Apparently at that time he was quite depressed and displayed some psychotic traits, and was initially thought to be schizophrenic, but later this diagnosis was changed to that of depression with drug intoxication. By his history he has not been a heavy consumer of alcohol since that time, though has continued to drink. He denies consuming alcohol at the time of his accident of 10-25-81. He has a history of hypertension and at one time was treated with Hygroton for this diagnosis; he's not taking this medication at present. He has been a long-term heavy smoker, consuming currently two packs of cigarettes daily.

His family history is significant in that an uncle had diabetes.

In January of 1981 he was placed on Diabinese 250 mg twice daily for diabetes mellitus. Diabinese is a long-action oral drug, and for this reason is particularly likely to cause hypoglycemia in persons who take it but fail to eat regularly. This may lead to confusion and even hypoglycermic coma. Apparently the patient ate only a sandwich on the afteroon [sic] of 10-24-81, then nothing at all on 10-25-81 but continued to take both his Diabinese and his Hygroton.

He was driving his semi-truck along the interstate highway in Indianapolis around 8 p.m. on 10-25-81, and the truck overturned and he was found in a semi-conscious state. Mr. Patchin doesn't remember what happened at the time of the accident. He just remembers awakening in his overturned truck. He was taken to Methodist Hospital in Indianapolis, where he was found to have a blood sugar of 25, which rapidly corrected itself with the administration of intravenous glucose, and his initial decreased level of consciousness rapidly improved. He continued to be rather lethargic for sometime after admission and it was felt this might be due to his head injury, though he was receiving intravenous morphine during this time for chest pains.

It should be noted he had a blood alcohol level done on admission, and it was zero. His serum potassium on admission was markedly depressed at 2.6, undoubtedly due to the Hygroton he had been taking. His injuries on admission included a 3-4 cm laceration of the left forehead. He had a normal CT scan of the head and cervical spine films on 10-25-81. He was also found to have fractures of the ribs 5-9 posteriorly on the right side, and as a result of his chest injuries developed a right hemothorax and bilateral pneumonia, with acute respiratory failure, requiring him to be on a mechanical ventilator.

He had a rather stormy course and had to be on the respirator for a total of a week. He was noted during this hospitalization to have macrocytosis of his red blood cells, though his serum folate and B-12 were normal. He was treated with vitamin B-12. As mentioned earlier in this report he had in earlier years been treated with vitamin B-12 after his gastric resection. Gastric resection is a well recongnized [sic] course of vitamin B-12 deficiency. He was instructed to continue to receive vitamin B-12 shots each month. He was discharged on Tolinase 500 mg daily, a different anti-diabetic drug which is usually a safer medication than Diabinese in those who eat irregularly, since it's got a shorter period of action. Later Lopressor and Hygroton were added to his medications to control his blood pressure.

In late November, 1981, he began to display confusion, and on December 8, 1981 he was admitted to Schoitz Hospital because of this confusion. He had some tests done as an outpatient during the previous week, including a normal CT scan of the head, and a fasting blood sugar of 60. Because of the low blood sugar all of his medications were discontinued, but he continued to have problems with confusion, and therefore was admitted to Schoitz. An EEG was done and was essentially normal. During his early hospitalization he displayed confusion and hyperventilation with electrolyte abnormalities. This condition spontaneously cleared up and he was discharged home.

He again began displaying the same symptoms, and finally became rigid and unresponsive, and was readmitted to Schoitz on 12-18-81. He was very confused and agitated after admission, and had to be restrained for three days. He was found to have a very toxic level of salicylate in his blood stream of 54.5. He again showed the same metabolic abnormalities that he had displayed on the previous hospitalization, and these abnormalities and his mental abnormalities all spontaneously resolved. He also had hydroxyzine, and again was normal. When he became coherent he gave a history that he had been taking Aspirin for pain. He had a normal skull x-ray and EKG, and a spinal tap showed normal fluid except a slightly elevated protein of 74 (45 upper limits of normal).

On 12-23-81 he was transferred from Schoitz Hospital to the psychiatric ward at St. Francis Hospital, where he was under the care of Dr. Marvin Piburn. He was mentally completely clear during that hospitalization, but did leave the hospital sooner than was wished by Dr. Piburn. He was dischared on Tranxene, a mild tranquilizer, which was prescribed mainly for anxiety, but also because it has the effect of suppressing minor seizures, though no such diagnosis was documented or placed on the patient. Since his discharge he had not had any particular problems. There have been no further episodes of loss of consciousness or confusion. There has not been any obvious change in behavior.

A complete physical examination was performed in my office on 2-1-82. At that time the vital signs showed a blood pressure of 150/90, pulse 104, weight 165 pounds. The patient's general appearance was unremarkable, seeming to be that of a rather quiet, stoical man of slightly below average intelligence. He is frankly a rather poor historian; this seems to not be due nearly so much to decreased mental ability or memory as it is to a tendency of the subject to minimize any mental or psychiatric difficulties he has had in the past. He is quite voluble about the medical aspects of his history, but very reticent about the psychiatric aspects. The examination showed a small scar 5 cm in length over the left forehead. The tympanic membranes showed some old scarring. The mouth is edentulous, the throat normal. The pupils are equal, react normally to light, and show normal fundi, with full visual fields to confrontation. The neck shows a full range of motion, and the thyroid is unremarkable. The chest is slightly hyperresonant, with good breath sounds, and no obvious residual rib deformities. The heart is normal sized, with good heart tones, and no murmur or gallop, with normal pulses. The abdomen is soft, nontender, with no masses or organomegaly. Bowel sounds are normal, with no bruits or hernias. The genitalia are normal, with both testes in the scrotum, and the rectal exam shows a normal prostate. The extremities show tatoos on the left arm and right leg, and he has slight osteoarthritis involving the distal interphalangeal joints. Neurological exam showed cranial nerves 2-12 to be intact. Deep tendon reflexes were brisk and symmetrical, with negative Babinski signs. The gait was normal, with coordination being excellent, with no atoxin. The cutaneous sensation to light touch is intact, and muscle tone is normal throughout. The patient can perform serial 7's well. He interprets proverbs in a rather literal and ineffective but not in any way inappropriate, way; so this appears to be mostly a reflection of intelligence and literacy. Memory, both recent and remote appears intact except for the immediate events surrounding his recent hospitalization, about which he has some amnesia. He is, though, as mentioned earlier, a very reluctant historian, and volunteers little when discussing some events.

My conclusion about this case are as follows: This is a man with a long history of substance abuse, with resulting abuse of his general health. He has a significant psychiatric history. The truck accident of 10-25-81 was beyond a reasonable doubt due to hypoglycemia, caused by taking the medication Diabinese, which lowers blood sugar, without eating for a prolonged period of time. Thre is no evidence from his medical record of that hospitalization that would suggest any hypoxic brain damage from his pulmonary problems. His head injury would not seem likely to have caused any significant brain damage, and his hypoglycemia was not of such a degree or duration as to be expected to cause any measurable long term mental change. His later behavior problems in November and December 1981, resulting in his hospitalization at Schoitz ans [sic] St. Francis Hospitals, seem clearly to have been related to the ingestion of large amounts of Aspirin, with his symptoms completely clearing up with decline in his blood level of that Aspirin. Since that time there has not been any evidence of any significant thought disorder, physical affliction, or seizure disorder (nor has there ever been any evidence that this patient has had a seizure

disorder).

Currently he only suffers from a character disorder that he has had for many years; a tendency to substance abuse with its attendant neglect of physical health and personal responsibilities. This is not disabling per se but certainly makes him a questionable employee in positions of responsibility.

At present he denies any pain or residual injuries from his accident of 10-25-81, and other than the scar on his forehead, I can find no objective evidence of any residual injury, either physical or mental. His hospitalizations at Schoitz and St. Francis in December, 1981 can only indirectly be said to stem from his accident of 10-25-81 in that they were due to Aspirin toxicity, and he was taking the Aspirin because of discomfort he was suffering at that time from injuries from his accident.

In a report dated July 19, 1982 Dr. Bolin stated:

I've been requested to give an opinion on the status of the possible seizure disorder on Mr. Jack Patchin. I've recently had the opportunity of examining him at some length and it was my opinion at that time that beyound [sic] a reasonable medical doubt that he did not have any true seizure disorder but rather was having some problems with medications that he was taking. As this problem does not exist at the present time, I feel that he would be entitled to have his drivers license reinstated. He does have mild diabetes but it's well controlled with no problems whatsoever.

On July 26, 1982 Dr. Bolin certified that claimant was qualified to work as a truck driver.

Pamela Jean Marxen-Kelly, M.D., who testified by way of deposition indicated that she specializes in internal medicine and saw claimant on April 28, 1982. Dr. Kelly stated that claimant informed her he had no problem since December 1981. Dr. Kelly disclosed that she could find nothing wrong with claimant which would explain his symptoms. On cross examination Dr. Kelly testified that the accident caused his injuries to his chest and head and the resultant treatment. On redirect Dr. Kelly stated:

> Q. You mentioned that Mr. Patchin had a salicylate level of 54. Can you tell us -- and if you can't that's find, but could you tell us what -- how many aspirin in a 24-hour period it would take a normal person, a male, to reach a salicylate level of 54?
>
> A. That vaies widely because aspirin is excreted -- it's metabolized and excreted by the kidneys, and some people could get that high a level with a much smaller dose of aspirin than another person. So it's a very individual thing.

E. Peter Bosch, M.D., who testified by way of deposition indicated that he is a neurologist and saw claimant on April 28, 1982. Dr. Bosch revealed that when he saw claimant, claimant did not have any complaints but wanted to find out if he had epilepsy. Dr. Bosch conducted a neurological examination of claimant which was normal and could find no evidence that claimant had a convulsive disorder.

Thoru Yamada, M.D., who testified by way of deposition indicated he is a neurologist and also has a specialty in EEG. Dr. Yamada disclosed that he interpreted claimant's EEG in May of 1982 and found it essentially normal. Dr. Yamada reviewed claimant's EEG taken on December 28, 1981 and opined that it was normal also.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 25, 1981 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 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).

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, 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).

ANALYSIS

As indicated previously defendants at the time of hearing stipulated that claimant received an injury arising out of and in the course of his employment on October 25, 1981. The main dispute therefore is what if any of claimant's problems are causally connected to that injury.

The greated weight of evidence causally connects claimant's hospitalizations and treatment with his injury. Defendants appear to argue that they should not be held responsible for claimant's hospital expenses because they were related to an overuse of drugs, more specifically aspirin. Claimant was using aspirin to combat his chest pain which was real and which was a result of his accident. This is supported by the medical evidence as well as the claimant's statement. Since the accident caused claimant's pain for which claimant took the aspirin which resulted in a reaction and the subsequent hospitalization, a causal connection is present.

The greater weight of evidence indicates that claimant suffers from no permanent impairment as a result of his injury; however, there is a question as to the extent of temporary total disability benefits that claimant may be entitled.

Claimant testified that he felt he could have driven a truck in February of 1982 if he had not had his license taken away. The claimant's doctors kept claimant from driving because of the possible consequences of having a seizure while driving. Claimant got his license reinstated on July 30, 1982. Although claimant did not have a job to return to on July 30, 1982, the period of claimant's disability was over at that time. One could not expect claimant to go back to work while the doctors felt it was unsafe for him to do so. The greater weight of evidence indicates that there is a causal connection between the loss of claimant's license and his injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WHEREFORE, based on the evidence presented and the principles of law previously stated, the following findings of fact and conclusions of law are made:

Finding 1. On October 25, 1981 claimant received an injury as the result of a motor vehicle accident while working for defendant.

Conclusion A. Claimant received an injury arising out of and in the course of his employment with defendant.

Finding 2. In order to treat his pain claimant took aspirin.

Finding 3. Claimant had a reaction to the aspirin he took to relieve his pain.

Finding 4. Claimant also had other problems related to his injury.

Finding 5. The evidence failed to show claimant abused the use of aspirin.

Conclusion B. Claimant's hospitalizations were causally connected to his injury on October 25, 1981.

Finding 6. Claimant felt he could return to work in February of 1982.

Finding 7. Claimant had his driver's license taken away on doctors orders.

Finding 8. Claimant did not have his license reinstated until July 30, 1982.

Finding 9. The period of claimant's disability lasted from the date of his injury until July 30, 1982.

Finding 10. Claimant has no permanent functional impairment as a result of his injury.

Conclusion B. Claimant is entitled to temporary total disability benefits from the date of his injury until July 30, 1982.

THEREFORE, defendants are to pay unto claimant thirty and one-seventh (30 1/7) weeks of temporary total disability benefits at a rate of two hundred fifty-eight and 59/100 dollars ($258.59) per week.

Defendants are also ordered to reimburse claimant for the following medical bills:

Metropolitan Ambulance Service Inc.	$ 73.00
City of Waterloo	57.50
Dr. Bolin	45.00
Dr. Nakhasi	230.00
Dr. Buckles	252.00
Internal Medicine Associates, P.C.	450.00
Dr. Piburn	330.00
University of Iowa Hospitals & Clinics	558.25
St. Francis Hospital	1,070.34
Methodist Hospital	20,384.21

Defendants are to file a memorandum of agreement.

Defendants are to pay the costs of this action.

Defendants are to be given credit for benefits previously paid.

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.

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 18th day of July, 1983.

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ARLIS PATTEN,

Claimant,

s.

HELBY COUNTY CARE FACILITY,
HELBY COUNTY, IOWA,

Employer,

nd

OWA NATIONAL MUTUAL
NSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 662694

A P P E A L

D E C I S I O N

By order of the industrial commissioner filed January 23, 984 the undersigned deputy industrial commissioner has been ppointed under the provisions of §86.3, Code of Iowa, to issue he final agency decision on appeal in this matter. Claimant ppeals from an adverse review-reopening decision.

The record on appeal consists of the transcript; claimant's xhibits 1, 2 and 3; defendants' exhibits A, B, C, and D; and fficial notice of the entire industrial commissioner's file of o. 695365, all of which evidence was considered in reaching his final agency decision.

The outcome of this final agency decision will be the same that reached in the review-reopening decision.

ISSUE

The review-reopening decision denied further weekly benefits a result of a low back injury of December 20, 1980.

Claimant states the issue in her brief: "Whether the cision of the Deputy Industrial Commissioner was erroneous in nying compensation based on her analysis of the symptomatology the claimant's complaints."

STATEMENT OF THE CASE AND APPLICABLE LAW

The statement of the case and applicable law found in the view-reopening decision are adequate and under the circumstances e adopted herein.

ANALYSIS

Claimant had episodes of low back pain both prior to and bsequent to December 20, 1980. She was paid compensation as a sult of an incident at work on that date. However, she also nally settled the case under the provisions of §85.35, which lated to an incident of September 22, 1981.

Compensation benefits were denied in the reopening decision the theory that although claimant had a compensable back jury, her symptoms were on the right side and her subsequent eatment was on the left, thereby bringing the causal relation- ip between the incident and the impairment into question.

Evidence which illustrates the basis for the review-reopening ision is found in a hospital admission of January 15, 1981 a report by James W. Dinsmore, M.D., an orthopedic surgeon. hospital report states:

> Patient admitted to the hospital because of pain in her right hip and back. This seemed to come on when she was doing some activity with some patient where she is working. It has been difficult to get around more particularly if she tries to do something extra activity. This causes some pain and discomfort. It has become more and more difficult to walk around. Hospitalization was advised for more definitive care.

Dinsmore states:

> I made the diagnosis of a herniated disc syndrome on the left side. Several days later Mrs. Patten advised me that she wanted to proceed with myelography and surgery. The myelogram was performed on 2/23/82. The sleeve defect at L4 on the left side was identified. On 2/24/82 a surgical decompression of the L5 nerve root on the left side was carried out.

obvious conclusions from such evidence is that there is no sal relationship between the injury and the impairment ause the injury is on the right and the disability on the t.

However, claimant argues:

> What the Deputy has, in effect, done is to compartmentalize Mrs. Patten's low back pain into "right" or "left" and on that basis denied compensation. Problems of the lower back are symptomatically much more difficult than that analysis suggests. The pain manifestations of Mrs. Patten's back injury cannot be arbitrarily isolated into categories, rather the medical history must be viewed as a whole and augmented by the lay testimony.

ndants respond: "As found by the Deputy, there had been no ion by claimant of any significant pain or other symptomology] in her left lower back following the injury of December 1980, but instead complaints of pain primarily in the right lower back and right hip." Although claimant's case was ably presented, it is claimant who has the burden to show the causal relationship, and nothing in the evidence or claimant's brief explains away the difference between the symptomatology on the right versus the impairment on the left. Thus, one concludes there is no causal relationship between the work incident and the resulting disability.

Therefore, the findings of fact, conclusions of law and order of the review-reopening decision of September 26, 1983 are adopted herein.

FINDINGS OF FACT

WHEREFORE, it is found:

That claimant is 44 years of age.

That claimant had a ninth grade education and recently completed a GED.

That claimant's work experience prior to beginning work for defendant employer was as a waitress.

That claimant had no cervical or lower spine problems at the time she went to work for defendant employer and passed the pre-employment physical.

That claimant's duties for defendant employer were primarily in housekeeping although she also helped with cooking and canning.

That on December 20, 1980 claimant felt a pull in her back and hip area below the belt line when she pulled a resident across the floor.

That claimant had another episode of back pain when she was cleaning windows in January of 1981.

That claimant was treated by a chiropractor who referred her to Dr. Dinsmore.

That claimant had a myelogram and ultimately surgery.

That when claimant was released to return to work, her position had been filled.

That claimant does not feel capable of doing her former work for defendant.

That claimant has been unable to find other work.

That claimant has foot numbness and cramps with long periods of sitting and soreness with weather changes.

That claimant takes Tylenol.

That claimant entered a special case settlement regarding her alleged injury of September 22, 1981.

That claimant complained of back discomfort during a hospitalization in 1975.

That claimant was treated for left back and hip pain in September 1978.

The claimant was hospitalized with back and right hip pain in January 1981.

That claimant was treated in September of 1981 for low back pain radiating into her left knee.

That claimant was hospitalized in February of 1982 from a myelogram and a lumbar laminectomy at L4 on the left.

That claimant's injury of December 20, 1980 resulted in temporary total disability only.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed to prove by a preponderance of the evidence that her injury of December 20, 1980 is a cause of the disability on which she now bases her claim.

That claimant has established entitlement to additional temporary total disability benefits relating to an injury of December 20, 1980.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant temporary total disability benefits from January 18 through January 25, 1981 at a rate of one hundred and 68/100 dollars ($100.68), with interest accruing from January 18, 1981.

That defendants be given credit for the amount previously paid.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed at Des Moines, Iowa this 18th day of May, 1984.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TWILA M. PETITT,	:	
	:	File No. 720409
Claimant,	:	
	:	A R B I T R A T I O N
vs.	:	
	:	D E C I S I O N
COUNCIL BLUFFS COMMUNITY SCHOOLS,	:	
	:	
Employer,	:	
	:	
and	:	
	:	
AETNA CASUALTY AND SURETY,	:	
	:	
Insurance Carrier, Defendants.	:	

This is a proceeding in arbitration brought by the employee, Twila M. Petitt, against her employer, Council Bluffs Community Schools, and its insurance carrier, Aetna Casualty and Surety Company, for a personal injury she alleges she sustained on March 11, 1982. On December 13, 1983 the case came on for hearing before the undersigned deputy industrial commissioner at the courthouse in Council Bluffs, Iowa. The case was considered submitted for decision on that date.

The record consists of the testimony at the hearing; claimant's exhibit 1; and defendants' exhibits A through I, inclusive, all of which evidence was considered in reaching this proposed agency decision.

The parties stipulated that the weekly compensation rate would be determined on the basis of exibit 1-D which showed yearly earnings of $24,321 and that said earnings could be divided by 52 to reach the compensation rate. The parties also agreed that the medical bills could be considered fair and reasonable, defendants reserving a objection as to causation.

ISSUES

The issues are (1) whether claimant sustained an injury which arose out of and in the course of her employment; (2) whether a causal relationship existed between the alleged injury and any disability; (3) the extent of permanent partial disability, if any; and (4) whether the alleged injury was the result of the willful act of a third party "directed against the employee for reasons personal to such employee" as described in Iowa Code section 85.16.

STATEMENT OF THE CASE

Claimant and Harry Robinson were teachers at Council Bluffs Abraham Lincoln High School during the 1981-1982 school year and had adjacent rooms, off claimant's classroom was a small room which contained a sink. At first, the two got along well and then they did not. In January 1982 an incident occurred wherein Robinson allegedly backed claimant up against a blackboard. Both teachers were called in as a result of that incident, and Robinson apologized.

On March 11, 1982, Robinson wanted to wash out his coffee pot in the aforementioned sink, and claimant would not let him. The two argued and Robinson allegedly "assaulted" claimant.

Mary Ann Fajman, a teacher's aide for Robinson at the time, testified that she heard the argument and went to the parties. She stated that Robinson set her aside and backed claimant up against the sink. Robinson did not testify.

Upon the advice of Joseph Scalzo, who was the assistant superintendent for administration in Council Bluffs at the time, claimant went to the emergency room at the hospital.

The next morning claimant and her husband had a conference with James Gaffney, who was the principal of Abraham Lincoln High School. Later Mr. Gaffney talked with Dr. Scalzo and made an investigation of the incident. Robinson was moved to a different room and no disciplinary action was taken. The statements taken in the investigation were in disagreement, and the teacher's aide's statement was closer to Robinson's version.

Claimant testified that she thought constantly of the incident and had nightmares. She stated that her colleagues were uncomfortable around her and that she was very upset by a performance evaluation in which one item was marked marginal.

Later in the spring, claimant decided to resign because, she thought, she had no possibility of transfer and because of Robinson. She testified that she did not mention Robinson in her letter of resignation because she did not wish to appear "unprofessional." Claimant also testified that she looked for work and continued to have anguish over the incident.

In October of 1982, she had a mental depression and was hospitalized. The medical evidence shows that claimant was admitted to the emergency room on March 11, 1982 with the following impression: "History of physical trauma to the patient with slight bruising of the left hand and soft tissue, involvement of the shoulders, neck and trauma to the spine with rigidity of the spine, probably transient."

The evidence concerning claimant's course of treatment during the fall of 1982 and afterward is found in medical records and depositions of Stephen R. Nelson, M.D., and Harmoz Rassekh, M.D. Dr. Nelson is claimant's family doctor, and Dr. Rassekh is a psychiatrist. Dr. Nelson's note of October 19, 1982 describes claimant as depressed and threatening suicide. For that reason, claimant was referred to Dr. Rassekh.

Dr. Rassekh's note of October 22, 1982 states in part as follows: "From the patient's descripton she has experienced the identified symptoms since January of 1982 at which time she and a fellow teacher were involved in an altercation. This resulted in the patient resigning her teacher position in May of 1982."

His note of November 6, 1982 states: "Apparently the way she feels is that her condition was precipitated by her resignatio from the school system." A note from the Jennie Edmundson Memorial Hospital Department of Occupational Therapy, signed E. Schroeder, an occupational therapist, notes that claimant stated "her difficulties began a little more than a year ago. She had problems with another teacher at work."

Schroeder also made the following comment:

> The patient shifted in her chair and frequently covered her face with her hands while taking [sic]. She stated she just could not cope with her former job situation and attempting to find a new job. She became teary at times and generally appeared very distresed. The patient stated she has seriously considered suicide as a way out.

The discharge summary stated that claimant had a diagnosis of a major depression and had been admitted on the recommendation of Dr. Nelson. A prior report of October 20, 1982 had also diagnosed an "acute and major depression with suicidal thoughts." In a letter of November 29, 1982, Dr. Rassekh stated: "Based on our evaluation and the information available, we have determined that the patient's depression is job related and started with a conflict at work and inability to tolerate her coworkers."

With respect to the issue of any causal relationship between the incident of March 1982 and claimant's depression, Dr. Rassekh testified as follows:

> Based on your treatment of her, would you agree with her conclusion that the unemployment was the precipitating factor to her progressive depression and other symptoms?
>
> A. Well, I think if we don't take it out of context. Here is a lady who has been working for a school system for 16 years. She was a teacher and since '75, 1975, became a Special Education Teacher. She was anxious. Once she had the problem before the last year and she had been very concerned, has been reported that because of that she couldn't sleep at night, she had nightmares, she was worried about it. Then she doesn't work, she became more depressed. I think it's only fair to say that the financial situation, not working, not being able to go--to return back to the previous job, had been certainly a precipitating, aggravating factor in her depression. (Rassekh dep., pp. 8-9 ll. 17-25 and 1-8)

He also testified: "This depression, in my opinion, was precipitated by conflict at work, leading to decision by herself of resigning, not going back to work, financial situation. And those are the facts, I think." (Rassekh dep., pp. 12-13 ll. 24-25 and 1-3) Finally, Dr. Rassekh testified that claimant would have impairment of five to ten percent. (Dep., p. 19)

David Kentsmith, M.D., testified for defendants at the hearing that he was a qualified psychiatrist and had examined claimant on August 5, 1983. In his opinion, the cause of the hospitalization in October 1982 was depression, which was in turn caused by claimant not being able to find work and being denied unemployment compensation. On cross-examination, he stated that the reasons for claimant's resignation from the school system were the incident of March 1982, nothing being done about that incident and nightmares. In Dr. Kentsmith's opinion, these reasons were not a source of depression.

Finally, John Gustavson, Ph.D., of the Bluffs Psychiatric Associates, P.C., stated:

> It would appear, based on the present findings taken together with the patient's history, that the difficulties which she was undergoing at school were instrumental in provoking her initial emotion and related physical problems, which further prompted her desire for a reassignment. These problems were further compounded when the patient's request for reassignment was denied, she was subsequently unable to find another suitable teaching position, and was finally declared ineligible for unemployment assistance or workman's [sic] compensation. It is reasonable to conclude that these events were the primary and significant factors which resulted in the patient's depressive illness and ongoing difficulties.

APPLICABLE LAW

Claimant has the burden to prove that she sustained an injury which arose out of and in the course of her employment. Lindahl v. L. O. Boggs Co., 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 results from the employee's 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 the 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. Claimant also has the burden to prove the extent of the permanent disability.

Section 85.16(3), The Code, states: "By the willful act of a third party directed against the employee for reasons personal to such employee." Defendants have the burden to prove the affirmative defense. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Professor Larson notes that the law allows recovery for a

sudden stimulus causing a nervous injury. Arthur Larson, The Law of Workmen's Compensation, Vol. 1B, §42.23, p. 7-624 to 633. Discussing assaults, Larson quotes Justice Rutledge:

"This view recognizes that work places men under strains and fatigue from human and mechanical impacts creating frictions which explode in myriads of ways, only some of which are immediately relevant to their tasks. Personal animosities are created by working together on the assembly line or in traffic. Others initiated outside the job are magnified to the breaking point by its compelled contacts. No worker is immune to these pressures and impacts upon temperament. They accumulate and explode over incidents trivial and important, personal and official. But the explosion point is merely the culmination of the antecedent pressures. That it is not relevant to the immediate task, involves a lapse from duty or contains an element of violation or illegality does not disconnect it from them nor nullify their causal effect in producing its injurious consequences." Hartford Acc. & Indemn. Co. v. Cardillo, 72 App. D.C. 52, 112 F.2d 11, 17.

Industrial disability includes considerations of functional impairment, age, education, qualifications, experience and claimant's inability, because of the injury, to engage in employment for which she is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Martin v. Skelly Oil Co., 252 Iowa 128, 106 N.W.2d 95 (1960).

ANALYSIS

Considering the case in the context of Justice Rutledge's remarks, the evidence, especially that of Dr. Rassekh, tends to show that claimant underwent a very distressing occurrence. Thus, even though one assumes she was equally at fault with Robinson, the incident nevertheless arose out of her employment. Dr. Rassekh's opinion is taken over that of Dr. Kentsmith because Dr. Rassekh was the treating psychiatrist. Also, it should be pointed out that whereas defendants argue claimant's loss of her unemployment compensation case was a cause of her depression, the decision was not filed until November 3, 1982 which was in the month after the major depressive episode began.

Concerning industrial disability, the record shows claimant was age 48 at the time of the hearing and had a position teaching school in Ulysses, Kansas since August 1983 at $19,600 for the school year. Prior to that time, she had lived in Council Bluffs for eight years and taught school all that time. She has a total of 20 years teaching in elementary and secondary education and holds a Masters Degree from Western Illinois University and has 32 hours credit beyond the masters level. Her husband is a groundskeeper for the school in Kansas.

Although claimant's immediate earning capacity has been reduced somewhat, her future appears bright. She is not under the active care of psychiatrist at this time and should not have any serious lingering effects from the injury. Considering that she is mature, well educated and experienced, her disability is found to be ten percent.

Before the hearing, the parties discussed the length of the healing period and suggested the time from October 19, 1982 through the second week of December 1982. That period of time appears reasonable in that the acute phrase of claimant's illness ended around that time and she was therefore able to actively seek work.

FINDINGS OF FACT

1. At the time of the hearing, claimant was age 48 and married.

2. She has a Masters Degree from Western Illinois University and 32 hours credit beyond that degree. She has taught in elementary and secondary schools for some 20 years.

3. On March 11, 1982 she was involved in an altercation with another teacher which resulted in some bruises on one hand.

4. As a result of that altercation, claimant resigned her teaching position and in October 1982 had a major depressive psychological disorder.

5. She is now teaching school in Ulysses, Kansas and earns $19,600 per year as opposed to her prior earnings of $24,321 at Council Bluffs Abraham Lincoln High School.

CONCLUSIONS OF LAW

On March 11, 1982, claimant had an altercation with another teacher which arose out of and in the course of her employment and which was a significant factor in causing a depressive psychological disorder.

As a result of claimant's injury, she is entitled to permanent partial disability benefits for industrial purposes of ten (10) percent of the body as a whole and to healing period benefits from October 19, 1982 through December 14, 1982 plus certain medical and hospital charges which are detailed in the order below.

ORDER

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant at the rate of two hundred seventy and 12/100 ($270.12) per week from October 19, 1982 through December 14, 1982 for the healing period and further to pay beginning December 15, 1982 weekly compensation benefits at the same rate for a period of fifty (50) weeks for the permanent partial disability, accrued payments to be made in a lump sum together with statutory interest from October 19, 1982.

Defendants are also ordered to pay the following bills:

Diagnostic & Internal Medicine Assoc., P.C.	$ 541.00
Johnson Pharmacy, Inc.	77.18
Jennie Edmundson Memorial Hospital	127.00
Jennie Edmundson Memorial Hospital	3,375.25
Bluffs Psychiatric Associates, P.C.	920.00

Costs of this action are taxed against defendants.

Defendants are also ordered to file a record of payments upon completion thereof.

Signed and filed at Des Moines, Iowa this 23rd day of February, 1984.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL PICKETT, Claimant, vs. WILSON FOODS, Employer, Self-Insured, Defendant.	File Nos. 644307/699342 A P P E A L D E C I S I O N

Defendant appeals from an arbitration and review-reopening decision in which claimant was awarded permanent partial disability benefits based on ten percent functional impairment of the body as a whole pursuant to section 85.34(2)(s), Code of Iowa, as a result of an injury on February 25, 1980. Claimant was denied any benefits for an alleged injury of November 7, 1981.

The record on appeal consists of the pleadings of the parties; the transcript of the hearing which contains the testimony of claimant; and claimant's exhibit 1. Also considered are the filings required by law and rule.

The issue in the review-reopening proceeding was simply the degree of permanent disability to which the claimant was entitled. On appeal defendant states the issue as whether the deputy "erred in choosing to accept the evaluation of Dr. Wheeler as to the claimant's disability over that of Dr. Connolly who was the attending and operating surgeon and who was the most recent to see and evaluate the claimant." The record is void of any evidence of an injury of November 7, 1981 and the arbitration proceeding warrants no further consideration.

STATEMENT OF THE CASE

Claimant was employed in the boning department of defendant where he developed bilateral carpal tunnel syndrome. An employer's first report of injury was filed August 12, 1980; memorandum of agreement was filed October 27, 1980; final report was filed October 27, 1980 showing payment of 22 weeks six days of temporary total disability; final report filed April 15, 1982 showing additional payment of 25 weeks of permanent partial disability based upon five percent of 500 weeks.

Evidence in the record relating to claimant's disability is limited to the testimony of claimant and medical reports of M. E. Wheeler, M.D., and John F. Connolly, M.D.

Claimant testified that his hands had bothered him for two or three months prior to reporting it to the company; that defendant sent him to Dr. Garner and Dr. Harten who eventually sent him to Dr. Blenderman in Sioux City; that Dr. Blenderman recommended surgery to which claimant was apprehensive and asked for and received a second opinion from Dr. Connolly in Omaha.

Dr. Connolly concurred in the recommended surgery and was selected to perform the surgery. Carpal tunnel release surgery was performed in April 1980 on the right with incidental release of a trigger finger in the ring finger and carpal tunnel release on the left was performed in June 1980.

Claimant returned to work in August doing night sanitation for about a week and then returned to his former department. He experienced problems with mobility of his fingers and loss of strength in the fingers on both hands plus feelings of puffiness and aching around his right elbow. Claimant developed another trigger finger in the middle finger of his right hand which was released by Dr. Connolly in January 1981. After returning to work from this surgery claimant "bumped" into night sanitation on a permanent basis.

In the sanitation job claimant expressed difficulty with carrying anything any appreciable distance. After a short distance his arms would start to ache and he would have to rest before continuing. Holding anything for a long period caused his hands to curl and ache and feel puffy.

Around October or November 1981 claimant inquired as to possible permanent disability for his condition. Defendant sent claimant to Dr. Garner who declined to give an evaluation. Defendant then sent claimant to Dr. Wheeler in Sioux City for evaluation. Dr. Wheeler examined claimant on three occasions.

Dr. Wheeler's report of January 5, 1982 stated:

> It is difficult to give him an impairment rating. The AMA guidelines in terms of the paresthesias are not that straightforward, but with the problems he is complaining of would probably give him a 15% impairment rating on the right and a 10% on the left. His problem is complicated by the fact that he has an old navicular injury on the left wrist with degenerative arthritis. The etiology of this is not clear. With the restricted range of motion he has in this, he would rate an 11% impairment of the upper extremity because of the wrist problem. I do not really know whether the latter injury fits into his Workman's [sic] Comp.

The defendant disclosed the contents of Dr. Wheeler's letter to claimant indicating some disagreement with the evaluation. Later defendant suggested that a three and five percent rating might be more appropriate. After some discussion concerning that rating and conversation regarding sending claimant to Dr. Connolly for a rating and who would stand the expense of that trip a letter dated February 25, 1982 was secured by defendant from Dr. Connolly which stated: "I estimate, because of functional impairment from the operations and entrapment of his medial nerve, that he will have a permanent 5% overall body functional impairment. I hope this information is helpful to you and to Mr. Pickett."

This letter was not based upon any recent examination.

A letter dated April 20, 1982 was sent from Dr. Wheeler to claimant's attorney which, with regard to disability stated nothing different than the January 5 letter.

Claimant later again saw Dr. Connolly after which Dr. Connolly sent a letter dated November 28, 1982 to defendant. The letter stated:

> When I examined him, he had well healed incisions over the carpal tunnel regions of both wrists. He had 30° limitation of dorsiflexion of the left wrist, compared to the right, and about equal palmar flexion on both wrists. He says there is a question of a scaphoid injury to the left wrist which may explain the limitation of motion on the left side. He has good grip strength in his left hand on 60 lb. test, and on the right of 65 lb. test. He has no further symptoms of numbness at this time in the median nerve distribution, although occasionaliy he feels, as I have mentioned, some aching in the hand when he wakes up in the morning, before he first starts moving the wrist. At any rate, I think he has recovered satisfactorily from the carpal tunnel release. I would estimate, because of the residual limitation of function and grip strength, that he will have 5% functional impairment of both hands, amounting to a 5% impairment of his overall body function. I told him if he has any further difficulty, I would like to see him back, but at this time I am not having him return for another appointment.

APPLICABLE LAW

Section 85.34(2)(s) of the Code 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.

The loss of two major members specified in section 85.34(2)(s) is a scheduled disability to be determined based on functional loss rather than industrial loss. Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983).

Rule 500-2.4, Guides to evaluation of permanent impairment states:

> 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.

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup v. Shores Co., 222 Iowa 272, 268 N.W.2d 598 (1936). Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942). See Roberts v. Pizza Hut of Washington, Inc., II Iowa Industrial Commissioner Report, 317, 320 (1982); Sheflett v. Clearfield Veterinary Clinic, II Iowa Industrial Commissioner Report, 334, 347 (1982); and Webster v. John Deere Component Works, II Iowa Industrial Commissioner Reports, 435, 450 (1982).

ANALYSIS

Defendant contends the deputy erred in choosing to accept the evaluation of Dr. Wheeler over that of Dr. Connolly. The decision of the deputy relates that the opinion of Dr. Connolly had "a tempering effect on the final disposition of this case." It is therefore evident that the deputy did not consider one opinion to the exclusion of another but considered both and in conjunction with claimant's testimony of difficulties incurred in using the injured members determined the overall functional impairment to the body as a whole to be 10 percent.

According to the AMA Guides referred to by Dr. Wheeler and in Rule 500-2.4, Dr. Wheeler's evaluation of 15 percent of the upper extremity and 10 percent of the other would convert to a combined body impairment of 14 percent. The five percent of each hand assessed by Dr. Connolly would translate to six percent combined body impairment under the AMA Guides.

Thus the finding of 10 percent permanent partial disability supported by the record. Neither Dr. Wheeler's nor Dr. Connolly's opinion were taken as carte blanche but were considered together and with other matters to make the final determination of disability.

FINDING OF FACT

That on February 25, 1980 claimant sustained injuries to both hands and wrists which resulted in 10 percent permanent partial impairment to the body as a whole.

CONCLUSIONS OF LAW

That the arbitration and review-reopening decision of the deputy are hereby affirmed.

That as a result of such injury claimant is entitled to permanent partial disability benefits based upon 10 percent permanent partial disability to the body as a whole at the rate of $238.60 per week.

Claimant's petition for arbitration should be dismissed.

ORDER

THEREFORE, IT IS ORDERED:

That defendant shall pay claimant fifty (50) weeks of permanent partial disability at the rate of two hundred thirty-eight and 60/100 dollars ($238.60) per week.

That defendant are given credit for benefits previously paid.

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

That costs of the proceeding are taxed against defendant pursuant to Industrial Commissioner Rule 500-4.33.

That claimant's arbitration petition is dismissed.

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

Signed and filed this 19th day of August, 1983.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CURTIS H. PITMAN, JR.,	:	
Claimant,	:	FILE NO. 735379
vs.	:	A R B I T R A T I O N
POLK COUNTY, IOWA,	:	D E C I S I O N
Employer,	:	
SELF INSURED,	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by the claimant Curtis H. Pitman, Jr., against his self-insured employer, Polk County, Iowa, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury he alleges in his petition he sustained on or about April 10, 1983.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Iowa Industrial Commissioner's Office in Des Moines, Iowa on February 28, 1984. The record was considered fully submitted on that date. Both parties filed briefs which were reviewed in the disposition of this case.

An examination of the industrial commissioner's file indicates a first report of injury was filed June 13, 1983.

The record in this case consists of the testimony of claimant, of Otis L. Anderson, of James L. Madsen, and of Bill E. Mackin; and of defendant's exhibits 1 through 13.

ISSUES

The issues to be resolved are:

1. Whether claimant received an injury which arose out of and in the course of his employment.

2. Whether there is a causal relationship between the alleged injury and the disability.

3. The nature and extent of claimant's benefit entitlement, if any.

4. The rate of weekly compensation to which claimant is entitled in event of an award.

5. Whether claimant's action is barred because claimant failed to give his employer timely notice of injury pursuant to section 85.23.

6. Whether the employer is entitled to a credit for paid leave and disability income benefits paid claimant during his period of disability.

REVIEW OF THE EVIDENCE

At the time of hearing the parties stipulated that claimant was off work from May 31, 1983 through August 28, 1983 and that claimant's medical costs were fair and reasonable.

The claimant, Curtis H. Pitman, Jr., testified in his own behalf. Claimant is 30 years old and single. He completed tenth grade and completed his GED two months prior to hearing. He has had no other formal education or training. Claimant gave an employment history of unskilled manual labor as a groundskeeper, clothing unpacker, and construction worker. Claimant also has worked as a factory foreman and as both a muffler clinic mechanic and shop manager. Claimant began work for Polk County as a road maintenance laborer and equipment operator in 1976 and has continued with the county since that time but for a three month period in 1979 when he quit because of personal problems. Claimant earns approximately $19,600.00 per year.

Claimant testified that he sustained one non-work injury and three work injuries prior to the injury which is the subject of this claim. In 1975, claimant pulled his rib cage loose while playing frisbee. Claimant's three work injuries occurred while working for the county. Claimant shut the endgate of a pickup on his finger. He missed one day at work and was seen in the emergency room at Iowa Lutheran Hospital. Claimant slid down a hillside while operating a chain saw. He suffered lumbar strain, was seen by Dr. Ordna, and missed one week of work while undergoing hydrotherapy. Claimant also hit his elbow on a steel outrigger while pull-starting a generator. He was treated at the emergency room at Lutheran Hospital following this injury.

Claimant then described the injury which is the subject of this claim. Claimant alleged he was straddling I-beams while repairing a bridge. He stated he turned to hand nail strips to co-worker and felt a sharp pain in his low back. He testified he subsequently continued to experience sharp pain in his low back. Claimant reported he told Kenny Hill of his injury but worked his shift the injury date and the following day. Claimant testified he first missed work because of his injury in May 1982. He took three days off work then, but does not believe he told his employers that his back pain was related to his work injury.

On Memorial Day 1983 claimant sought treatment at the Lutheran Hospital emergency room. He was admitted and examined by William R. Boulden, M.D., who diagnosed a ruptured disc and prescribed chemopapappian injection. Claimant failed to respond to the chemical treatment. Claimant subsequently underwent surgery with removal of his disc in late June 1983. Claimant reported still experiencing loss of feeling in his toes and pain in his legs and lower back. He returned to work August 29, 1983. Claimant reported he has not missed work because of his back problems since his return. He notes work occasionally aggravates his pain, however.

Claimant's union steward visited claimant in the hospital. Claimant described his work injury to him and completed an accident report. Claimant then discussed his injury with Bill Mackin, Polk County Safety Officer, following his initial hospital discharge. Claimant gave Mackin an approximate injury date of April 10, 1983. Claimant testified at hearing that he subsequently realized the correct injury date to be late February or early March 1983 since the bridge work was finished during this period.

On cross-examination, claimant reviewed his union contract and employee work rules. Both require injuries to be reported immediately. Claimant explained he didn't report his injury immediately because at that point the pain wasn't that extreme and he did not believe he was injured. On redirect examination, he explained that that with his previous injuries he had needed immediate medical care and, therefore, filled out accident reports in order to insure medical coverage. Claimant has been a union steward.

Claimant denied telling Otis Anderson he hurt his back playing softball over the weekend when he called in sick May 9, 1983. Claimant stated his back pain was affected both by work and non-work activities. He noted that being "bounced around while operating work equipment heightens his pain. Claimant owns and rides a 1200 Harley Davison motorcyle.

Claimant explained the medical history he gave Dr. Kappos by stating he had noticed nagging pain earlier but had only experienced serious pain one month prior to his May 30 emergency room visit. Claimant stated he exhausted his paid leave July 28, 1983. He then received $715 disability pay from the county.

Otis L. Anderson was the first witness called by defendant. Mr. Anderson is the first district highway superintendent for the Polk County Engineers Office. He is in charge of district highway maintenance and record keeping. Claimant works under the witness and did so in February 1983. The witness reported that, in February 1983, the district road crew was rebuilding Bridge Number 1874 at NE 118th Avenue. Claimant operated a Bandan Digging Telescoop backhoe. James Madsen was the on-the-job superintendent for the project which began on February 1, 1983. The witness explained that circled numerals on defendant's exhibit 7 indicate those days on which claimant operated the backhoe and thereby earned $.50 per hour premium pay. He explained that defendant's exhibit 8 is the road superintendent's diary of work completed and work injuries reported which, Mr. Madsen maintained. The exhibit indicates nailing strip work was performed on February 17, 18, 23, 24, and 28, 1983. The witness stated Madsen did not notify him claimant had been injured on the project and that he had no knowledge indicating Madsen's log recorded claimant was injured. The witness reported neither claimant nor any other employee reported an injury directly to him. The witness explained that the employee fills out the injury report and reports his injury to his immediate supervisor. The supervisor then reports the injury to the witness. The witness stated reports are filed for just about every type of injury.

The witness reported claimant called him May 9, 1983 and requested sick leave. He stated claimant told him he had injured his back over the weekend while playing softball and sought several days off. He stated the memorandum to Larry Land included in defendant's exhibit 10 resulted from this phone conversation and claimant's subsequent sick leave. The Land memorandum of May 16, 1983 states:

> Curt Pitman called in May 9, 1983, in the early morning and said he hurt his back over the weekend and needed some time off. I told him if he could make it in, I needed him. Curt did come to work Monday and ran the ditching machine. Pitman called in sick on Tuesday, May 10, 1983, and took an unpaid day because he was out of casual days. He called in Wednesday, May 11, 1983, and Thursday, May 12, 1983, and took sick leave. Curt Pitman came back to work the following Monday, May 16, 1983.

The witness stated he had no reason to believe claimant's injury was work related at that time, and that he was surprised when Mr. Mackin investigated claimant's injury as a work injury. The witness testified claimant's girlfriend called him May 31, 1983 to report claimant had been hospitalized for his back.

On cross-examination, the witness admitted he did not record claimant's statement that he had hurt his back playing softball in his memorandum to Larry Land.

James L. Madsen next appeared for defendant. He is an assistant highway superintendent for Polk County and was claimant's supervisor on the bridge project. He also testified that February 28, 1983 was the last day nailing strip work was done. He testified neither claimant nor any other employee advised him claimant received a work related back injury and that his log does not indicate claimant received a work injury during the bridge project. Logging an injury is standard operating procedure.

Bill E. Mackin, Polk County Safety Officer, next testified for defendant. Mr. Mackin administers the county's workers' compensation program and investigates all reported injuries. He stated he first became aware of claimant's claim June 2, 1983 and contacted claimant June 7 or 8, 1982. Claimant indicated he had been injured on April 10, 1983, but also indicated that his injury occurred during nailing strip work on the bridge project. The witness then spoke with Misters Anderson and Madsen regarding claimant's injury and was advised neither was aware claimant had sustained a work injury. The witness did not speak with claimant's co-workers or his examining doctors. On June 15, 1983, the witness told claimant the county was denying his workers' compensation claim. On cross-examination, the witness reported claimant's claim was denied both because claimant had reported a non-work injury to Anderson in May and also because claimant had not immediately reported his injury and, therefore, defendant had no actual knowledge of an on-the-job injury.

The witness detailed both amounts the county paid claimant during his incapacitation and the specific work benefits from which these amounts were drawn.

Defendant's exhibit 1 is claimant's medical records. Of significance are the following: An August 8, 1982 letter of Dr. Boulden to defendant's counsel in which the doctor opines claimant has a total disability of his spine of 10 percent. A "history of present illness" of May 30, 1983 which states:

> This is a 29-year-old white male, who presented to the Emergency Room, complaining of severe pain into his left leg for approximately two weeks. He stated that, approximately one month ago, while working, he was lifting some heavy objects and then later twisted, felt a sudden, sharp, severe pain in his left side of his lower back and his left buttocks. The pain gradually began to radiate down the left leg over the next one to two weeks. The two weeks prior to admission, he had developed severe pain throughout the entire left leg and into the left calf and has noticed a feeling of numbness or going to sleep in the lateral side of his left foot. States that the pain is markedly increased with coughing and sneezing and, when he coughs, the pain down his leg is so bad that he has to sit in bed and has almost fallen. The patient has been trying to rest at home, but has been unable to find a comfortable position and the pain has been getting gradually severe.

A report of August 18, 1983 states:

> Follow up of chemonucleosis of L5-S1, which did not respond, and then he had an extensive discectomy with neuroforaminotomies of L5-S1, for free fragment. The patient has done well and is not having any problems. He has some achiness in his back, but he desires to get back to work, so therefore, we have released him back to active work status 8/29/83, and told him to continue doing his back exercises, as well as working at his exercises at work, and watch his back carefully so that he does not hurt it, and I have recommended to follow him up if he has any further problems. At this point in time, I feel that the patient has sustained a permanent impairment of 10% of his back and that he should be able to return back to his regular duty.

Defendant's exhibit 2 is a statement of claimant's medical charges with Iowa Lutheran Hospital totaling $5,599.67. Defendant's exhibit 3 are the first reports of injuries filed for claimant's reported worked injuries while employed by the county. Defendant's exhibit 4 is the agreement between the county and the secondary road employee's council. The agreement, on page 36, provides:

> Employees shall complete a Work Injury Report when they have an accident or injury which may or does lead to a sick leave of absence. Such forms will not be accepted by department heads unless they have been completed properly; including, but not limited to, the nature of the injury, date of Employee's return to duty, and signature of the Employee. Work Injury Report forms will be supplied by the Employer.

Defendant's exhibit 5 is the work rules for Polk County secondary road unit employees. The rules provide: "The reporting of all on-job injuries will require the employee to fill out an accident report with the superintendent present. Do not go the [sic] the engineer's office. They must be filled out the same day as the injury occurs." Defendant's exhibit 6 is the employee work log for the rebuilding of bridge number 1874. Defendant's exhibit 7 is claimant's payroll time sheets from February 4, 1983 to March 18, 1983. Defendant's exhibit 8 is a copy of the road crew superintendent's log from February 1, 1983, to March 7, 1983. Defendant's exhibit 9 is the secondary roads daily work schedule of the road superintendent from February 1, 1983 to March 8, 1983. Defendant's exhibit 10 are various work, leave, grievance, and benefit records relative to claimant. These were fully reviewed. Defendant's exhibit 11 is a resolution of the Polk County Board of Superviors granting claimant $714.68 in disability income benefits. Defendant's exhibit 12 is a photograph of Bridge Number 1874.

Defendant's exhibit 13 is the deposition of William R. Boulden, M.D. Upon questioning by defense counsel, the doctor related the following regarding the medical history claimant gave:

> Q. And I take it that a registered nurse also took a bit of history from him when he was in the emergency room?
>
> A. Yes. His admitting nursing interview, yes.
>
> Q. I'm going to show you what's been marked Deposition Exhibit B, and there's three pages to this, and the third page is--
>
> A. I have that.
>
> Q. --Emergency Ambulatory Care. In the box that's marked "nursing interview," the nurse wrote down the following: "Check out sharp pain in left leg and left hip. Left foot numb. Has had for two weeks but thought it would go away but has increased. Can't get out of bed, walk, et cetera. Nauseated, can't sleep and eat."
>
> Now, that would indicate that he's had those symptoms for two weeks?
>
> A. That's correct.
>
> Q. And that he was in the hospital with those symptoms on May 30 of 1983?
>
> A. That's correct.
>
> Q. Do you know in the next box--and I really can't make out what that box says--but it says, I believe, "Two months ago was lifting at work and developed sudden pain left lower back and buttocks. Since then has developed radiation into leg and severe pain in left calf. Pain with cough, sneeze, movement. Leg will go"--I can't make that out--"when coughs."
>
> A. Yeah. That's supposed to be approximately one month ago.
>
> Q. Approximately one month ago? Okay. So one month before he was admitted on May 30 of 1983, he was having the symptoms.
>
> A. It says "approximately." Yes.
>
> Q. Approximately. So that would be sometime either in the beginning of May or the end of April, 1983?
>
> A. If you read it as exactly one month, yes.
>
> Q. Other than the information that's contained in the Emergency Ambulatory Care Center history, did you obtain any other history from him and Dr. Kappos?
>
> A. Basically, this is the first time he ever had any type of leg pain with any--with his back problem.
>
> Q. So as far as historically speaking--
>
> A. He's never had a history before of a ruptured disc.
>
> Q. Did he indicate to you how or when the--he first noticed the pain?
>
> A. Well, approximately a month before he was admitted to the emergency room. He said he was lifting some boxes and twisted with those boxes, and he felt a sudden pain in his back, and then over the ensuing next week or two, he started developing the left leg pain. He thought originally the pain would go away in the back, but then it got worse to the point he started having pain down the leg.
>
> Q. So he indicated to you that he was lifting boxes and twisted?
>
> A. That's correct.
>
> Q. Did he indicate anything about working at a bridge site doing repairs on a bridge when this injury occured?
>
> A. I'm not familiar with that.

The doctor subsequently stated claimant had said he was lifting objects not boxes. He agreed that, with a herniated disc, pain might begin after a specific incident and then increase gradually over time. The doctor did not recall whether claimant ever told him he injured himself while lifting nailing strips and twisted while carrying a nailing strip but qualified by stating his basic concern was with the body mechanisms which produced the injury, that is, twisting and lifting, and not with what claimant was doing per se.

The doctor indicated claimant's surgery consisted of excision of the nucleus pulposus and enlargement of the neuroforaminotomies. He stated claimant had made an excellent recovery and that the impairment rating of 10 percent of the spine was based on American Academy of Orthopedic Surgeons' Guidelines for likely impairment when a disc is removed with good clinical results.

On cross-examination by claimant's counsel, the doctor opined the following:

> Q. And, specifically, in Mr. Pitman's case, if he remembers the lifting and twisting episode some 90 days prior to May 30, and recalls a gradual worsening with a significant worsening in May, would that be inconsistent with his findings and complaints?
>
> A. As I stated earlier, if he was asymptomatic, if you're saying 90 days prior to May that he injured his back, and he had worsening symptoms for those 90 days and finally in May it got suddenly worse, if that's what you're asking me--
>
> Q. Uh-Huh.
>
> A. --then it's not inconsistent that he had a small tear to begin with, and then finally may have turned around and it ruptured to the point that it was causing significant discomfort. And in this case, there was neurological changes in his examination. So that's inconsistent then.
>
> I'm saying, as I stated earlier, it would be inconsistent if he hurt his back 90 days earlier, got over it a day or two, had no symptoms in the next 90 days, and all of a sudden had them again. Then it would be hard to correlate the first injury of 90 days ago.
>
> Q. If he had a gradual worsening the entire time--
>
> A. Then he probably had a small tear and the tear wasn't pushing on any specific nerve at that point in time, and then finally, the episode in May--if that occurred as it was stated to us--then that would have been the one that would have caused him to have the surgery.

On redirect examination, the doctor reported claimant did not describe an incident 90 days previously with gradual worsening of his condition. He opined that, in the absence of such history, a second trauma likely produced claimant's symptoms and surgery stating the following:

> Q. Now, in the medical history that we have, does Mr. Pitman indicate that there was a gradual symptomatology for 90 days before the accident--before he was admitted to the hospital?
>
> A. No. That isn't what he told us.
>
> Q. In fact, he told you that he had those symptoms for approximately a month?
>
> A. A month with gradual onset, that prior to two weeks before the admission, it became very severe and debilitating to him.
>
> Q. So if Mr. Pitman did perform an act at work 90 days before he was hospitalized, and one month before he was hospitalized had symptoms that gradually became worse that required his hospitalization, is there any relationship between that occured 90 days before and his ultimate hospitalization for the herniated disc?
>
> A. I guess that would have to be answered by, was there a second trauma then? Was there this incident that he described for this 30 days before his admission. If there's no new type of trauma--
>
> Q. Well, let's throw this fact in: That Mr. Pitman,

on May 9, 1983, called his employer and said, "I hurt my back this weekend and I won't be able to come in to work." Could that incident on the weekend of May 9 have been the incident that caused him to have his symptoms for which he was hospitalized and had surgery performed?

A. That incident could have, yeah.

Q. And is the history that Mr. Pitman gave you consistent with him in fact injuring himself sometime in early May, with the gradual onset of severe symptoms requiring his hospitalization?

A. Well, what he stated.

APPLICABLE LAW AND ANALYSIS

The first issue for resolution is whether claimant sustained an injury which arose out of and in the course of his employment.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on February 28, 1983 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 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).

Claimant has not sustained his burden of proving an injury of February 1983 which arose out of and in the course of his employment. Claimant alone relates the onset of his problems with a lifting and twisting incident while performing nailing strip work on the bridge project in late February 1983. Neither claimant's immediate nor remote supervisor had any personal or reported knowledge that claimant injured himself while working on the bridge project. Claimant did not report his injury at the time he alleges he sustained it. This in itself would not be significant if claimant could not be charged with some knowledge of the potentially serious consequences of back related work incidents. Claimant had previously injured his back at work in the chain saw incident, however. He then was diagnosed as having a lumbar strain and was off work for one week while undergoing hydrotherapy. Thus, claimant knew that even apparently minor back injuries may have serious consequences. A person having such knowledge would generally be more likely to report a subsequent injury at the time of its occurrence in order to assure medical treatment. That claimant did not report such raises questions as to the credibility of claimant's unsubstantiated testimony that he injured himself while working on the bridge project.

The medical history claimant gave at his May 30 admission also lessens the weight that can be given claimant's report of a February work injury. Claimant recited that approximately a month earlier, while working, he lifted heavy objects, twisted and felt sudden, sharp pain. Even if claimant is allowed considerable latitude as to the date of the onset of his problems, it is difficult to believe that claimant, who, at hearing, appeared both articulate and intelligent, was mistaken by approximately two months as to the time his problem developed. If claimant had experienced gradually increasing pain throughout the three months from his alleged injury date to the time of his emergency room event, it is reasonable to expect that he could and would actually relate such history. That claimant did not do. This fact also makes far less credible claimant's report of a February work injury.

Entitled to special significance in resolving this matter is Dr. Boulden's deposition testimony. The doctor agreed that had claimant experienced a relatively minor back injury in February with gradually worsening symptoms, this sequelae would be consistent with a ruptured disc. He also opined that, in the absence of such a history of gradually increasing symptoms in the 90 plus days between February 28 and May 30, a subsequent trauma would be necessary to produce claimant's symptoms and surgery. He then reported claimant did not relate a history of symptoms increasing gradually over a 90 day period. Thus, it must be concluded that claimant's alleged work incident of late February 1983 did not produce his injury. Claimant has not sustained his burden of proving that he received an injury in February 1983 which arose out of and in the course of his employment.

(It is noted in passing that the reference in claimant's medical "history of present illness" of an incident "while working" does not establish a subsequent employment-related trauma. The reference is unsupported by any evidence of a second employment-related injury. The phrase is nebulous and is not used as a term of art. It could well refer to work claimant performed about his home or otherwise outside his employment. Therefore, the phrase, without more, does weigh on the outcome of the above issue.)

In the event the foregoing issue had been resolved in claimant's favor, claimant's action would still have failed on the issues of notice and causation. The record establishes that defendant had no actual knowledge of any injury claimant sustained within the 90 days required under the statute. Claimant did not report his injury within that time frame either. Thus, the issue would stand or fall on the applicability of the discovery rule. The rule provides that the reasonableness of claimant's point of ascertainment of the seriousness and compensable character of his injury must be governed by claimant's own intelligence and experience. Claimant is an intelligent young man who has sustained a previous employment related back injury as well as several other promptly reported work injuries. Thus, his failure to recognize the seriousness of his alleged injury and report within the prescribed period was not reasonable and cannot be justified under the discovery rule.

Likewise, Dr. Boulden's testimony that, in the absence of a history of gradual worsening of pain during the three month's from claimant's alleged initial injury to his hospital admission, a second trauma was necessary to produce claimant's symptoms and surgery is damaging to claimant's case on the issue of causation. For this reason claimant would not have prevailed on this issue as well.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant alleges an injury in late February 1983 while performing nailing strip work on a bridge rebuilding project for his employer.

Claimant did not immediately report the alleged incident to either his immediate or his remote supervisor as prescribed by his work rules and employees' agreement.

Claimant has sustained three (3) previous work injuries including a previous work injury to his back which required medical treatment.

Claimant is an intelligent, thirty (30) year old man who has been a union steward.

Claimant did not seek treatment for back pain until May 30, 1983. Claimant then gave a history of an onset of symptoms "while working" approximately one month earlier with subsequent worsening of these symptoms.

Claimant did not give a history of gradual worsening of his symptoms during the more than 90 days from his alleged injury to his emergency room admission.

Without such a history a second trauma was necessary to produce claimant's symptoms and surgery. No history of an employment related trauma was established.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has not established an injury arising out of and in the course of his employment.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing from these proceedings.

Defendant shall pay costs of this action.

Signed and filed this ____ day of May, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS PORTER, Claimant, vs. IOWA BEEF PACKERS, Employer, Self-Insured, Defendant.	:	File No. 674250 A P P E A L D E C I S I O N

By order of the industrial commissioner filed January 17, 1984 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.

The record on appeal consists of the transcript of the hearing testimony; the deposition of Dennis Porter; claimant's exhibits 1 through 28, inclusive; and defendant's exhibits A through P, inclusive, all of which evidence was considered in reaching this final agency decision.

The outcome of this appeal decision will somewhat modify the review-reopening decision.

ISSUES

The review-reopening decision awarded claimant benefits for a running healing period from October 19, 1981 until such time as the healing period would end and ordered the payment of a medical bill and a hospital bill.

The issues are stated in defendant's brief:

1) There is insufficient substantial competent evidence in the record to support the conclusion of the Deputy Commissioner that Claimant's psychological condition, if any, is causally related to the injury of June of 1981.

2) That there is insufficient substantial competent evidence in the record to support the conclusion of the Deputy Commissioner that the Claimant is entitled to healing period benefits at all and certainly not from October 19, 1981 to some date in the future.

3) Error occurred in admitting in evidence, over objection of Defendant-Appellant, the March 28, 1983 decision of the Department of Health and Human Services, Social Security Administration.

SUMMARY OF THE EVIDENCE

Claimant strained his left arm at work for Iowa Beef Packers on June 3, 1981. He had initial treatment and continued to work but his elbow pain continued. On October 20, 1981, Ronald K. Miller, M.D., a qualified orthopedic surgeon, performed a release of the extensor tendon with removal of a bone spur, lateral epicondyle, left elbow. Unfortunately, claimant continued to have pain in his left elbow and on March 11, 1982, Dr. Miller performed further exploratory surgery. Dr. Miller and L. F. A. Peterson, M.D., an orthopedist from the Mayo Clinic both gave claimant a permanent partial impairment rating to the upper left extremity of 25 percent. John J. Dougherty, M.D., a qualified orthopedic surgeon, examined claimant on August 27, 1982 and stated that claimant was able to go to work but should be given a light job.

Claimant's problems were not confined to his left arm. Claimant developed psychological problems and was treated by John V. Fernandez, M.D., a psychiatrist. (There is a dispute in the evidence as to who referred claimant to Dr. Fernandez.) According to Dr. Fernandez's bill, he first saw claimant August 16, 1982 and gave psychiatric therapy twice a month until February 1983, at which time claimant was admitted to the hospital for several days for an "acute exacerbation of major depression disorder" and a learning disability. A report of February 18, 1983 stated that the psychiatric problem "appeared to be secondary to an orthopedic difficulty which was traumatic, sustained at work in January [sic], 1981." A report of September 22, 1982 said that the depressive disorder was "secondary to injury to his left elbow, and subsequent inability to work."

In a report of October 28, 1982, Dr. Fernandez also points out that claimant had other problems which contributed to his psychiatric disorder, such as the death of an uncle to whom he was close, the illness of a friend and a dispute with the internal revenue service.

In a report of September 26, 1983, Dr. Fernandez stated that claimant's impairment "appears to be 10% of the body as a whole."

Greg Roberts, M.D., a psychiatrist, examined claimant on behalf of defendant and stated that the cause of claimant's major depression could not be stated with any certainty because of the many factors which influence such problems. In support, exhibit F, which is a book by Harold I. Kaplan, M.D., et al, Comprehensive Textbook of Psychiatry/III, Vol. 2, Williams & Wilkins, Baltimore: 1980, was entered into the record. The part which explains Dr. Roberts' opinion reads as follows:

> The trend of all clinical experience and research studies supports the view that adult clinical states of affective disorders occur in relation to the balance between stresses on the person and vulnerability or predisposition. Although it is often difficult to guage the relative importance of those two factors, environmental stress seems to play a role mainly in the timing and precipitation of the acute episode, but a purely environmentalistic view is incomplete. A major if not the most significant factor accounting for adult affective disorders lies in the person's predisposition or vulnerability.

APPLICABLE LAW

Claimant has the burden of proof to show that his health impairment was caused by the 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 v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 (1934). "The incident or activity need not be the sole proximate cause, if the injury is directly traceable to it." Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974) and Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971). "A cause is proximate if it is a substantial factor in bringing about the result." Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

A claimant may be compensated for the results of an aggravation of a preexisting condition. Almquist, 218 Iowa 724, 254 N.W. 35; Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Ziegler v. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960); 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).

Section 85.34(1) states:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

Industrial commissioner rule 500-8.3, effective September 28, 1977, 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.

The case of Thomas v. Knudson & Son, Inc., is an Iowa Court of Appeals case of March 20, 1984 that will be published per an order of May 25, 1984. In the third from the last paragraph, the court states: "It is only at the point at which a disability can be determined that the disability award can be made. Until such time, healing benefits are awarded the injured worker."

ANALYSIS

Concerning the issue of causal connection, Dr. Fernandez clearly relates the psychiatric problem to the injury, as is shown by the above quoted evidence. Dr. Roberts is of a different opinion, of course. One takes the opinion of Dr. Fernandez over that of Dr. Roberts for two reasons: (1) Dr. Fernandez is the treating physician and therefore has the better ability to form an opinion; and (2) Dr. Roberts' opinion of causation (based upon the cited authority, above) is a matter of medical causation, not legal causation. In other words the medical causation shows "the most significant factor accounting for adult affective disorders lies in the persons predisposition or vulernability" which does not take into account the legal rule that a preexisting disposition may be aggravated and therefore compensated under the law.

The more difficult question, perhaps, is presented by defendant's second issue, which concerns the extent of claimant's disability. Defendant argues in its brief:

> Exhibit B shows that the Claimant was paid and received worker's [sic] compensation benefits for all time lost from work beginning on July 5, 1981 through and including March 2, 1983, a period of one year and eight months. Thereafter, additional worker's [sic] compensation benefits were paid to the Claimant for the period beginning March 3, 1983 through September 14, 1983, another six and a half months, making a total of two years, three and a half months of worker's [sic] compensation benefits paid. Part of the benefits paid were considered to be in payment of the permanent partial disability rating fixed by Mayo Clinic and Dr. Miller.
>
> We submit that the record in this case is void of evidence as to Claimant's ability to engage in employment after August 30, 1982.

Defendant goes on to argue that the orthopedic evidence shows claimant has received a permanent impairment rating and that Dr. Roberts was of the opinion that claimant could work with his depression.

The question is even more difficult when one considers that Dr. Fernandez also gave a rating to the body as a whole on the basis of the psychiatric problem. Also, there is a problem in that claimant's psychiatric difficulty is contributed to by non-work related matters. Dr. Fernandez's letter of September 26, 1983 states further:

> Mr. Porter continues to be under my care and is being seen at biweekly intervals. He is presently on Sinequan 300 mg. at 6 p.m., and Xanax 1 mg. t.i.d. Over the last two weeks he has informed me that he has not been drinking, and has agreed to go for alcoholism counseling. He continues to have some anxiety reactions and some depression. He also has some psychophysiologic problems.

The most important part of that letter is that claimant was still being treated for a problem which has been found to be work connected. The hearing deputy had this to say about the extent of the healing period:

> While the undersigned is reluctant to grant a "running award" in this case, he is presented with medical evidence from the treating psychiatrist that claimant's condition has not stabilized. It is also obvious to the undersigned, by virture of his observation of the claimant, that the claimant appeared sullen and morose throughout the hearing and the claimant further testified that he needs the medication to remain calm, and the reports of Dr. Fernandez support his claim. The reluctance to grant a running award stems from the feeling that it can possibly harm all parties. Defendant suffers a financial harm, but most importantly, claimant is given the potential of having far greater harm by being the victim of a self-fulfilling prophesy [sic] that he will never be able to return to work and become a gainfully employed citizen. Therefore, all parties are admonished to closely monitor claimant's progress.

Thus, there are two certain factors: (1) the treating psychiatrist, Dr. Fernandez, establishes the necessary causal

relationship, and (2) the hearing deputy had some very definite thoughts about the disposition of the case. Although this case is being considered de novo the proposed agency decision (the review-reopening decision) has significance. Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293 (Iowa 1982).

The final issue raised by defendant concerns whether or not the hearing deputy was in any way convinced about the disability from a piece of evidence that was entered into the record over the objection of defendant, an award for total disability under the Social Security Act. In that respect, the hearing deputy stated:

> Additionally, the claimant was awarded social security disability benefits on March 28, 1983. The administrative law judge found that claimant's depression was causally related to his elbow injury and that claimant should receive social security benefits until he was able to return to work after his release from psychiatric counseling.

The foregoing shows that the evidence was used in reaching the result of the running healing period. Since there was no showing that the social security standards for disability were in any way similar to those of the Iowa Workers' Compensation Act, it is clear that the social security decision would have no probative value here. Therefore, defendant's objection to the entrance of the exhibit into the record is sustained.

On last thing should be mentioned. It will be noted that in the above quotation from defendant's brief, it states that certain weekly benefits should be considered as payment of a bill from the Mayo Clinic. This decision in no way legitimitizes that position.

FINDINGS OF FACT

1. Claimant hurt his left elbow at work on June 3, 1981.

2. As result of that injury, claimant had two surgeries and sustained a 25 percent permanent partial impairment of the left upper extremity.

3. Claimant also has a depressive disorder caused by the injury.

4. Although Dr. Fernandez, the treating physician, gave a rating of permanent impairment, and Dr. Roberts, the examining physician, says claimant can work, claimant is being treated for his psychiatric disorder and there is no clear indication that the healing period has ended.

5. Claimant has been paid compensation benefits from July 5, 1981 through September 14, 1983.

CONCLUSIONS OF LAW

Claimant sustained an injury which arose out of and in the course of his employment on June 3, 1981.

Claimant has a twenty-five (25) percent permanent partial disability to the left arm as a result of that injury.

Also as a result of the physical injury, claimant has a psychiatric depressive disorder which entitles him to a running healing period.

ORDER

THEREFORE, defendant is hereby ordered to pay weekly compensation benefits unto claimant for a healing period at the rate of two hundred fifty and 47/100 dollars ($250.47) per week from July 5, 1981 until such time as the test for cessation of healing period compensation is met, accrued payments to be made in a lump sum, with a credit for any payments heretofore made.

Interest should be paid in accordance with §85.30, Code of Iowa.

It is further ordered that defendant pay the following medical and hospital benefits:

Dr. John V. Fernandez	$ 980.00
Jennie Edmundson Memorial Hospital	1,247.90

Costs are hereby taxed against defendant.

Defendant is further ordered to file a current activity report within twenty (20) days of the date below.

Signed and filed this 21st day of June, 1984.

ppealed to District Court;
eversed and Remanded for
etermination of permanency

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TERRY PRATT, Claimant, vs. TERRY ORR d/b/a ORR TRUCKING, Employer, and EMPLOYERS MUTUAL CASUALTY CO., Insurance Carrier, Defendants.	File No. 701939 R U L I N G

Defendant-appellees have filed a motion to dismiss claimant's appeal to which claimant has resisted. Claimant filed an appeal to the commissioner on November 2, 1983 from an arbitration decision filed October 14, 1983 in which he was denied recovery for injuries received in April of 1982.

On November 22, 1983 claimant-appellant filed an application for relief from reimbursing the defendants the cost of the transcript they had provided to the hearing officer in the arbitration proceeding. This relief was denied on November 30, 1983.

Defendants now contend claimant's appeal should be dismissed for his failure to comply with section 86.24, Code of Iowa, 1983, which provides in relevant 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 appeal shall be in Polk county unless the industrial commissioner shall direct the hearing be held elsewhere.
>
> ....
>
> 4. A transcript of a contested case proceeding shall be provided by an appealing party at the party's cost and an affidavit shall be filed by the appealing party or the party's attorney with the industrial commissioner within ten days after the filing of the appeal to the industrial commissioner stating that the transcript has been ordered and identifying the name and address of the reporter or reporting firm from which the transcript has been ordered.

and further, Rule 500-4.30 which provides in relevant part: "In the event the cost of the transcript has been initially borne by a nonappealing party prior to the appeal, the appealing party or parties within thirty days after notice of appeal or cross-appeal shall reimburse the cost of the transcript to the nonappealing party." Rule 500-4.30 clearly carries out the intent of the legislature as expressed in section 86.24(4), Code 1983.

As indicated, paragraph (1) of section 86.24 allows appeal of a deputy commissioner's decision; paragraph (4) of section 86.24 sets out a condition to be met in the event the appeal prerogative is exercised; and Rule 500-4.30 provides the manner in which the transcript of the proceeding before the deputy is to be financed in the event it is already available by virtue of having been provided to the hearing deputy as a courtesy and convenience by another party to the action.

The furnishing of a transcript to the hearing officer is in no way to be considered a facilitator for the opposing party to appeal in the event the furnishing party prevails.

In Reid v. Landess, 252 N.W.2d 442 (Iowa 1977) the claimant's claim for workers' compensation benefits made in a petition for arbitration before the Iowa Industrial Commissioner was denied by a board of arbitration. She timely petitioned for review of the board's decision by the industrial commissioner. The claimant brought an action in district court alleging indigency in asking that writ of mandamus issue requiring the industrial commissioner to furnish the transcript of the arbitration proceeding at public expense and to proceed with a review hearing. Pursuant to the statutory scheme at that time, the industrial commissioner was to hold an evidentiary hearing concerning the appeal even if a transcript was not provided. The industrial commissioner admitted this in his answer in district court. The district court refused to require the furnishing of a free transcript to an indigent in such workers' compensation review proceeding. Its decision was affirmed by the Iowa Supreme Court citing United States v. Kras, 409 U.S. 434 (1973) and Ortwein v. Schwab, 410 U.S. 656 (1973) for the following argument:

> Under these holdings neither due process nor equal protection rights (when a suspect classification is not involved) are infringed by economic or social welfare legislation which effectively denies indigents appellate rights available to persons of means. The court held due process does not require creation of an appellate system and no equal protection violation exists under traditional equal protection analysis when an appropriate fiscal objective is served by economic or social welfare legislation. In the present situation, plaintiff's appellate rights are not foreclosed, a suspect classification is not involved, and the avoidance of public expense which would be incurred in furnishing free transcripts to indigents is a rational legislative purpose.

The present appeal process within the agency differs from

that in existence at the time Reid was decided. At the time of Reid, there was not a statutory provision requiring the appealing party to provide a transcript and section 86.24 allowed the parties to produce additional evidence and required the commissioner to hold the hearing without a transcript. Section 86.24(4), The Code, now requires the appealing party to provide a transcript and to pay for such. This change in the law was not applicable to the Reid appeal to the industrial commissioner but had occurred prior to the Iowa Supreme Court's consideration of Reid and is discussed in Reid. The constitutional ruling that neither due process nor equal protection rights were infringed by not providing an indigent with a transcript are equally applicable to require an appealing party to pay the expense of a transcript.

As the Iowa Supreme Court noted in Reid, whether indigents should be provided free transcripts for use in workers' compensation appeals is a matter of legislative prerogative. The current statute, section 86.24(4) clearly provides that an appealing party must bear the cost of an appeal. The intent of the legislature is fully carried out in the rules which require an appealing party to reimburse the non-appealing party for a transcript which has been previously provided.

An analogous case was decided by the Court of Appeals of Michigan in Sharp v. Allied Supermarkets, Inc., 51 Mich.App. 605, 215 N.W.2d 769 (1974), rev'd on other grounds, 392 Mich. 767, 219 N.W.2d 432 (1974). In that case a claimant's appeal to the Workmen's Compensation Appeal Board from an adverse decision by a referee was dismissed for failure to provide a transcript. Using an identical analysis as the Iowa Supreme Court in Reid, the Michigan Court of Appeals affirmed the dismissal of the appeal to the Workmen's Compensation Appeal Board stating that due process and equal protection did not require the provision of a free transcript on appeal and that a decision concerning the expense of an appeal was a legislative decision and not a judicial decision.

The claimant correctly notes that a transcript is available to the commissioner. This transcript was ordered by the deputy industrial commissioner at the conclusion of the arbitration proceedings for his review before entering a decision. The cost of this transcript was borne by the defendants as provided in section 86.19(1). A transcript therefore is available to the undersigned. However the claimant has not reimbursed the defendants for the cost of this transcript as provided in Rule 500-4.30. As stated above, Rule 500-4.30 correctly exemplifies the legislative intent of section 86.24(4). This is a legislative matter and the legislature had determined that an appealing party should bear the cost of the transcript. As noted in Sharp, 51 Mich.App. 605, 215 N.W.2d 769, the requirement of the appealing party to bear the expense of the transcript is a legitimate state objective to avoid the possibility of numerous frivolous appeals encouraged by free provision of a transcript. In addition, there is a legitimate state objective in requiring the non-appealing party to be reimbursed the expense of the transcript which was initially ordered by the deputy industrial commissioner. The fact that the record has been transcribed does not alter the fact that the claimant has refused to abide by the rules in reimbursing the non-appealing parties for the cost of the transcript. Failure to do such requires the dismissal of the claimant's appeal.

It should be noted that there is no proof of the claimant's indigency in the record nor is there an agreement of the parties that the claimant is indigent as was the case in Reid. However, in light of the above ruling that the claimant's due process and equal protection rights are not violated by requiring him to reimburse the non-appealing defendants for the cost of the transcript, a determination of indigency does not need to be made.

WHEREFORE, the claimant's appeal from the deputy's decision of October 14, 1983 is hereby dismissed for the claimant's failure to reimburse the non-appealing defendants the cost of a transcript as provided in 500-4.30 of the Iowa Industrial Commissioner's Rules.

Signed and filed this 30th day of March, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BARBARA D. PRINCE,	:	
	:	File No. 642866
Claimant,	:	
	:	A P P E A L
vs.	:	
ROCKWELL GRAPHIC SYSTEMS, INC.,	:	D E C I S I O N
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

By order of the industrial commissioner filed April 4, 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. Defendant appeals from an adverse review-reopening decision.

The record on appeal consists of the transcript; two depositions by James W. Turner, M.D. (dated March 29, 1982 and October 7, 1982), a deposition by John R. Walker, M.D., and a deposition by Steven Bertch; defendant's exhibits A through G, inclusive and claimant's exhibits 1 through 13, inclusive.

Claimant stated that she slipped on a bolt and fell, landing in a sitting position. She went to the doctor the next day and told him the same history. It turned out she had a broken coccyx, and she was treated; she continued to have trouble and developed the problems more fully discussed in the hearing deputy's decision. There was no showing that there was any intervening cause, and other inconsistencies in the evidence seem minor. The hearing deputy heard the case in person and weighed all the evidence giving his decision some significane. Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293 (1982).

Of course, this review is de novo, and the undersigned deputy industrial commissioner may choose to disagree with the hearing deputy. Here it is simply the case that the hearing deputy's findings of fact and conclusions of law appear to be proper and are adopted and repeated herein.

FINDINGS OF FACT

1. Claimant was employed by defendant employer on July 8, 1980.

2. Claimant injured her coccyx when she fell at work.

3. Defendant filed a memorandum of agreement.

4. Claimant's injury caused permanent disability to the body as a whole to the extent of 20 percent.

5. Claimant was disabled from work from March 2, 1981 through August 17, 1981.

6. Claimant's medical expenses are related to the injury, and are fair and reasonable.

7. The rate of compensation is $222.26.

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties and subject matter.

2. Claimant was employed by defendant employer on July 8, 1980.

3. Claimant sustained an injury arising out of and in the course of her employment on July 8, 1980.

4. Claimant is entitled to healing period compensation for a period of 24 1/7 weeks.

5. Claimant is entitled to permanent partial disability compensation for a period of 100 weeks.

6. The medical expenses shall be ordered to be paid.

ORDER

IT IS THEREFORE ORDERED that defendant pay unto claimant twenty-four and one-sevenths (24 1/7) weeks of healing period compensation at the rate of two hundred twenty-two and 26/100 dollars ($222.26) per week.

IT IS FURTHER ORDERED that defendant pay unto claimant one hundred (100) weeks of permanent partial disability compensation at the rate of two hundred twenty-two and 26/100 dollars ($222.26) per week.

IT IS FURTHER ORDERED that defendant pay unto claimant the following medical expense:

James W. Turner, M.D. $390.00

Costs are taxed to defendant. These costs include one hundred fifty dollars ($150) for Dr. Turner's witness fee and two hundred sixty dollars ($260) for Dr. Walker's witness fee and reports.

Interest is to accrue pursuant to section 85.30, Code of Iowa.

Defendant is to receive credit for health and accident amounts paid pursuant to section 85.38, Code of Iowa.

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

Signed and filed at Des Moines, Iowa this 20th day of July, 1983.

Appealed to District Court;
Affirmed
Appealed to Supreme Court;
Affirmed

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAUL T. RAMSEY, Claimant, vs. DILTS TRUCKING, INC., Employer, and GREAT WEST CASUALTY CO., Insurance Carrier, Defendants.	File No. 679117 A R B I T R A T I O N D E C I S I O N

INTRODUCTION

This was a proceeding in arbitration brought by the claimant, Paul T. Ramsey, against his employer, Dilts Trucking, Inc., and Great West Casualty Co., the insurance carrier, at the courthouse in Council Bluffs, Iowa on December 5, 1983 pursuant to a prehearing order of September 14, 1983. The case was considered fully submitted at that time.

A review of the industrial commissioner's file reveals an injury date of January 7, 1980. A first report of injury was filed October 14, 1981; a memorandum of agreement was filed September 14, 1981.

The record consists of the testimony of the claimant, of Clifford D. Dilts, of Edward J. Rothanzel, of Jerry L. Swanger, of Carl B. Behm, of Carolyn J. Ruby, and of Betty Thompson; claimant's exhibits 1 through 17; and defendants' exhibits A through L. Defendants submitted a medical chart summarization as part of the record. Claimant was given until December 13, 1983 to file a response thereto and did so.

ISSUES

The issues as presented in the prehearing order are:

1. Whether a causal relationship exists between the alleged injury and the disability.

2. Whether claimant is entitled to benefits for temporary disability.

3. Whether claimant's medical expenses are causally related to the alleged injury and resulting disability.

4. The rate of weekly compensation as fixed by the proper number of dependent exemptions to which claimant is entitled.

REVIEW OF THE EVIDENCE

Claimant appeared in his own behalf. He testified that he was forty-six years old, married and had four children living at home at the time of his injury. Two of the children, Paula and Terry, were over eighteen at the time of the injury. Terry was nineteen, single and a high school senior enrolled in industry and trades program through his school. Under the program, he worked part-time and attended school part-time. He received both wages and school credit for his work. Paula was twenty-one, single, and a full time student at Iowa Western Community Technical College. She had a part-time job and used her earnings to make car and auto insurance payments. Claimant testified that both Paula and Terry relied on him for support and were claimed as his dependents on his 1980 income tax return. Paula's tuition was paid under a federal grant.

Claimant testified that he left school after completing eighth grade. He then worked at various jobs until he entered the armed services in 1959 and was discharged after two years. While in the service he attended both supply handling school and maintenance school. On discharge, he worked for approximately eight months for the Iowa Highway Commission as a grade inspector and member of the survey crew. He then worked for an auto service station for one year. He left to work as a mechanic with Beeline Motor Freight. He left Beeline when he was hired by defendant Dilts in 1965. He has worked for Dilts continuously since then but for time off for allegedly work-related disabilities. Claimant first worked as a lease driver for Dilts; in 1972, he became a mechanic in the employer's shop.

Claimant testified to a number of work-related injuries other than that on which he bases this claim. He stated that he had torn cartilage in both knees which resulted in three surgeries on the left knee and two on the right; he also stated that he had "mashed" his hand and cut his wrist. Both injuries required medical treatment. Claimant said he had no bitter feelings concerning his employer's handling of his earlier injuries. Clifford Dilts, owner and manager of Dilts Trucking, is claimant's brother-in-law by marriage.

Claimant testified that he injured his hip and back while working for defendant employer on January 7, 1980. He reported this series of events. Claimant had climbed a ladder on a truck trailer to retrieve his tools from the top of the trailer. When claimant was at the top of the ladder another employee moved the trailer and claimant fell approximately 20 feet onto crushed rock. Claimant testified he heard a popping sound and experienced pain above or at the knee. Claimant testified he then rolled under a second trailer to avoid being hit as the first trailer continued to move.

Claimant reports he first experienced pain in his back and hip in the hospital. He testified that he has had hip pain since the injury which pain is localized below the belt line on the left side and radiates in the groin area on the inner side of his right leg.

Claimant testified he first experienced back pain on the date of injury when he was moved from the stretcher to the operating table. He characterized the pain as a tingling down his back with numbness in his left leg and a burning sensation in the sole of his foot. He recited that the back and leg pain was constant and gradually worsened until M. P. Margules, M.D., performed surgery in July 1983 but that his hip pain made it "awful hard to tell what was hurting." Claimant testified that the back pain is now gone. He reports that since his July 1983 surgery, he can stand and sit better than previously. Claimant stated that he attempted to let his doctors know of his problems with his back and legs.

Claimant's exhibit 17, a chronology of claimant's medical treatment and time off work, reveals that claimant worked intermittently post-injury when his condition permitted. On July 21, 1981, claimant was released to return to light duty work which does not require stooping, climbing or lifting. The restriction has not been lifted; claimant reports he has engaged in some such activities when he has worked post-injury.

Claimant reports that his July surgery alleviated his left leg pain and he feels he will be able to do "a lot more" since surgery. Claimant last saw Dr. Margules on September 5, 1983 and was scheduled to see him in January 1984. Claimant believes Dr. Margules will release him to return to work then. Claimant says he would like to return to work.

Claimant's exhibit 15 is a compilation of medical bills claimant alleges are causally connected to his injury. Regarding a bill for $29.20 from Dr. Margules, claimant testified he had not seen the doctor for other than his back and leg injury. Claimant recited that an anesthesia bill of July 1983 related to the time of his myelogram and back surgery. Claimant recited that a bill from Jennie Edmundson Hospital for July 10 through July 14, 1983 related to his hospitalization for his myelogram. Claimant also reported that a hospital bill for July 1983 related to the period in which he was hospitalized for removal of the herniated disc.

On cross-examination, claimant testified that he felt his knees were gradually getting worse before the January 7, 1980 injury and that he doesn't know if his knees were hurt in that injury. Claimant again recited that he is "getting better" since his July 1983 surgery. He said he no longer has back pain nor tingling and numbness in his left leg and that his left leg no longer feels dead. Claimant again stated he feels he could return to his former work with defendant employer and that he would like to do so.

Defendants called Clifford D. Dilts, Edward J. Rothanzel, Jerry L. Swanger, and Carl B. Behm in its behalf. Mr. Dilts is the owner-operator of Dilts Trucking; the other gentlemen are employees of Dilts Trucking.

Mr. Dilts stated he was familar with claimant's prior injuries and with his physical condition before the January 7, 1980 injury and that he had visited with claimant concerning his condition after claimant's January 1980 injury. He reported that before his July 1983 surgery, claimant had stated his legs were bothering him but Mr. Dilts did not recall claimant complaining of back problems. On cross-examination Mr. Dilts admitted he had never talked at length with claimant about claimant's problems.

Edward J. Rothanzel stated he has known claimant since Mr. Rothanzel began working for defendant employer in the early 1980's. He testified that before his January 1980 injury claimant was "all right." He stated that he knew claimant had hip problems before July 1983 but that he couldn't recall other complaints before that time. On cross-examination the witness stated that as a lease driver he had little contact with claimant and that he had not talked with him extensively regarding his medical treatment.

Jerry L. Swanger testified he has worked with claimant as a mechanic in defendant employer's shop for six or seven years. He reported that after his January 1980 injury, claimant said his hip hurt and that he had shooting pain down to his heel but never went into details. The witness reported claimant only complained of back pain a few days before his July 1983 surgery. On cross-examination, the witness admitted he couldn't remember when claimant first stated he had back problems.

Carl B. Behm testified that he has been in defendants' employ since 1973, working as a lease operator until entering the shop as a mechanic in 1981. The witness said he was not present at the time of claimant's January 1980 injury. He characterized claimant's preinjury condition as fair, however. The witness reported he knew claimant's legs and hips bothered him prior to his 1983 surgery but he knew nothing of claimant's back problems until a few weeks before claimant's July 1983 hospitalization. At that time, claimant told him he was entering the hospital for a myelogram. On cross-examination, the witness admitted he had no reason to recall claimant's physical complaints.

Claimant called Carolyn J. Ruby and Betty Thompson as rebuttal witnesses.

Ms. Ruby is claimant's sister and a licensed practical nurse at Mercy Hospital. She reported visiting claimant while he was hospitalized after the January 1980 injury. She stated he had said he was doing fair but that his back and leg were bothering him. She also saw claimant after his release from the hospital. She stated that claimant was doing fairly well but used a cane and reported that his back was bothering him and that he had pain and numbness in his left leg. She testified that claimant was "grouchier" after his injury and couldn't lie down without pain. She stated that claimant's complaints increased until his surgery in July 1983 and that she has not heard him complain of the leg pain since that surgery though she knows he still has hip pain. The witness characterized claimant as someone who keeps his complaints to himself and who was not likely to tell co-workers of his pain. On cross-examination the witness admitted she had never read claimant's hospital chart.

Betty Thompson is a long time friend of claimant and his wife. She reported she knew of claimant's knee problem and his limp but of no other problems he may have had prior to his January 1980 injury. She recited that between the 1980 injuiry and the 1983 surgery claimant complained of back and leg pain. She reported that before his surgery claimant explained that he could no longer play horseshoes or fish because of his back pain.

Claimant's exhibit 1 is medical records from Mercy Hospital relative to claimant's January 1980 hospitalization. Claimant's exhibit 2 is medical records from Mercy relative to claimant's August-September 1980 hospitalization. This discharge summary states principal diagnosis of degenerative disc disease L1-2, L3 interspace and fibrous union of left hip fracture, status post Jewett nailing and an associated diagnosis of repair of lateral collateral ligament left knee with meniscectomies both knees. Claimant's exhibit 3 is a September 24, 1980 letter of R. K. Miller, M.D., to Great West Casualty stating claimant suffered a comminuted intertrochanteric fracture at initial injury; subsequently developed deep venous thrombosis, and experienced joint discomfort on return to work.

Claimant's exhibit 4 is the medical records of claimant's June-July 1981 hospitalization. The records relate claimant's lumbar and left leg and hip pain to his January 1980 injury. Claimant's exhibit 5 is a report of Dr. Miller and a work release of Dr. Miller releasing claimant to return to light duty work July 15, 1981 following removal of his hip pins. Claimant's exhibit 6 is a report of claimant's September 1981 examination under Richard A. Brand, M.D., at the University of Iowa Hospitals and Clinics. Dr. Brand stated he was unable to determine the cause of claimant's pain but "frankly doubt that much, if any, of it is due to the left hip joint and/or fragment of the lesser trochanter...."

Claimant's exhibit 7 is an August 26, 1982 report of Franklin H. Sim, M.D., of the Mayo Clinic. The doctor suggested the possibility that claimant might be getting some impingement from the protuberant lesser trochanteric region. Claimant's exhibit 8 is medical reports of Dr. Miller to December 28, 1982. Claimant's exhibit 9 is medical records from claimant's July 1983 hospitalization. The record lists claimant's final diagnosis as herniated lumbar disc, L4-L5 interspace, left, due to trauma initially sustained in an accidental fall on January 7, 1980 and intertrochanteric fracture of the left neck of the femur sustained in same fall. Claimant's exhibit 10 is other medical records from claimant's second July 1983 hospitalization. Claimant's exhibit 11 is a medical report of Dr. Miller of September 14, 1983 in which the doctor assigns claimant a 25 percent permanent impairment of the body as a whole.

Claimant's exhibit 12 is a November 11, 1983 report of Dr. Margules. In the report, the doctor opines:

> In reviewing Mr. Ramsey's case it must be said that the patient had pre-existing degenerative disease of the lumbar spine which was markedly aggravated by the accidental fall of January 7, 1980. On this day the patient sustained two separate injuries: one involving the neck of the Left femur where an intertrochanteric fracture occurred with comminution of the fragments, as well as, a second injury to the lumbar spine aggravating a pre-existing disc disease and causing a severe compression of the L5 root on the Left.
>
> It was difficult in this case to arrive at a definite diagnosis because of the dual nature of the injury which makes it difficult at times to distinguish between radicular pain and local bone pain due to the facture [sic] of the neck of the femur.

Claimant's exhibit 13 is a November 9, 1983 report of William R. Hamsa, Jr., M.D. The report notes the impression: a historical lumbar disc treated by laminectomy, at this time, asymptomatic. Claimant's exhibit 14 is a November 28, 1983 letter of Dr. Hamsa to Rick Barntsen stating:

> I agree with Dr. Ron Miller that his [claimant's] back complaints could have easily been masked by the distress he was having from his hip fracture, and as he has stated in my history in the past, he did not have trouble with his back prior to the injury, so the injury may have certainly produced the hip fracture, probably also started the symptoms in his back leading to the laminectomy.

Claimant's exhibit 15 is various billing statements relative to claimant's treatment and care.

Claimant's exhibit 16 is the deposition of Dr. Ronald K. Miller taken October 19, 1983 on defendants' behalf. The doctor opined that claimant's 1983 surgery and his disc herniation were a result of the fall suffered in 1980. He noted that it would not be unusual for such a problem to elude immediate diagnosis when the patient had also suffered severe hip injuries and that a principal indication that claimant's problems were not merely in his hip was the fact claimant's overall condition did not improve with healing in that area.

Defendants' exhibit A through L are medical records and hospital reports, many of which are duplications of materials already submitted by claimant. Of significance, however, is defendants' exhibit D, claimant's hospital records of September 21 through September 26, 1975 diagnosing hypoplastic and possible torn left lateral meniscus.

APPLICABLE LAW AND ANALYSIS

We first must decide the issues of whether a causal connection exists between claimant's January 1980 injury and his disability following his 1983 surgery and whether claimant is entitled to benefits for his surgery-related disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 7, 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). 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).

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, 760-761 (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, 815 (1962).

Claimant has sustained his burden of showing a causal relationship between his 1980 injury and the back problems which precipitated his 1983 surgery and subsequent disability. Drs. Miller, Margules, and Hamsa all relate claimant's back problems to his 1980 work injury. Each indicates that the severity of claimant's hip injuries sustained in the 1980 incident could well have masked back problems sustained concurrently. The record establishes that, while claimant may have had degenerative disc disease earlier, claimant had few, if any, serious back problems before his 1980 injury. Thus, the credible evidence establishes it is probable claimant's back injuries resulted either directly from his 1980 work injury or from aggravation of a preexisting condition on that injury.

Claimant seeks benefits for temporary total disability. 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 occurs first.

Claimant has not returned to work, it is not altogether clear that he ever will be able to return to work substantially similar to the employment to that in which he was engaged at the time of his injury. Claimant has already received one permanent partial impairment rating and it appears more than likely that the issue of claimant's permanent partial disability will be before this agency at some future time. Therefore, this is a case where an award of healing period benefits is appropriate. In regard to healing period benefits, section 85.34 provides relative to healing period benefits:

> Compensation for permanent disabilities and during a healing period for permanent partial disabilities shall be payable to an employee as provided in this section. In the event weekly compensation under section 85.33 had been paid to any person for the same injury producing a permanent partial disability, any such amounts so paid shall be deducted from the amount of compensation payable for the healing period.
>
> 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.

Claimant reports he was scheduled for a return visit to Dr. Margules in January 1984. He believed the doctor would release him to return to work then. The evidence presented at hearing established claimant is entitled to healing period benefits to such time. Should events subsequent to claimants return visit with Dr. Margules established a furhter entitlement to healing period benefits, defendants are urged to pay any benefits to which claimant is entitled.

With causal connection between claimant's 1980 injury and his back problems established, it follows that claimant's medical expenses relative to diagnosis and treatment of the back problems are also causally connected to claimant's 1980 injury. Under section 85.27, claimant is entitled to payment of such.

Lastly, we must determine claimant's weekly rate of compensation as fixed by the proper number of exemptions to which he is entitled. Section 85.61(10) permits claimant the maximum number of exemptions for actual dependency to which he was entitled under the internal revenue code and chapter 422, The Code, on his injury date. Claimant was entitled to and did claim Terry and Paula as exemptions on his 1980 income taxes. Therefore, he is entitled to exemptions for them as well as for his two younger children and his wife and self. A review of the file reveals that claimant's gross weekly earnings on the injury date were $400.00 His weekly rate, therefore, is $260.03.

FINDINGS OF FACT

WHEREFORE IT IS FOUND:

Claimant sustained an injury to his back while working for defendant employer on January 7, 1980.

Claimant's condition was subsequently diagnosed as herniated lumbar disc, L4-L5 interspace and surgery was performed in July 1983.

Claimant's period of disability following his July 1983 surgery are causally related to his January 7, 1980 injury.

Claimant's medical expenses relative to diagnosis and treatment of his herniated disc are causally related to his January 7, 1980 injury.

Claimant was entitled to claim all four of his children as actual dependents under the internal revenue code and chapter 422, The Code.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

Claimant has established that a causal relationship exists between his injury of January 7, 1980 and his disability following his 1983 surgery.

Claimant is entitled to healing period benefits from the date of his surgery until the time of his January 1984 return visit to Dr. Margules.

Claimant is entitled to payment of medical expenses causally related to diagnosis and treatment of his herniated disc.

Claimant is entitled to claim a total of six exemptions in establishing his rate of weekly compensation.

ORDER

THEREFORE IT IS ORDERED:

Defendants pay claimant healing period benefits at the rate two hundred sixty and 03/100 dollars ($260.03) per week from the date of his surgery until the time of his January 1984 return visit to Dr. Margules.

Defendants pay claimant's medical costs causally related to diagnosis and treatment of his herniated disc as evidenced by claimant's exhibit 15.

Interest accrues pursuant to section 85.30 as amended.

Defendants pay the costs of this action.

Defendants file a final report upon payment of this award.

Signed and filed this 28 day of March, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAUL T. RAMSEY,
Claimant,
vs.
DILTS TRUCKING, INC.,
Employer,
and
GREAT WEST CASUALTY CO.,
Insurance Carrier,
Defendants.

File No. 679117
N U N C
P R O
T U N C
O R D E R

Upon examination of the record and the Findings of Facts and Conclusions of Law set forth at page 10, it is ascertained that the compensation rate awarded, $260.03 was taken from the Workers' Compensation Benefit Schedule effective July 1, 1983 rather than that in effect on January 7, 1980, claimant's injury date. The proper rate of compensation is $246.73. The Arbitration Decision filed March 28, 1984, is corrected to so read.

Signed and filed this 10th day of April, 1984.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FRANKLIN RAUSCH,
Claimant,
vs.
CERRO GORDO COUNTY CARE FACILITY,
Employer,
and
UNITED STATES FIDELITY & GUARANTY COMPANY,
Insurance Carrier,
Defendants.

File No. 700306
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 Franklin Rausch, claimant, against Cerro Gordo County Care Facility, employer, and United States Fidelity & Guaranty 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 September 22, 1981. It came on for hearing on February 24, 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.

At the time of hearing the parties stipulated that claimant's rate of pay was $4.32 per hour and that he was single and entitled to one exemption.

The record in this matter consists of the testimony of claimant; Kathryn Tolefrier, Margaret Brunswold, Fern Bond, Janice Walters, Joan Smyth and Susan Boever; claimant's exhibit 1, a letter from Sterling John Laaveg, M.D., dated August 16, 1982; claimant's exhibit 2, doctor's notes from Dr. Laaveg dated September 22, 1982; claimant's exhibit 4, a letter from Dr. Laaveg dated April 1, 1982; claimant's exhibit 5, a radiographic report dated February 16, 1982; claimant's exhibit 6, a discharge summary for a hospitalization of February 16, 1982; claimant's exhibit 8, a statement from Surgical Associates; claimant's exhibit 9, a statement from Slaats; claimant's exhibit 11, a note from claimant dated September 8, 1981; claimant's exhibit 12, a letter from claimant dated May 28, 1982; claimant's exhibit 13, a memo from Joan Smyth; claimant's exhibit 14, a certificate for return to work from Dr. Laaveg dated April 7, 1982; claimant's exhibit 15, certificates to return to work dated February 8 and March 10, 1982; claimant's exhibit 17, a letter from claimant's counsel dated April 6, 1982; claimant's exhibit 18, certificates from courses claimant has completed; claimant's exhibit 20, the deposition of Slaats; claimant's exhibit 21, the deposition of Dr. Laaveg with accompaning exhibits; defendants' exhibit C, claimant's time sheets; and defendants' exhibit D, a summary of sick days. Defendants' objections to claimant's exhibits 3, 7, 10, 16 and 19 are sustained. Defendants' objections to claimant's exhibits 8, 9, 11, 12 and 13 and claimant's objection to defendants' exhibit D were considered in weighing the evidence.

ISSUES

The issues in this matter are whether or not claimant's injury arose out of and in the course of his employment and whether or not claimant is entitled to temporary total disability. Defendants have raised the affirmative defense of notice.

STATEMENT OF THE CASE

Forty-nine year old single claimant, a high school graduate, served in the army as a clerk. He later attended cooking and meat school. He also took courses and received certificates in geriatrics, residential care and sanitation.

Claimant's work history includes a job in a greenhouse prior to his entering the service. The majority of his work post service has involved meat cutting -- work entailing lifting weights of 200 pounds as well as bending and twisting. After having no job for a period of time, claimant commenced work for defendant on June 1, 1976. He was hired with no restrictions.

Claimant's first position with defendant was as a ward attendant helping feed, clothe and care for patients. He claimed he was unbothered by walking and did no lifting. An additional duty taking 10 to 15 minutes was to mop the floor each night. He noted stiffness in his back, but he felt that was normal for post back surgery.

Around the middle of September in 1976 he took on additional work as a meat cutter. Meat cutting alternated between beef and pork and took 20 to 25 hours each month on his days off or on weekends. He had help lifting the quarters of beef. His meat cutting job terminated September 1, 1981.

In the fall of 1977 he became a cook with the duty of preparing food and a little cleaning -- work entailing lifting and some bending. Claimant remembered that once in a while he would get sore and stiff, but his problems were about the same as those he had after surgery. He saw both orthopedic doctors and a chiropractor.

Since January of 1983 claimant has been working part-time in a grocery store for 26 to 30 hours where he is able to perform his duties with the aid of a body brace. His work includes lifting 40 to 50 pound boxes of beef.

Claimant recalled having back surgery performed by Dr. Fischer in January of 1973 and being off work until April or May. He denied seeking compensation for this surgery and asserted he was able to go back to the same job with no restrictions although he still had trouble with his back and noted that after a time his legs would become weak and he would have to either sit down or fall down. He testified to intermittent weakness and to pain most of the time. He was fired from his job in 1974 or 1975.

Claimant reported going to the veterans hospital to try to get his back in shape to work. He was seen in the rehabilitation center. Although he felt able to work, no one would hire him.

Claimant recollected going to the emergency room in May of 1980 where he saw Dr. McCoy. He asserted that his legs and back bothered him and he was barely able to walk. He remained off work for a week or two at bedrest and taking pain pills. He was released to his usual duties.

A year later claimant saw Dr. Laaveg. Prior to that time he had been seeing a chiropractor on a weekly basis. On a particular morning he awoke hardly able to walk. He thought his back was getting worse. As a chiropractor could not give him a slip to remain off work, he went to Dr. Laaveg who gave him pain pills and placed him on bedrest with little activity. He returned to work at the end of May or the first of June.

Claimant recollected that after this episode he tired more easily; but he was back at the same duties. He was called in on emergencies as cook and ward attendant and worked extra hours to assist with the freezing of corn and beans.

At some point claimant fell in the bathroom at work, hurt his shoulder and was off the job for awhile.

As claimant remembered, Smyth took over as administrator in August of 1981. Smyth thought claimant's meat cutting work was overtime, but he thought of it as a separate job under contract. He had minor surgery at the end of August. He was released from the hospital on Thursday evening. On Friday he took a release to Smyth and told her he could cut up the meat, but it had already been taken to the locker. He denied knowing that jobs like his were taken away from other employees as well.

Claimant reported submitting a bid to get the meat job back on September 11, 1981. He claimed that Smyth would not look at the bid. He went to the board of supervisors as well. He asserted that he had to buy the family home and needed income from both jobs. In addition to a loss of income of $1500 to $1600, claimant lost sleep. He denied that his August surgery caused emotional problems, but he said he did not want to develop cancer. He also denied concern about a second OMVUI offense or about losing his license as he said he would have been able to get a work permit. He alleged that he told the officers who stopped him that he was unable to walk a straight line because of his back condition. Neither did he think his back trouble was causing emotional problems as his back was the same as usual.

Claimant testified that he was beside himself and needed emergency medical leave. A leave of absence was verified by the nurse. He went to his sister's in Minnesota where he saw doctors at the veterans administration where he had a standing appointment. When it was suggested he see a psychologist (claimant denied being told verbally to see a psychologist), he went to Slaats whom he saw two times weekly at first. His visits have tapered off since then. He stated that before this time he knew through a report he was to see a psychologist. He returned to work on October 22, 1981. He was given no pay.

At the time of his return to work he stated that he told Smyth he was seeing a psychologist. He also requested that Smyth speak with the women employees about badgering him in the kitchen.

Claimant said that in October of 1981, his legs would not work. He saw Dr. Laaveg.

At the end of 1981, claimant had surgery for a non-related problem. He went back to work on January 11, 1982 with his back feeling about the same as it had since 1973. Claimant asserted that resident help was no longer available at that time and therefore he did such things as dishes, peeling vegetables and setting up tables in addition to his regular tasks which resulted in his doing a lot more hurrying to get his work done although there was no change in his job description. Claimant recalled that following the first day back he was unable to sleep and walking hurt. He told Brunswold on Tuesday or Wednesday of that week that his back hurt. He recalled beginning to limp. He saw Dr. Laaveg on January 18, 1982 for his regular appointment. As he remembered, his complaints at that time were of limping and stumbling when he turned quickly. He claimed that during this time he did nothing at home including shoveling sidewalks.

On February 2, 1982 Dr. Laaveg was called from Smyth's office. Prior to that time his back was stiff and his legs weak. He had trouble getting up and down and the pain in his legs was bad. After Dr. Laaveg called, Smyth told claimant to go home for bedrest. Shortly after this time claimant fell at home when he got up in the night to go to the bathroom and his legs gave out. He was treated in the emergency room with a temporary cast for a chipped ankle. On the following Tuesday he was placed in the hospital for tests and therapy. Claimant said that this hospitalization was not really related to his ankle problem but rather was for traction, hot packs and massage. He characterized his pain as steady in his lower back and legs. Although he had pain in his legs before this time, his back pain occasionally left. He used a cane.

Initially, according to claimant, he was given a 15 pound weight restriction. Later it was raised to 50 pounds with little twisting and bending. Claimant said he was able to do all his duties, but he agreed there were valid restrictions with which he had to comply.

Claimant testified that he went to talk to Smyth on two occasions, but he was not allowed to return to work as he was told he could not work with a weight restriction. He signed a memo relating to a leave of absence. There was a discussion of other jobs he could do and Smyth told him she would look into other jobs.

In June Dr. Laaveg prescribed a form fitting brace which claimant says he now wears constantly when he is awake to keep him from tiring. After the brace was ordered, Dr. Laaveg gave claimant a new release slip. He applied for and got unemployment benefits in June.

Claimant recalled that Smyth claimed he had voluntarily quit. However, she later offered him a job buffing floors. Taking the job meant starting over as a new employee including taking a physical. A couple of days prior to the physical Smyth called to tell him the job was no longer available.

When claimant was asked about when he first told his employer he was claiming his emotional distress was related to his employment, he claimed no knowledge of legal matters and agreed that the letter from his attorney was probably the first notice. He is seeking compensation for one month off for emotional distress. He stated that time off from October 22, 1981 to January 1982 was because of surgery not related to his back. He claimed that he had no nerve problems prior to the meat cutting job being taken away. He knew that he was taking Valium beginning in 1970 but he did not know why. He did not think that he took any nerve medication after the meat cutting job was ended.

Claimant said that he had notified his supervisor of a work related injury which resulted in the incident report being completed and signed by him. He acknowledged making a claim for compensation when he ruptured a tendon. He did not remember a claim for his back surgery, but he said he got unemployment from that employer who he asserted fired him because of his back and legs.

Claimant denied any restriction on his driving, but apparently has no driver's license.

Claimant acknowledged complaints of tired legs since 1972 and his continuing to complain of numbness and weakness in his legs. He experiences weakness in his arms as well. He admitted hospitalization in 1977 for complaints of his right hip. He is currently seeing a doctor for high blood pressure.

Kathryn Tolefrier testified that she has known claimant for five years having met him at work and having worked with him from time to time. She also lives six blocks from his home. She found claimant willing to do his part.

She reported driving claimant to Minneapolis in January of 1982. She stated that she had driven him to doctor's appointments as well, not because he had no license, but because he was hurting.

Tolefrier observed that claimant limped and had trouble getting out of chairs. She said he had told her of pain. She was unable to say if his condition had worsened since January 1982. She was unsure whether or not she had seen claimant at work in January. She also was unable to assess the degree of claimant's limping.

Margaret Brunswold, who retired as head cook with defendant employer after nearly ten years, testified to supervising claimant when he worked as a cook's helper. She listed duties as a cook's helper as peeling vegetables; washing dishes, pots and pans; cleaning freezers and preparing foods. She said that as a supervisor she was the one to whom notification of injury would be directed so that an incident report could be made. She was unaware of claimant's making any claim for an emotional problem. He had not told her he was going to a psychologist. Neither had claimant notified her of a back injury in January of 1982 although he had complained of his back and limped from time to time. She said that she had observed no difference in either his complaints or limping. She testified to an incident when claimant limped badly and a short time later walked with no limp.

Brunswold claimed difficulty in getting claimant to do jobs which were not involved with foods as he sometimes did not wish to do the work for which he was scheduled. She acknowledged that she did not see claimant each day. She was unable to recollect if claimant worked all of January, if he was limping

or if he said he had strained himself because of extra work as she did not know of any change in his duties. Neither was she able to recall any change in the use of resident help. Later she admitted there was a decrease in help, but she did not remember when it occurred. It was her recollection that in January of 1982 one resident ran the dishwasher on a part-time basis and one fixed vegetables.

Fern Bond, head cook since Brunswold's retirement, was a cook's helper for almost eight years. She gave the work of cook's helper as cooking, cleaning, peeling vegetables, setting up the tables, and washing dishes. She did not know of any change in duties. She reported that at one time residents helped in peeling vegetables and with washing pots and pans. Now there is resident help for dishwasher operation only.

Bond testified that she knew claimant when he was on the ward and had worked with him. She said claimant had complained of his back and "another problem." She agreed that claimant limped and she thought his limping was basically the same.

Bond had not been told by claimant that he had injured himself in January of 1982. She believed he had cut himself, hurt his foot and pulled a muscle in his shoulder at other times. She said that injuries are to be reported to the supervisors or to the nurse if the supervisor is not there. In the alternative, an employee can fill out an incident report and leave it in the medical room.

Bond thought claimant had financial problems as a result of losing the meat cutting job.

Janice Walters, who has worked for defendant employer slightly more than a year, testified that she was trained by claimant as a cook's helper and worked with him on different shifts. She was not cognizant of any injury to claimant on January 11, 1982. She noted no change in claimant's complaints of his back hurting in that he always complained. She said that claimant limped a lot at times.

The witness reported getting a call from claimant on January 12, 1982 at which time he asked her if she was going to work. He then told her he was trying to get his car and driveway shoveled out and that he was not going to work. She was unable to recall claimant's exact words, but it was her interpretation that claimant was shoveling the snow out and it was blowing back.

Joan Smyth, who has been administrator of the Cerro Gordo Care Facility since July 15, 1981, testified to prior work experience as a nurse, charge nurse and assistant director of nursing. Smyth testified that in an attempt to promote consistency and to give workers laboring in excess of 40 hours overtime pay, claimant's meat cutting job was taken away as was the job of another employee who cut hair. Although she had already made the decision, she talked to claimant before she took the job away. She said that claimant could have contracted the meat cutting had he resigned his position as cook's helper. She asserted that she had explained to claimant two or three times what she was doing and had received a call from the supervisors regarding the matter. She thought he last did the meat job in August. She denied ever having seen a bid by claimant for the meat cutting job.

The administrator said that she was first aware of claimant's claim for emotional injury when she got a letter from his attorney. She agreed it was possible someone other than she might have been contacted. She assumed that the emotional problem was with the cook as claimant had not spoken of other stress. Smyth talked with Slaats in October of 1981 at which time he told her claimant had a problem with the cook. He also told her claimant had spoken with him about termination of the meat cutting job. Smyth recalled speaking with Slaats on the phone. Claimant filed no incident report for September 21, 1981 or January 11, 1982. Claimant did not tell her he hurt his back. She had spoken with both the nurse and claimant regarding emergency medical leave for claimant. Smyth okayed the emergency leave, but she did not have much information about the reason it was necessary. Claimant was not paid for the time from September 21, 1981 to October 22, 1981.

Smyth claimed she had not seen a return to work slip for claimant without restrictions. She reported that claimant had attempted to return to work, but his 15 pound weight restriction would not allow him to perform his duties. Additionally, much of the work in the dietary area required twisting and lifting.

Claimant was off work from December 19, 1981 to January 11, 1982.

This witness denied that there had been any change in claimant's job requirements in January. She stated that residents were still doing dishes and setting up tables, but they were not to handle food. Another regulation prohibited the exclusive use of resident help so the staff had to work, too.

In February of 1982 she had a conference with claimant and talked to Dr. Laaveg as well. Claimant was told to go home and get rest. Although she did not think claimant worked after the 11, the record showed claimant was paid for eight hours. In which claimant carried restrictions which kept him from doing certain duties in dietary.

In April Smyth met with claimant and the cook. She believed she asked claimant to take a leave of absence at that time. She refused to grant the leave of absence and to return claimant to work. The latter refusal was based on her thought that claimant needed to be able to lift 40 to 50 pounds. Smyth acknowledged that claimant had requested the job of ward attendant. There were no openings and that position necessitated lifting which she was unsure whether or not he could do.

Claimant's employment was terminated in late May 1982. At the time of his termination, claimant was told he would have to have a physical. Smyth claimed claimant voluntarily quit and contested unemployment. She thought claimant was offered a job similarly. The administrator did not feel that assuming a weight restriction of 20 pounds without bending or twisting, claimant could do the work of a cook's helper even with a back brace.

Susan Boever testified regarding the preparation of exhibit D which was compiled at Smyth's instructions from past pay sheets. That summary showed claimant absent on sick leave for 203 days and 7.5 hours in the period from June 1, 1976 to June 30, 1982.

Offered in evidence were certificates which show claimant satisfactorily completed training as a geriatric aide; as a residential aide; in meat cutting, meat mechandising and self service meats; in quality food preparation and in sanitation.

A compilation of claimant's days of absence either for sick leave or on leave of absence showed claimant was on a leave of absence from September 21 to October 21, 1981. He had eight days of sick leave in December, seven days of sick leave in January, 18 days in February, 22 days in March, and two until the record ceases in April.

A note dated September 8, 1981 expresses claimant's wish to submit a bid on the meat cutting job.

On April 6, 1982 claimant's counsel wrote to Smyth to notify her that claimant was claiming injury in late August and early September for emotional stress and on January 11, 1982 for injury to his back.

On April 28, 1982 Smyth wrote to claimant that his leave of absence was being denied and that he would not be permitted to return to work because the restrictions placed by the doctor would keep him from doing his job. The memorandum set out specific weights for items claimant would be expected to lift.

On May 28, 1982 claimant wrote Smyth a letter in which he confirmed his oral offer to return to work as a cook or at a job meeting his restrictions. His letter stated that he had not quit nor did he intend to quit his job. He offered to work as a ward attendant -- a job he claimed he could perform. Claimant asked that if no jobs were available at that time he be considered for hire at a future time. He asked for a response so he would know his status.

Sterling John Laaveg, M.D., board certified orthopedic surgeon, first treated claimant for a ruptured biceps tendon on September 16, 1978; however, claimant had been cared for by Dr. Laaveg's associates beginning in July of 1972 when he was seen by Dr. Wulfekuhler, urologist. Claimant had a normal cystocopy. According to clinic records, claimant complained to Dr. Wulfekuhler of back pain and of pain in both legs and was wearing a corset. Claimant was hospitalized and seen by an orthopedist who found no significant disease. A Dr. Brush noted in August of 1972 that claimant did well with Valium, but he was in need of psychiatric evaluation.

Claimant was back in January of 1973 at which time he again spoke of leg pain and urinary tract difficulties. A cystometrogram was done which showed developing neurological dysfunction of the bladder. A myelogram was performed; and following the discovery of a defect at L5-S1 on the right, claimant underwent a laminectomy. Claimant was able to go back to work on March 1, 1973. About this same time, claimant also had a hemorrhoidectomy. Claimant was given a lifting limitation of 25 pounds for three months.

In May of 1973 claimant was still complaining of back pain. In July the complaint was of numbness in the legs on sitting. He was given a lumbosacral corset and referred to the urology clinic at Mayo.

Dr. Fischer saw claimant in the emergency room on February 8, 1974 at which time claimant was described as 4+ psychogenic. A Minnesota Multiphasic Personality Inventory was proposed.

Claimant was seen at the Mayo Clinic in May and June of 1974. Claimant presented with paresthesia from the waist down with bladder dysfunction. He complained of impotence and bladder and kidney infections. He was moderately ataxic on tandem gait. There was marked diminution to pin prick from the waist down, but his temperature sensation was relatively normal. Robert C. Burton, M.D., was unable to offer adequate answer for the etiology of claimant's complaints.

In late July there was a flurry of changes in claimant's medications. He was placed on Tofranil because Dr. Brush felt Valium was depressing him. Dr. Wulfekuhler put him back on Valium. Then Dr. Brush put him on Tranxene. On August 1, 1974 claimant was referred to Dr. Pothost at the Mental Health Center.

Dr. Laaveg interpreted records from the Veterans Hospital in Minneapolis as concluding claimant had bladder dysfunction of an undetermined etiology -- probably demyelinating disease. The orthopedist said that the etiology of demyelinating disease is uncertain, but that there is no evidence it is traumatic in origin and is probably an immunological abnormality or a viral illness or both.

In September of 1978 claimant had a left bicipital tendon repair following an incident which occurred at work.

Claimant's bathroom fall at work which resulted in a sprain to his left shoulder was recorded by Dr. Laaveg on April 11, 1980.

Claimant was seen in the emergency room by Dr. McCoy on May 7, 1980 at which time he complained of back pain with radiation into his thigh which came on after work. X-rays of the lumbar spine showed no change from the previous films in 1978. Claimant was treated with an anti-inflammatory; and when he was seen by Dr. McCoy a week later, he was scheduled for return to work on May 18, 1980. Claimant was treated through the summer of 1980 for left shoulder pain.

Claimant was admitted to the Veterans Hospital on February 17, 1981. He was found to demonstrate "remarkable suggestibility" and advised to get psychological help.

Dr. Laaveg saw claimant on May 13, 1981, and claimant recounted that he began having increasing back pain which came on while he was at work and which radiated into his left lower extremity with mild paresthesias throughout both lower extremities a few days before his visit. Claimant was kept off work, given routine medication and started on a walking program. As to a precipitating cause for claimant's visit, the doctor proposed:

"I felt that the majority of his problem was due to a back sprain as an exacerbation of previous back surgery, and that he was neurologically intact although he might have had mild nerve root irritation as a result of that sprain." (Laaveg dep. p. 14 ll. 19-23) Later he said: "I do not refer to a specific injury, and my notes state that this came on while at work. That would mean to me that after asking him that question, he had no specific injury but that the back pain gradually developed while at work." (Laaveg dep., p. 15 ll. 6-10) Claimant was released to return to work on June 21, 1981 without new restrictions.

Claimant returned on July 27, 1981. The doctor believed claimant's trouble was mechanical back pain. Claimant was placed on an abdominal strengthening program.

The doctor was asked whether or not claimant has a permanent disability as a result of his aggravation in 1981. He testified:

> X-rays in 1980 taken by Doctor McCoy when he saw the patient showed disc space narrowing at L5-S1 that was not present on previous studies which would indicate that the patient from the time of his original surgery, through 1980, had continued to have some problems with his back of a mechanical nature resulting in degenerative disc disease. That was probably a continuation of the first process. Okay. The next x-rays that were taken were not taken until February of '82 after the most recent episode of back pain, and at that time there was disc space narrowing both at the L5-S1 area but also at the L4-5 area, indicating that there was degenerative disc disease occurring at a level above what had originally been seen in 1980, indicating the process was still going on. It gets very difficult to sort out exactly where some of these things start to come into play, but, the patient in July of '81 was having increasing problems with his back, and the reason why I hesitated with the first question was when I saw him in the exacerbation of his pain in May of '81, no x-rays were taken cuz he had had x-rays in late fall of '80. From the time of that episode with the increasing pain which persisted on and off even though he returned to work by '82 there was evidence of degenerative disc disease, okay, at the level above, indicating that perhaps on the May, '81, episode of pain which developed an increasing injury, the patient was developing degenerative disc disease at the level above which came on at the time of work. I have no reason to either refute or to support that other than what I've already said. (Laaveg dep., pp. 16-17 ll. 2-5 and 1-8)

Dr. Laaveg agreed that prior to May 13, 1981 claimant had a preexisting back condition that was permanent in nature and resulted in disability. The surgeon attributed ten percent impairment to L5-S1 for the previous disc injury and five percent to degenerative disease at L4-5.

Regarding the additional five percent, Dr. Laaveg said that "[t]he exact etiology of that is not clear other than by patient history that he claims that came, to me at least, through increasing problems while at work." Later he was questioned:

> Q. Given the condition that Mr. Rausch had as of 1973, following surgery, was his condition at that time one that you would naturally expect to lead to the condition that he presently has?
>
> A. If you mean by that would I expect to see degenerative disc disease at the L5-S1 disc level, which is the level at which the disc was excised, that's entirely consistent. Statistically that's routine. It's not routine to necessarily develop degenerativie disc disease at a level above that. However, degenerative disc disease is part of an aging process in all of us that's going on from the time we're twenty. At different times during our lives we may have an injury or irritation which can hasten that process along, and that's why it's difficult for a physician, orthopedist or otherwise, to pinpoint unless they have a specific traumatic episode, the exact etiology of degenerative disc disease or of a problem. I have nothing other than the patient's history that tells me he was having increasing problems with his back developing through that period of time just prior to May of '81, to relate as the etiological cause of his degenerative disc disease at L4-5, which is the five percent question. (Laaveg dep., pp. 37-38 ll. 2-25 and 1)

On August 16, 1981 claimant was admitted to the hospital where Dr. Wulfekuhler performed an excision of a right spermatocele, right testis biopsy, cystourethroscopy, transurethral incision of hypertrophied bladder neck and transurethral incision of the posterior urethral valve. According to the admission notes, claimant requested "a testicular biopsy along with his other surgery to help deliniate [sic] the etiology of his small testes and erectile dysfunction." Later on in the month claimant complained of an inability to get erections. On October 14, 1981 Dr. Wulfekuhler noted: "Seems to be quite happy at this time."

On October 30, 1981 Dr. Laaveg said claimant was not making complaints of a specific incident of back pain, but rather was telling him that his back pains from May of 1981 had not resolved.

Deponent next saw claimant on January 18, 1982 at which time claimant had many complaints including his back, feet, fingers, shoulders and hips and routine care was commenced with salicylates. The doctor said that none of the complaints related to an alleged work injury.

A call was received from claimant on February 2, 1982 to tell of pain in his back and hips. He was advised to go home to total bedrest. Claimant came to the doctor's office on February 8, 1982 and related that he was having pain in his left side, aching in his left side, anterior groin, low back and into his hips, and numbness in both lower extremities. Claimant was tender over L4-5, L5-S1 and a portion of the muscle origin on the pubic bone of the left side and had some limitations on back motion. The majority of claimant's symptoms were traced to an adductor muscle strain of the hip with irritation because of mechanical back pain. As to a precipitating cause for the hip pain, the doctor said he had been told by claimant of gradual onset at work. The doctor's certificate of February 8, 1982 lists diagnoses of low back sprain and left adductor tendonitis. Claimant was scheduled to go back to work on February 15, 1982 but the doctor was called instead.

Claimant indicated that he had increasing pain in his back and legs with intermittent numbness and that he had fallen and twisted his right ankle at home. Claimant was admitted to the hospital for total bedrest and an evaluation. An avulsion fracture of the ankle was found and the ankle was placed in a cast. No neurological problems or evidence of radiculopathy were present. Claimant was treated with bedrest, muscle relaxants, analgesics, anti-inflammatories and gravity lumbar reduction. The doctor stated claimant's admission was for his back and not for his ankle.

Claimant was seen by Sant M. S. Hayreh, M.D., who diagnosed musculoskeletal low back pain secondary to underlying degenerative arthritis in the lumbar spine. Dr. Hayreh noted an eight year history of paresthesia, ataxia and weakness in the lower extremities with falling episodes. In addition to consideration to functional overlay, the physician suggested a number of tests.

Dr. Laaveg did not feel claimant's fall at home had any major effect on his back. Dr. Laaveg acknowledged claimant had been complaining of numbness in his legs for a number of years.

The doctor thought that had it not been for claimant's ankle, claimant would have been able to return to work in three or four weeks after March 10, 1982. As it was, claimant was scheduled for return to work on May 3, 1982 with a 15 pound weight limitation and no frequent bending or twisting.

On May 19, 1982 claimant was still having mechanical symptoms and was fitted with a chair back brace. Claimant was again released for return to work on June 14, 1982 with the same restrictions.

On June 30, 1982 Dr. Laaveg wrote a to whom it may concern letter in which he stated: "As long as he does a job in which he does not do repeated bending or lifting or lift over 40 to 45 pounds at a given time, his back should do quite well while using the brace, and the patient should be able to be a consistent employee."

When claimant called to complain of left leg pain on August 4, he was instructed to start using a cane on the right.

On August 16, 1982 Dr. Laaveg wrote to claimant's attorney that claimant "has two level degenerative disc disease of the lumboscral spine and this definitely pre-dates his most recent injury. However, this is definitely an exacerbation of his previous condition." The doctor related: "According to my notes, there was no specific injury which injured the patient's back. He began having increasing difficulty with his back with the increased job requirements that eventually led to his hospitalization in February of 1982."

When claimant was seen on September 22, 1982 he continued to have persistent symptoms. Claimant was given an impairment rating of 15 percent and a weight limit of 20 pounds with no repeated bending or twisting. More specifically Dr. Laaveg said "ten percent related to his original injury and surgery, and in 1973 with the degenerative disc disease at that level and five percent due to the L4-5 degenerative disc disease which apparently is subsequent to the May 3, 1981 evaluation."

In November of 1982 claimant called to complain of back pain with giving way in his legs. Dr. Laaveg provided assurance that using a cane was reasonable and suggested bedrest for one to two days and then a gradual increase in activity. Dr. Laaveg reported that an x-ray in the fall of 1980 showed degenerative disc disease at L5-S1 with no major changes at L4-5. X-rays in 1982 showed degenerative disc disease at L4-5 and L5-S1.

Although the doctor thought claimant might benefit from short periods of therapy, his overall process of degenerative disc disease would remain unchanged. Dr. Laaveg did not anticipate a change in claimant's condition, but he expected claimant's symptoms to intermittently improve.

As to whether or not an increased workload could lead to claimant's kind of injury he said: "Umm, it definitely can result in symptoms of increasing pain in back pain and can result in earlier degenerative disc disease if you're doing repeated bending, twisting, lifting, things like that. You're right. It does not need a single episode, if that's what you're asking me." (Laaveg dep., p. 42 ll. 15-20) Later he was asked and responded:

> Q. Could the situation where a person was working for a number of years and quit work for another problem, say a urological problem which he was off of work for say six weeks' period, you know, upon returning to work, even doing the same amount of work prior to the six-week layoff, could that result in aggravation of the L4-5 such as you referred to Mr. Rausch having?
>
> A. Uh, yes, it can. The very similar way that, you know, being slightly "out of shape", going to your first day of football practice, you ached a lot more than that, so any condition that is preexisting can be made worse or aggravated by a resumption of the level of activity that you're not completely used to. (Laaveg dep., p. 44-45 ll. 25 and 1-13)

He further testified:

> A. I felt that he was having increasing symptoms while at work. That's entirely consistent with the process that came out with the x-ray showing

degenerative change at L4-5. If you ask me specifically was there a work episode, he related none to me. If you ask me did he ask -- did he tell me that he was having increasing problems with mechanical things at work, yes, he was. (Laaveg dep., p. 47 ll. 15-18)

Marcel Slaats, licensed psychologist, first saw claimant on October 2, 1981 when claimant followed a suggestion made at the Veterans Hospital that he see a psychologist to receive counseling for stress. Slaats was provided with no medical records at that time, but claimant had shown him some at a later time. Claimant's complaints included trouble urinating, becoming overexcited, worrying, feeling nervous, sweating and experiencing sleeping difficulties. Claimant related that his primary purpose in seeing Slaats was stress due to work and deterioration of his financial situation because his meat cutting job had been taken away. Claimant had also been picked up for operating a motor vehicle under the influence. He was taking Valium and for low back pain Tylenol 3.

A number of tests were performed.

Slaats reached a diagnosis of adult situational reaction to stress which he said meant that claimant's "emotional difficulties stem from basically being overloaded with situational stress at the time." He expanded:

> In a sense we all have a certain level of stress threshold that we can function pretty adequately with. It's only when things continue to pile up and which no progress gets going that stress then begins to take its toll. I think honestly Franklin was experiencing stress for a long period of time, and then the situation at work from Franklin's position deteriorated in the sense that he lost his -- from his perspective lost the meat cutting position which cost him about fifteen hundred dollars a year which was basically the margin of comfortability he had financially. Umm, without that added income to his regular cook position, he was beginning to experience difficulties in making house payments. Umm, the stressing factor in terms of the meat cutting position was from his position it was done unfairly and without prior consultation with him and he felt he was doing an adequate job, and trying to pursue and resecure that meat cutting position, he was not getting anywhere. And he was having just a lot of frustration from dealing with that and going again with his value system, that he feels he does a job and he gets compensation for it. He feels that the reciprocal should also be true and felt that he was not being treated fairly because of that. Umm, in trying to rectify and clear the situation up he was getting nowhere, and I think in my opinion it was that continual frustration in trying to straighten that situation out that was continuing to induce more stress for him. (Slaats dep., pp. 17-18 ll. 11-25 and 1-15)

divided the stress into two sources -- financial worries from ss income and being treated unfairly as an employee. Later aimant was stressed by a change in the method of holiday pay, change in his duties, trouble with the head cook, concern out a burn on his hand being infected by dishwashing and by s termination which he did not understand. Another stress was xual functioning and reliability of friendships. Lower back fficulties were also stressing.

Slaats noted:

> One of the things that continues to happen with the kind of stress that Ralph [sic] was experiencing, and I think it relates back to the suggestibility as well, but also the fact that under stress I think Franklin develops also somatic difficulties, physical difficulties added to it, and stress exacerbates those difficulties which becomes a kind of a circular kind of process for him. (Slaats dep., p. 23, ll. 6-13)

Slaats said claimant's condition was disabling to him. He plained:

> to me a disability would basically be if a person cannot function at the level that they have normally functioned in the past. Given a normal person and the normal emotional development, that they cannot function as efficiently as they have in the past and in fact begin to interfere with their present level of functioning whether it be occupational functioning or marital relationships. (Slaats dep., p. 14 ll. 16-24)

agreed that information regarding claimant's past was essential his conclusions. As to the source and content of that ormation, he said:

> My basic information of that and I have to rely pretty much on Franklin's interpretation of the past, that in the last five years he had had to my understanding a clean -- a decent work record at the County Care Facility, and so at least in the immediate past going back at least five years his work record was adequate and to me would suggest at least over that period of time, barring any other things going on, that he's able to function well within that job setting. (Slaats dep., p. 17 ll. 8-17)

ats also spoke with Joan Smyth.

The psychologist admitted that as he did not have medical ords and did not know which physical complaints were related work and which were not. He was unable to say whether imant was ever not able to perform his work for defendant loyer because of stress alone because he was unsure of:

> how strong the interrelationship is between the stress he experiences and also the physical disabilities that he has. It's hard for me to put on a percentage of how much is which. It's been my experience that stress can exacerbate physical difficulties and physical problems and so it's hard for me to determine that -- you know, how much is contributed where. (Slaats dep. p. 30 ll. 7-14)

Later he offered:

> there is an interplay and interaction between the physical difficulties that he is experiencing as well as emotional stress that he is experiencing, and I cannot -- I do not have the qualification to separate how much is where. I do believe that the emotional stress did exacerbate the physical difficulties. Umm, if there were no physical complications, although, I probably assume he could have still worked. But in terms of Franklin we have to deal with all of Franklin and not just part of Franklin, and to me with Franklin there is an interplay between the emotional difficulties or disability from the stress as well as physical disabilities and problems. (Slaats dep., pp. 34-35 ll. 17-25 and 1-5)

At the time of his deposition Slaats said he continued to treat claimant. He believed claimant had progressed and that he is better able to do problem solving. He thought that claimant continued to experience stress based on loss of wages and loss of work. Slaats saw claimant's seeking treatment as significant. He observed:

> However, one of the things that I think that -- that helps me make somewhat of a judgment on the fact is that some and many of these physical difficulties existed prior to -- prior to the time that I saw him and have been going on for a long time. Any my experience when I saw him, when the difficulties with the meat cutting position came up, precipitated in him coming to deal with his stress. Since the past history that I'm familiar with, he was able to cope without extra psychological help in dealing with stress and was only until this point in time that he needed some help in dealing with stress. I considered that that variable of stress that was related to work was a very significant factor for Ralph -- for Franklin. (Slaats dep., p. 45 ll. 5-19)

Slaats agreed that claimant has suggestibility -- a trait not caused by his work for defendant employer. He did not think claimant's suggestibility would interfere with his work performance.

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 his employment.

The Iowa Supreme has defined injury very broadly. In Almquist v. Sheandoah Nurseries, Inc., 218 Iowa 724, 732, 254 N. W. 35, 39 (1934) the supreme court said:

> A personal injury,...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.

That broad interpretation of injury allows psychological as well as physical impairments to be compensable.

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 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 to the work. Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

Claimant alleges that he suffered psychological stress in late September and October of 1981 when a supplementary meat cutting job was taken from him following a change in the care facility's administration. This supplemental job supplied him with additional income of $1,500 to $1,600 per year. Claimant further testified that he needed the income from his extra job to pay for his family home.

It cannot be doubted that this claimant was a psychologically fragile individual prior to September of 1981. As early as 1972 his doctors were noting the need for psychiatric evaluation. Claimant denied being verbally instructed to get psychological help, but he was aware from reading reports that he needed psychological help. The fact remains that he had not sought psychological treatment before October of 1981. Defendants' cross-examination very adequately brought out the fact that claimant had stresses in his life other than those related to his employment. He had experienced sexual dysfunctioning. He had urological and orthopedic difficulties. He had been picked up for operating a motor vehicle under the influence.

The Iowa Supreme Court has recognized the duty of the employer to exercise care:

> to avoid injury to the weak and infirm is precisely the same as toward the strong and healthy; and,

> when that duty is violated, the measure of damages is the injury inflicted, even though the injury might have been aggravated, or might not have happened at all, but for the peculiar condition of the person injured.

Hanson v. Dickinson, 188 Iowa 728, 732-33, 176 N.W. 823, 824-25 (1920). The court has cited, Crowley v. City of Lowell, 223 Mass. 288, 111 N.E. 786 (1916) for the proposition that:

> The statute prescribes no standard of fitness to which the employee must conform, and compensation is not based on any implied warranty of perfect health or of immunity from latent and unknown tendencies to disease, which may develop into positive ailments, if incited to activity through any cause originating in the performance of the work for which he is hired.

Hanson v. Dickinson, 188 Iowa 728, 732, 176 N.W. 823, 824 (1920).

A preexisting condition that is aggravated, accelerated or lighted up by employment activities is deemed a personal injury under the act. Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965). The aggravation may be of a condition that originates apart from employment. Ford v. Goode, 240 Iowa 1219, 1222, 38 N.W.2d 158, 159 (1949).

Claimant told psychologist Slaats that his primary purpose for seeing him was related to stress due to his work and to the deterioration of his financial situation because his meat cutting job was taken away. Slaats testified that he thought:

> Franklin was experiencing stress for a long period of time, and then the situation at work from Franklin's position deteriorated in the sense that he lost his -- from his perspective lost the meat cutting position which caused him about $1500 a year which was basically the margin of comfortability he had financially.

The testimony of claimant and that of Slaats supports a finding of an injury arising out of and in the course of the employment milieu.

Attention must now be given to whether or not defendant has established the affirmative defense of notice.

Iowa Code section 85.23 states:

> Unless the employer or his representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on his behalf or a dependent or someone on his behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed.

The Iowa Supreme Court in Reddick v. Grand Union Tea Co., 230 Iowa 108, 296 N.W. 800 (1941) set forth the rule for dealing with affirmative defenses. The opinion of the court in Reddick provided that once claimant sustains the burden of showing that an injury arose out of and in the course of employment, claimant prevails unless defendant can prove by a preponderance of the evidence an affirmative defense.

In DeLong v. Iowa State Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940) the court recognized the industrial commissioner's treatment of notice. The commissioner, quoted in DeLong at 702-03, 92, wrote:

> that while the weight of the evidence is not entirely free from doubt, much of which may be due to lapse of time...we are of the opinion claimant sustained the burden of proof in that respect, but in this the question upon whom the burden of proof may rest is not free from doubt. We are constrained to believe that want of such notice is an affirmative defense and if that be true the burden of proof would rest upon the defendant.

In Robinson v. Department of Transportation, 296 N.W.2d 809, 811 (Iowa 1980) the Iowa Supreme Court discussed notice:

> The purpose of section 85.23 is to alert the employer to the possiblity 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 clamant'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.

Claimant testified on cross-examination that perhaps the first notice he gave to his employer regarding a claim for injury was a letter from his counsel, but he qualified that by saying he was not knowledgeable in legal matters. Although that letter might be the first written notice claimant gave, Joan Smyth, administrator, had actual knowledge claimant was seeing a psychologist and had in fact talked to that psychologist. She knew that claimant was having difficulty understanding her position on the meat cutting job and she was cognizant of problems he was having with the cook. Overall, there are sufficient facts connecting claimant's psychological illness with his employment to indicate to a reasonably conscientious manager the potential for a compensation claim. The affirmative defense notice is not established.

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 occurs first.

Claimant makes claim for temporary total disability for the period from September 22, 1981 until October 22, 1981.

Defendants have raised a number of other circumstances which might have caused claimant to be off work in late September and early October. It is important to keep in mind that the Iowa Supreme Court has said that an injury does not need to be the only cause of disability. "A cause is proximate if it is a substantial factor in bringing about the result." Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980). Expert medical evidence must be considered with all other evidence introduced bearing on 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).

The testimony of claimant coupled with that of Slaats is sufficient to sustain claimant's burden of temporary total disability from September 22, 1981 until October 22, 1981. Time sheets for claimant show he returned to work on October 22, 1981 and at that point his temporary total disability benefits would terminate.

A statement from Slaats shows treatment for claimant from October 2, 1981 through December of 1982. Iowa Code section 85.27 provides: "The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osetopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services." Slaats' charges from October 2, 1981 through October 21, 1981 will be allowed as those charges were incurred for the time claimant was off work because of psychological difficulties. At that point claimant was able to return to work in this case meaning that the treatment he received for adult situational reaction relating to his work was complete. Payment for treatment claimant received thereafter will not be ordered in this decision.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is 49 years of age.

That claimant worked for defendant employer as a cook's helper.

That claimant did 20 to 25 hours of meat cutting each month as well.

That claimant's meat cutting job was taken from him after Smyth took over as administrator.

That claimant was off work from September 22, 1981 until October 22, 1981.

That Smyth was aware that claimant was seeing a psychologist and that claimant was being badgered by other kitchen workers.

That claimant was treated for urological and back problems and found in need of psychiatric evaluation as early as 1972.

That claimant's psychological evaluation was proposed again in 1974 and claimant was referred to the Mental Health Clinic.

That claimant complained of impotence in 1974.

That claimant was advised to get psychological help in February of 1981.

That in August of 1981 claimant had an excision of the right spermatocele, right testis biopsy, cystourethroscopy and transurethral incisions of the bladder neck and posterior urethral valve.

That post surgery claimant continued to complain of sexual dysfunction.

That claimant experienced an adult situational reaction to stress.

That the situational reaction was disabling to claimant.

That in addition to stresses in his employment, claimant was stressed by sexual dysfunction and lower back difficulties.

That claimant was able to cope with various stresses in his life until his meat cutting job was taken away with what he perceived to be unfairness and he was unsuccessful in his attempts to get it back.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant suffered an injury arising out of and in the course of his employment which resulted in his being off work from September 22, 1981 to October 22, 1981.

That defendant employer had notice of claimant's injury.

That claimant is entitled to temporary total disability and medical treatment from September 22, 1981 through October 21, 1981.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant temporary total disability from September 22, 1981 through October 21, 1981 at a rate of one hundred six and 30/100 dollars ($106.30).

That defendants pay unto claimant medical expenses for five (5) visits to Marcel Slaats, M.S., at forty-five dollars ($45) each totaling two hundred twenty-five dollars ($225).

That defendants pay the accrued amount in a lump sum.

That defendants pay interest pursuant to Iowa Code section 85.30 as amended.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

That defendants file a final report in sixty (60) days.

Signed and filed this 23rd day of September, 1983.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARGARET REED,	:	
	:	
Claimant,	:	
	:	FILE NO. 647621
vs.	:	
	:	R E V I E W -
GLENWOOD STATE HOSPITAL-SCHOOL,	:	
	:	R E O P E N I N G
Employer,	:	
	:	D E C I S I O N
and	:	
	:	
STATE OF IOWA,	:	
	:	
Insurance Carrier,	:	
Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Margaret . Reed, claimant, against Glenwood State Hospital-School, mployer, and the State of Iowa for the recovery of further enefits as the result of an injury on September 5, 1980. laimant's rate of compensation as indicated in the memorandum f agreement previously filed in this proceeding and agreed by he parties is $104.07. A hearing was held before the undersigned n March 28, 1983.

The record consists of the testimony of claimant, Kenneth L. eed, Jay Field and claimant's exhibits 1-26. Both parties have iled briefs.

ISSUES

The issues presented by the parties at the time of the re-hearing and the hearing are the extent of permanent partial isability benefits she is entitled to; and benefits under ection 85.27, The Code. The parties stipulated that claimant's ealing period ended July 29, 1982.

FACTS PRESENTED

Claimant testified that on January 1, 1980 she started orking for defendant as a child development worker. Claimant ndicated her job consisted of being like a house mother to 15 ys which were grown but mentally retarded. Claimant disclosed at she had to help the patients dress and would take them to chool. Claimant revealed that the job required her to lift rbage, a buffer, heavy mops and patients who suffered seizures.

On September 5, 1980 claimant received an injury arising out and in the course of her employment with defendant when one her patients attacked her, twisting her over and knocking her the ground. Claimant indicated she finished work that day d was seen by defendant's physician who instructed her to take f a couple of days. On the advice of defendant's physician e went to her own doctor. Claimant disclosed her back pain so radiated down her right leg. Claimant was hospitalized a uple of times and seen by several doctors. Claimant revealed at in February of 1981 she was hospitalized for depression but s also having back problems.

On August 13, 1981 claimant had back surgery, and upon being released from the hospital, was instructed not to do any house work. Claimant stated that she had to have Candice Britten help her out of bed and cook her meals.

Claimant testified that she still has pain which feels like an electric shock up her back. Claimant indicated her back aches and her right leg tends to drag. Claimant states she cannot vacuum, bend or lift over 20 pounds. Claimant revealed that she does not drive because of her medication and has problems sitting.

Claimant revealed that in 1960 she had back problems which resulted in having a disc removed but did not feel like she had any subsequent problem s related to that incident. Two weeks prior to hearing claimant had problems related to her heart which caused her to be hospitalized.

On cross-examination claimant revealed that a month after her surgery her husband committed suicide. As a result, claimant has had increased depression.

Claimant testifed that she would like to return to work but has not checked with anyone to find out what would be available and has made no other effort to find employment.

H. Randal Woodward, M.D., who testified by way of deposition indicated he is an orthopedic surgeon and first saw claimant on December 5, 1980. Dr. Woodward revealed that another physician in his office had seen claimant on September 29, 1980. One of the recommendations given to claimant was that she lose weight. Dr. Woodward stated that when he saw claimant she was suffering from degenerative arthritis. Arrangements were made so claimant would have facet joint injections. Claimant had a decrease in symptoms as a result of the injections. On August 11, 1981, claimant had a lumbosacral fusion. When the fusion was performed Knodt rods were implanted. Dr. Woodward now suggests that claimant have the knodt rods removed because they are causing her problems. Dr. Woodward indicated that he would recommend claimant keep her weight down. Dr. Woodward opined that claimant's "partial permanent disability" is 30 percent and causally connected it to her injury. Dr. Woodward stated claimant received maximum recovery on July 29, 1982.

In a report dated November 3, 1982 Kent M. Patrick, M.D., opined that a permanent partial impairment rating of 30 percent was reasonable. Dr. Patrick also indicated claimant could return to a job where she could change position at will, avoid heavy lifting and not be subject to long periods of standing or sitting.

Paul From, M.D., in a synopsis of evaluation center report stated:

> We do believe that, as a result of her injury of September 5, 1980, keeping in mind her previous surgery, she has sustained functional impairment. It is our opinion that the patient has a 30% functional impairment, however not all of it is a result of the September 5, 1980 incident because there was impairment present as a result of lumbar disc surgery in 1962 at the L4-5 and L5-S1 levels. Therefore, as a result of the 9-5-80 injury which resulted in a fusion of the L4-S1 levels, probably 20% was contributed to the total impairment.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 5, 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).

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).

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, 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, 255 Iowa 1112, 125 N.W.2d 251. 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 her burden in showing that the surgery performed on her back resulted from an aggravation to her prior condition which occurred on September 5, 1980. Claimant has been given an impairment rating of 30 percent by both her treating physician and an examining physician. Dr. From agrees that claimant has a 30 percent impairment but relates 10 percent of the rating to claimant's prior condition. However, functional impairment is only one of the factors in determining a person's industrial disability.

Claimant is 54 years old and has obtained a GED. Claimant has also had some training as a medical assistant and had one week of inservice training in one of her jobs. Claimant has worked as a cook, a waitress and a nurses' aide. In January of 1980 claimant started working for defendant as a child development worker. It is apparent that the job claimant had at the time she was injured required some lifting. It is also apparent from the restrictions placed on claimant that her former position would not be a position within her restrictions and that claimant would be unable to handle many of the duties that are required by a nurses' aide. However, the greater weight of evidence would indicate that the claimant is not permanently totally disabled as is argued in her brief. It is interesting to note that although claimant reached maximum recovery in July of 1982, she has not made any effort in attempting to find a job. Based on all the evidence presented, it is determined that claimant has an industrial disability of 70 percent as a result of her injury with defendant.

Claimant has raised some question as to psychological overlay of her injury. Claimant has produced insufficient evidence to indicate claimant has any psychological problems as a result of her injury. It is obvious that claimant has had other family problems which have caused her psychological difficulty.

Claimant has indicated that she wants to have two of her relatives reimbursed under section 85.27 for nursing expenses. Claimant has also submitted an amount in exhibit 24. Claimant testified she could not tell the undersigned what she paid her relatives. Although claimant might have been entitled to have such a reimbursement she produced insufficient evidence as to what expense she personally incurred in that regard and it would be mere speculation for the undersigned to award any amount.

Claimant has submitted other bills at the time of hearing which are not itemized. At this time there is insufficient evidence to award any reimbursement for those expenses.

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 September 5, 1980 claimant was injured while working for defendant.

Finding 2. Claimant's injury aggravated a preexisting back condition.

Finding 3. As a result of her injury claimant has a permanent partial impairment of 20-30 percent of her body.

Finding 4. Claimant is 54 years old and has obtained a GED.

Finding 5. Claimant has had some training as a medical assistant and had one week of inservice training in another position.

Finding 6. Claimant has worked as a cook and waitress.

Finding 7. Claimant has worked as a nurses' aide.

Finding 8. Claimant started working for defendant in January of 1980 as a child development worker.

Finding 9. Claimant cannot return to the job she had at the time of her injury.

Finding 10. Claimant's restrictions would make it improbable to return to any nurses' aide position.

Finding 11. Claimant could return to work when she could change positions and did not require heavy lifting or subject her to bending or long periods of sitting or standing.

Finding 12. Although claimant reached maximum recovery in July of 1982, she has made no attempt to find employment.

Finding 13. Claimant has failed to prove her injury caused her any permanent psychological problems.

Conclusion A. As a result of her injury claimant has an industrial disability of 70 percent.

Finding 14. Claimant had two relatives help her at her home.

Finding 15. Claimant has failed to prove the extent of her expenses that resulted in such care.

Conclusion B. It would be mere speculation for the undersigned to award any nursing expenses on the present record.

THEREFORE, defendants' are to pay unto claimant three hundred fifty (350) weeks of permanent partial disability benefits at a rate of one hundred four and 07/100 dollars ($104.07) per week.

Defendants are to be given credit for any permanent partial disability benefits previously paid.

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.

Costs are taxed to defendants pursuant to Industrial Commissioner Rule 500-4.33.

If the parties are unable to agree as to what medical expenses in exhibits 19-23 and exhibit 26 are compensable, they can resubmit that limited issue to the undersigned.

Defendants shall file a final report upon payment of this award.

Signed and filed this ____ day of August, 1983.

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EDWARD G. ROBINSON,
Claimant,
vs.
DARIN & ARMSTRONG,
Employer,
and
MICHIGAN MUTUAL INSURANCE COMPANY,
Insurance Carrier,
Defendants.

File No. 658641
A P P E A L
D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision wherein he was awarded healing period benefits, 25 weeks permanent partial disability benefits, and medical expenses as a result of an injury arising out of and in the course of his employment on January 9, 1981.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Gerald J. Cooper, D.O., Sue Quigg, Doug Banes, Marian Jacobs, and Alfred Walker;claimant's exhibits 1 through 12; defendants' exhibits A through F; and the briefs and filings of all parties on appeal.

ISSUES

1. Whether the deputy erred in failing to award claimant a greater degree of industrial disability.

2. Whether the deputy erred in refusing to admit certain testimony over the hearsay objection of defendants.

REVIEW OF THE EVIDENCE

At the time of the hearing the parties stipulated the applicable workers' compensation rate to be $310.32 per week. The parties also stipulated to the fairness and reasonableness of the medical bills. (Transcript, pp. 3-4)

Claimant, age 29 at the time of the hearing, attended Simpson College for four years as a physical education and recreation major, but did not obtain a degree. He testified that upon leaving College after the fall semester of 1976 he tried out with a professional football team and eventually spent most of 1977 playing for a semi-pro football team. Prior to joining the Millworker Union in either 1978 or 1979 claimant had worked short intervals as a furniture mover, dock worker, and drywall hanger. Claimant described the work he performed as a millwright apprentice as "bullwork" due to its heavy nature. (Tr., pp. 101-112)

On January 9, 1981 claimant was employed as a millwright by Darin & Armstrong. While returning to the work situs following his lunch break, claimant was struck on the back of the head by a rock thrown from a dynamite explosion. The impact of the rock was sufficient to crack claimant's hard hat and caused immediate dizziness. Claimant was seen that afternoon by D. W. Seitz, D.O., and was advised to apply heat as a means of soothing his neck pain. Claimant recalled a burning sensation in his neck, shoulders, and left arm when he returned to visit Dr. Seitz on January 12, 1981. Claimant attempted to return to work on January 13, 1981, however he was taken from the job site to the hospital by ambulance with symptoms of dizziness and a severe burning sensation in the neck. (Tr., pp. 112-115) Claimant was discharged from the hospital on January 22, 1981. (Cl. Ex. 5)

Claimant testified that he returned to work as a millwright in May 1982. He testified that he continues to experience severe headaches and tension from working, but lacks motivation to look for a different type job. Claimant stated that he sometimes needs help from co-workers to perform some of his duties. Claimant testified that he sometimes takes Percodan, a pain killer, while working. (Tr., pp. 117-128) He testified that he has not sought any type of alternative work since his injury. (Tr., p. 149)

Claimant was examined by Gerald J. Cooper, D.O., on January 9, 1981. Examination revealed that claimant suffered muscle spasms in the cervical spine from the skull base to the first thoracic vertebrae. Dr. Cooper prescribed manipulative therapy and has continued to treat claimant at two to three week intervals. Dr. Cooper testified that claimant's condition stabilized at some point between February and May of 1982. He recommended that claimant swim and take whirlpool treatments to combat recurrent neck pain, and assigned to claimant an impairment rating of one percent to the body as a whole. Dr. Cooper stated that he did not recommend the continued use of Percodan by claimant while working. (Tr., pp. 6-33)

Eugene Collins, M.D., examined claimant on February 3, 1981. Claimant's complaints at that time included posterior cervical headaches and intermittent numbness from his neck to his left arm and all fingers. Dr. Collins found claimant's symptoms to be compatible with ligamentis injury to the cervical spine region. Following a second examination on March 6, 1981 claimant was referred to Robert J. Chesser, M.D. (Cl. Ex. 2)

Dr. Chesser examined claimant on April 7, 1981 and on several occasions thereafter. Dr. Chesser believed claimant's symptoms to be due to a reflex tension myalgia. He was unable to detect evidence of any neurological deficit and suggested that claimant undergo an EMG. Dr. Chesser prescribed time off work, physical therapy, Motrin, use of a cervical collar while driving, and use of a cervical pillow while sleeping. (Cl. Ex. 4 and 7)

In a report dated December 2, 1981 Dr. Collins first reviewed claimant's history and the findings of Dr. Chesser. The doctor then concluded as follows:

> In essence, Mr. Robinson most likely sustained some cervical strain or flexion/extension injury from the above described accident. No consistent neurological deficit was documented on my examinations nor on EMG/Nerve conduction velocities. X-rays done revealed no evidence of instability or fracture. Mr. Robinson throughout complained of some cervical discomfort and left arm numbness which is consistent with a mild ligamentous injury or reflex tension myalgia as per Dr. Chesser. At this time there is no objective evidence of a permanent neurological deficit in this patient. (Cl. Ex. 2)

On June 30, 1981 claimant underwent an examination by Leo J. Miltner, M.D. The report prepared by Dr. Miltner indicated that x-rays of claimant's cervical and upper thoracic spine revealed normal findings. The doctor concluded that claimant had subjective complaints in his neck along with a moderate amount of psychological overlay. (Cl. Ex. 3)

On April 5, 1982 claimant underwent an examination at the University of Iowa Hospital and Clinics. On April 26, 1982 Richard W. Pincham, M.D., a staff member at the neurology department concluded as follows:

> It is our impression that the patient's cervical pains are due to muscle tension and contraction. This has shown some improvement in the past and possibly was recently exacerbated by his vigorous weight lifting. We have advised him to continue to be active and to do as much as he possibly can and have reassured him that there is no evidence of any neurological disorder. He seemed to accept this and to be somewhat relieved there is nothing seriously neurologically wrong. We also recomended to him that he cut down on his use of pain medications as much as possible. In light of his normal physical examination we did not feel it warranted to obtain electromyograms or repeat nerve conduction velocities. (Defendants' Ex. A)

Doug Banes, business manager for Millwright Union Local 8, testified that there are no light duty jobs in millwright work. He recalled that he has referred claimant to several jobs since May 1982, and in no instance has claimant been rejected by the employer due to physical limitations. (Tr., pp. 71-93)

Sue Quigg, manager of the Nautilus Fitness Center in Davenport, testified that claimant worked out in the center at least three times per week prior to his injury in January 1981. She stated that following the injury claimant's workout routine was greatly slowed down. Quigg indicated that while claimant was not able to lift as much weight as he could before his injury, he was making progress when she last saw him in the summer of 1982. (Tr., pp. 53-61)

Marion S. Jacobs, president of Rehabilitation Resources, provided a disability report on claimant in her capacity as a vocational consultant. (See Cl. Ex. 4) Jacobs' testimony at the hearing was to the effect that claimant had suffered a "vocational disability" of 30 percent to 50 percent due to his limited physical capabilities following the January 9, 1981 injury. (Tr., pp. 167-213)

Alfred C. Walker, vocational consultant with Vocational Consultation Services, also prepared a disability report pertaining to claimant. In his summary Walker indicated claimant experienced a "vocational impairment" equivalent to a 13.5 percent reduction in his access to the local labor market. (Tr., pp. 213-260; Def. Ex. F)

APPLICABLE LAW

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).

The opinion of the supreme court in Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963) 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

The first issue on appeal is whether the deputy erred in failing to award claimant a greater degree of industrial disability. Claimant is 29 years old and has made substantial progress toward obtaining a college degree. Claimant's functional disability has been established by Dr. Cooper, his treating physician, as one percent of the body as a whole. Other practitioners were unable to detect any neurological disorder. While two vocational experts testified that claimant's "vocational disability" ranges from 13.5 percent to 50 percent, these ratings do not necessarily translate to industrial disability. The most telling factor in this case is that claimant returned his work as a millwright in May 1982 and has continued to perform his duties to the apparent satisfaction of his employers through the date of the review-reopening hearing. While claimant did indicate that he received some help from co-workers with the heaviest of his duties, the fact remains that he is currently able to perform to the substantial satisfaction of his employers and has not suffered any loss of earnings as a result of his injury. Additionally, claimant has also illustrated total disinterest rather than inability to procure employment in any alternative occupation. For the above stated reasons it is determined that the deputy reasonably found claimant to have sustained an industrial disability of five percent of the body as a whole as a result of his injury of January 9, 1981.

The second issue on appeal is whether the deputy erred in refusing to admit certain testimony over the hearsay objections of defendants. The deputy rejected portions of the testimony of Doug Banes wherein the witness attempted to indicate that claimant's co-workers had told him that they sometimes help claimant. Such testimony shall be considered cumulative in light of claimant's testimony to the same effect. No error shall be found. In the event that error had been established it would have been considered as harmless in light of the bulk of the record.

FINDINGS OF FACT

1. Claimant was 29 years old at the time of the review-reopening hearing.

2. Claimant attended college for four years.

3. Claimant has not achieved a college degree.

4. Claimant was employed as a millwright by Darin & Armstrong on January 9, 1981.

Claimant was struck on the back of the head on January 9, 1981 by a rock thrown from a dynamite explosion.

6. Defendants filed a memorandum of agreement concerning the January 9, 1981 injury to claimant.

7. Claimant returned to work on May 1, 1982.

8. Claimant achieved maximum medical recuperation on May 1, 1982.

9. Claimant sustained a one percent functional impairment to the body as a whole as a result of his injury of January 9, 1981.

10. Claimant sustained an industrial disability of five percent of the body as a whole as a result of his injury of January 9, 1981.

11. The applicable workers' compensation rate is $310.32 per week.

CONCLUSION OF LAW

Claimant has sustained the burden of proving an industrial disability of five percent as a result of an injury arising out of and in the course of his employment on January 9, 1981.

WHEREFORE, the deputy's review-reopening decision filed August 31, 1983 is affirmed.

THEREFORE, it is ordered:

That defendants pay unto claimant sixty-eight and two-sevenths (68 2/7) weeks of healing period compensation at the rate of three hundred ten and 32/100 dollars ($310.32) per week.

That defendants pay unto claimant twenty-five (25) weeks of permanent partial disability compensation at the rate of three hundred ten and 32/100 dollars ($310.32) per week.

That defendants pay unto claimant eight hundred fifteen and 87/100 dollars ($815.87) for section 85.17 benefits.

That defendants are to receive credit for compensation already paid.

That the costs of this action are taxed to defendants.

Signed and filed this 27th day of February, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VERA A. RUBEY,	:	
Claimant,	:	File No. 600245
vs.	:	R E V I E W -
INTERSTATE NURSERIES, INC.,	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
IOWA KEMPER INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This matter came on for hearing at the Pottawattamie County Courthouse in Council Bluffs, Iowa on August 4, 1983 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 June 14, 1979. A memorandum of agreement was filed on April 15, 1980 calling for the payment of $81.69 per week in compensation. A final report was filed on October 28, 1980 indicating that claimant had been paid 28 3/7 weeks of healing period compensation and 50 weeks of permanent partial disability compensation based upon a ten percent loss to the body as a whole. The record consists of the testimony of the claimant; the deposition of the claimant; claimant's exhibits 1 through 4; and defendants' exhibit A.

ISSUE

The sole issue for determination is the amount of permanent partial disability sustained by claimant.

STATEMENT OF THE EVIDENCE

Claimant, presently 49, was employed by defendant Interstate Nurseries on June 4, 1979. Claimant was zipcoding catalogs and fell onto her right side. Despite the pain in her right hip she continued to work for about two hours. She was then taken to the hospital. Claimant was eventually transferred to the Archbishop Bergan Mercy Hospital in Omaha. X-rays showed a displaced fracture of the right femoral neck. On June 7 claimant had surgery by Robert Klein, M.D., an orthopedist. This surgery was a Massie nailing of the right hip. Claimant was discharged from the hospital on June 21, 1979 and returned to work on December 22, 1979. Claimant returned to work and resumed lifting mail sacks as before.

Dr. Klein had advised claimant to stay away from cold, damp environments so claimant did not anticipate that she would be able to participate in the fall field work characteristic of the nursery industry (it is cold and damp). Claimant testified that she could not do much of her work, particularly lifting. She testified that her employer was helpful in keeping her busy.

Claimant testified (and her deposition bore out) that she worked for defendant employer for about twenty years and was laid off each summer. In 1980 claimant was laid off. She became a part-time employee mailing advertising fliers for employer.

On September 15, 1980 claimant became employed by Grape Community Hospital in Hamburg as a housekeeper. Claimant testified that this was lighter work. She stated that she doesn't have to get down on her knees. Claimant continues to work full time. She is not employed in the "seasonal" manner that she was for the prior twenty years of nursery work. The record indicates that claimant has a pension at her new employment (she didn't before). She is making more money per hour than she would make at the nursery.

On cross-examination, claimant testified that her knee and ankle are her main problems.

The only medical opinion in this case is from Dr. Klein. He last examined claimant on April 21, 1983 (he had last seen claimant in July 1980). Physical examination revealed that claimant could walk without a noticeable limp on the right. The leg lengths were equal. There was flexion of the right hip to ninety degrees, ten degrees less than the left hip. Extension was absent. External rotation, abduction and adduction were normal. Internal rotation was absent.

X-rays showed good vascularity of the femoral head. There was no incongruity of the joint surfaces, and the joint space was normal. There was no evidence of aseptic necrosis in the femoral head. Dr. Klein thought that claimant's limitations were "consistent with 15 percent disability of the right lower limb."

APPLICABLE LAW

1. Sections 85.3 and 85.20, Code of Iowa, provide this agency with jurisdiction 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., 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 June 4, 1979 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. Section 85.34(2)(o) provides for 250 weeks of permanent partial disability compensation for the loss of a leg. In Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983) it was stated that the loss of a scheduled member entitled claimant to recover pursuant to the specific physical impairment. The elements of industrial disability are not to be considered in the recovery due.

ANALYSIS

Based on the principles enunciated, it is clear to me that claimant sustained a permanent partial disability. However, it is also clear to me that claimant's disability is confined to the leg. This means that the elements of industrial disability will not be considered.

The medical evidence from a respected and competent physician fails to reveal damage to the hip joint. Further, this evidence shows no evidence of aseptic necrosis (one often worries about this tragic condition in hip injuries).

Considering that claimant has been paid fifty weeks of permanent partial compensation and is entitled to 37 1/2 weeks (15% of 250 weeks), no award will be made and no repayment will be ordered by this agency. See Comingore v. Shenandoah Artificial Ice, Power, Heat & Light Co., 208 Iowa 430, 226 N.W. 124 (1929).

FINDINGS OF FACT

1. Claimant was employed by Interstate Nurseries on June 4,

2. Claimant injured her right hip on June 4, 1979 while working.

3. Defendants filed a memorandum of agreement on April 15, 1980 concerning a June 4, 1979 injury.

4. The injury caused permanent partial disability.

5. The permanent partial disability is confined to the right leg.

6. Claimant's permanent partial disability is fifteen percent (15%) of the right leg.

7. Claimant has already been paid fifty (50) weeks of permanent partial disability compensation.

CONCLUSIONS OF LAW

1. This agency has jurisdiction of the parties and the subject matter.

2. Claimant was employed by defendant employer on June 4, 1979.

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

4. Claimant is entitled to be paid thirty-three (33) weeks of permanent partial disability compensation at the rate of eighty-one and 69/100 dollars ($81.69) per week, all of which has been paid.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing further from these proceedings.

Costs are taxed to defendants.

Signed and filed this 4th day of January, 1984.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS WAYNE RUPE,	:	
Claimant,	:	
vs.	:	File Nos. 699327, 699328, 699329, 699330, 699331
CLOW CORPORATION,	:	
Employer,	:	A P P E A L
and	:	D E C I S I O N
ROYAL INSURANCE,	:	
Insurance Carrier, Defendants.	:	

By order of the industrial commissioner dated June 20, 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 5 and 7 through 9; defendants' exhibit 1; the deposition of Donald Berg, M.D., and claimant's discovery deposition.

The result of this final agency decision will be to remand the case to the original hearing deputy as further delineated below.

REVIEW OF THE RECORD

Claimant filed a petition alleging injuries on five different dates: October 23 and November 3, 1980, February 12 and December 4, 1981, and February 1, 1982. A pre-hearing conference was followed by an order dated November 29, 1982 which stated that witness lists were to be exchanged by December 15, 1982.

The hearing was held on December 22, 1982. The exhibits and depositions were made a part of the record and the testimony of claimant and claimant's wife was taken. Claimant rested. (Trans., p. 63) Then defendants offered the testimony of Glen C. Ridgeway, whose name did not appear on defendants' witness list.

Defendants' attorney explained that the first notice he had of the witness' "possible or potential knowledge concerning this case was today." (Trans., p. 64) The hearing deputy sustained claimant's objection to the taking of the witness' testimony.

Defendants then requested permission to make an offer of proof for impeachment purposes, and the hearing deputy said "proceed." (Trans., p. 65) There was no indication that the witness' testimony was sworn; in the case of the other two witnesses at the hearing, the shorthand reporter had clearly indicated each was sworn in. The testimony was contrary to that of claimant and claimant's wife in that the witness stated he had seen claimant playing basketball vigorously a couple of hours a day over a period of early spring and until about the last week of August. (Trans., p. 68)

ISSUES

In his decision, the hearing deputy stated that the offer of proof was of such a compelling nature that he would consider it as a part of the record in the case. He proceeded to make a finding that claimant had sustained an injury on March 17, 1980 which was not one of the dates listed in the petition but was an injury upon which some compensation had already been paid). He also ruled that claimant had failed to meet his burden of proof as to any disability which resulted from that injury because, in not telling the physician about playing basketball, the physician's opinion was based upon an erroneous history and therefore the medical evidence fell short.

Claimant states the issues:

I. Did the deputy industrial commissioner err in concluding that the testimony of Glen Ridgeway must be received and considered a part of the record in this proceeding?

II. Assuming Arguendo that the deputy industrial commissioner did not err in concluding that the testimony of Glen Ridgeway must be received and considered a part of the record in this proceeding, should the claimant have been granted a compensation award or in the alternative, should the claimant be given the opportunity to present further evidence in this matter?

APPLICABLE LAW

Industrial Commissioner Rule 4.20(9) states that as a part of the pre-hearing procedure, parties may be required to specify all witnesses expected to testify. Other legal principles are discussed below.

ANALYSIS

In support of his decision to consider the content of the offer of proof as a part of the record, the hearing deputy cited a Florida case, Hartstone Concrete Products v. Ivancevich, 200 So.2d 234 (Florida, 1967) to the effect that a party is not required to give advance notice of intent to use impeachment evidence. That principle seems to be a sound statement of law. However, the hearing deputy did not overrule the objection to the testimony but sustained it. And, as claimant points out an offer of proof is not evidence. See 88 C.J.S. TRIAL §73, 1982 Cumulative Supplement at note 93.5, which is not exactly on point but clearly states an offer of proof is not evidence. The hearing deputy's knowledge of facts which are not a part of the record cannot be considered as evidence. See In Re Brown, 183 N.W.2d 731 (Iowa 1971). At the conclusion of the offer of proof, claimant was faced with the question of what to do next. He chose to cross-examine the witness briefly and offered no further evidence.

The hearing deputy's use of unsworn testimony taken by way of offer of proof as a basis for the decision did not give claimant a fair opportunity to rebut the putative evidence, since claimant could not know in advance that the proffer would become a part of the record.

That being the case, the matter should be remanded to the hearing deputy for further proceedings as explained below.

ORDER

These cases are hereby remanded to the original hearing deputy for further hearing which, since the testimony of Glen Ridgeway was unsworn, should recommence as of the close of claimant's case. Upon completion of these proceedings, the hearing deputy should weigh and consider all the evidence of the original case as well as that taken on remand and then render a finding on compensability with a decision accordingly. The undersigned deputy industrial commissioner does not intimate what that finding and decision should be.

Signed and filed at Des Moines, Iowa this 23rd day of August, 1983.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES PAUL SANDERS,	:	
Claimant,	:	File No. 615169
vs.	:	R E V I E W -
CLINTON ENGINEERING COMPANY,	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
EMPLOYERS INSURANCE OF WAUSAU,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by James Sanders, the claimant, against his employer, Clinton Engineering Company, and the insurance carrier, Employers Insurance of Wausau, to recover additional benefits under the Iowa Workers' Compensation Act on account of an injury he sustained on July 24, 1979. This matter came on for hearing before the undersigned at the Scott County Courthouse in Davenport, Iowa on December 2, 1982. The record was considered fully submitted on that date.

On August 27, 1979 defendants filed a first report of injury concerning the July 24, 1979 injury. On December 31, 1979 defendants filed a memorandum of agreement indicating that the weekly rate for compensation benefits was $196.98. On January 17, 1983 defendants filed a final report indicating that 129 weeks of healing period benefits (August 11, 1979 to January 29, 1982) and 50 weeks of permanent partial disability (based on 10% of the body as a whole) had been paid pursuant to the memorandum of agreement. (Paragraph 18 of defendants' answer suggests that claimant received benefits for the initial time off.)

The record consists of the testimony of the claimant and of claimant's wife; the deposition testimony of Dale Howard Weber, M.D., and of Eugene E. Herzberger, M.D.; claimant's exhibit 1, reports from Harry Honda, M.D.; claimant's exhibit 2, January 6, 1981 report from Steven R. Jarrett, M.D.; claimant's exhibit 3, Marion Health Center records; claimant's exhibit 4, Jane Lamb Hospital records; claimant's exhibit 5, reports from Dr. Weber

and from Dr. Herzberger; claimant's exhibit 6, Moline Public Hospital records; defendants' exhibit A, booklet of medical records; and defendants' exhibit B, December 28, 1981 letter of inquiry to Dr. Herzberger. Claimant's exhibit 7, a statement from the University of Iowa was verbally offered and received but is not found among the documents presented at the hearing.

ISSUES

The issues to be determined are whether there is a causal connection between the alleged injury and the disability, and if so, the nature and extent of the disability. At the time of the hearing, the parties indicated that all medical bills, except exhibit 7, had been paid.

REVIEW OF THE RECORD

As he was performing his employment duties on July 24, 1979 claimant was struck in the back of the head and neck by a heavy cable that had snapped loose from a nearby crane. Dale H. Weber, M.D., a general practitioner, examined the claimant that day. Office x-rays of the skull and cervical spine appeared normal; however, because of the nature of the injury, Dr. Weber admitted the claimant to Mercy Hospital for observation. Claimant was discharged the following day. Claimant returned to work on July 26, 1979. He was assigned to various light duty jobs, such as driving the pickup or the dump truck or carrying lumber and scraping for the carpenters, instead of operating the backhoe and setting forms for concrete, the heavy work he had done over the two years he was employed by defendant employer.

Claimant continued to work until August 9, 1979 when headaches, blurred vision, dizziness, nausea, cervical and left upper extremity pain and loss of grip and numbness in the left hand became disabling. Dr. Weber admitted the claimant to Jane Lamb Memorial Hospital on August 12, 1979. Claimant was seen in consultation with Dr. Sanguino, a neurologist, on August 15, 1979 and with Dr. James Ives, an orthopedic surgeon, on August 18, 1979. Medication relieved the headaches but traction aggravated the neck pain. In his consultation report, Dr. Ives set forth his findings and recommendations:

> On physical examination he is alert and cooperative. He has considerable limitation of neck motion with lateral bending to the left being the most painful. The neck is tender over the left upper spine and out into theleft [sic] occipital area to palpation. There is also tenderness in the lower cervical area and midline, primarily at C6-C7 and C7-T1. He has tenderness over the left trapezius and along the vertebral border of the left scapula. No particular muscle spasm is noted on today's examination. Full range of motion of the left shoulder and elbow are present. He has weakness of grip on the left. He has weakness of wrist extension and weakness of elbow extension. Biceps strength and the small muscles of the hand appear to be working well. There is decreased sensation over the entire palm and fingers with no difference being noted by him over the ulnar distribution as opposed to the median distribution. He has numbness along the medial portion of the forearm and arm.
>
> X-rays of the cerv ical [sic] spine show degenerative changes with narrowing and anterior osteophyte formation at C5-C6. There is also some degenerative change at C6-C7 on the lateral view. On the AP. view the joints of Lushka are quite narrowed at C5-C6 and on the oblique views there is crowding of the vertebral foramena at C5.
>
> ASSESSMENT: Cervical spondylosis with C6 and C7 radiculitis, possible herniated nucleus pulposis C6-C7.
>
> PLAN: Since conservative treatment is failing to control the pain and headaches and since there is neurological deficit, would recommend a myelogram and for that would transfer him to a neurosurgery service, probably an interhospital transfer would be more feasible.
>
> (Claimant's exhibit 4; defendants' exhibit A.)

Claimant was transferred from Jane Lamb Memorial Hospital to Moline Public Hospital on August 18, 1979. Claimant was evaluated by Harry Honda, M.D., a neurosurgeon. Cervical x-rays taken at that time revealed significant spur formation at C5-6 with protrusion posteriorly into the spinal canal, some degeneration at C6-7 and some encroachment of the neuroforamen at C5-6 and at C6-7. A bloody tap prevented completion of a successful myelogram. Claimant's condition improved with physical therapy and adjusted cervical traction. Claimant was discharged on September 4, 1979 with a final diagnosis of cervical muscle strain.

When claimant continued to suffer neck and arm pain, Dr. Honda readmitted him on November 11, 1979 for another myelogram, which was successful and revealed a bar defect at C5-6 and at C6-7. Subsequently, but during the same hospitalization, claimant underwent an anterior discectomy and fusion at C5-6 and at C6-7. At the time of discharge on November 21, 1979, final diagnosis was "[c]ervical degenerative disc disease with acute exacerbation at the time of trauma at the C5-6 and C6-7 interspace." Claimant's exhibit 1; defendants' exhibit A.) However, claimant developed pain in the neck, left shoulder and arm on November 26, 1983 and was rehospitalized for additional cervical traction from December 1, 1979 to December 13, 1979.

According to Dr. Honda's office notes, he saw the claimant for follow-up care on February 6, 1980, March 12, 1980, April 9, 1980, June 11, 1980 and August 13, 1980. He prescribed physical therpay, Clinoril, Motrin and Tylenol #4 for claimant's ongoing complaints. On the latter occasion, Dr. Honda did not anticipate any further improvement in claimant's condition. He released the claimant to return to light work (30 pound weight restriction and avoidance of excessive neck turning and bending) on a trial basis and discharged him from his care back to Dr. Weber.

Claimant's complaints to Dr. Weber on November 26, 1980 included pain and numbness at the base of the neck on the left, numbness extending down to the upper left extremity to the hand and down the left thoracic area to the tip of the left scapula, pressure over the throat area, frontal headaches upon extending the upper left extremity overhead, and almost constant headaches across the back of his head. Examination revealed less grip strength in the left hand when compared to the right. At that point Dr. Weber decided to refer the claimant to Eugene E. Herzberger M.D., a neurosurgeon.

Dr. Herzberger first examined the claimant on January 22, 1981 and found moderate limitation of cervical motion in all directions (consistent with Dr. Honda's surgery) and mild atrophy and weakness of the left upper extremity. He determined that further testing was in order. (See also claimant's exhibit 2; defendants' exhibit A.) Claimant was hospitalized from February 8 to February 10, 1981 for a repeat myelogram and EMG. The latter test was unremarkable, but the myelogram revealed a moderate stenosis or narrowing of the spinal canal from C4 to C7. X-ray of the cervical spine indicated that:

> There is anterior fusion at C5, 6 and 7 levels. The disc spaces otherwise appear to be well maintained. There is good stability of the remaining cervical spine. The odontoid is intact. Vertebral foramen appear to be normal. There is some uncinate spurring noted at C4-5, 5-6 and 6-7 levels particularly on the right side.
>
> IMPRESSION: 1. Anterior fusion of C5, 6 and 7 which are stable on flexion and extension views.
> 2. Uncinate spurring at C4-5, 5-6 and 6-7 on the right side.
>
> (Claimant's exhibit 3.)

Dr. Herzberger discussed his opinion regarding the origin of the stenosis:

> [S]uch narrowing can be due to bone spurs and sometimes even to ruptured disks but it was my feeling that we were dealing here with bone spurs rather than ruptured disks.
>
> Q. And was your diagnosis consistent with the history that he gave you about the incident that occurred in July of 1979 followed by the history of the medical treatments that he had following that time?
>
> A. Well, 1981 is just about a year and a half removed, February, '81, is about a year and a half removed from July of '79. This would allow for a certain amount of bone spur formations but my experience is, general experience is that there are certain people that have a rather narrow cervical spinal channel from birth and that in the course of their life due to injuries or other factors there may be an over growth of bone spurs and also the ligaments inside the spine. They grow thicker than normal and this produces a narrowing of the spinal channel.
>
> Q. And quite often that is caused by injury?
>
> A. Well, it is a natural process that's not always caused by injury but it tends to be aggravated by injury and having a time lag of a year and a half from the injury I would say that from the time of this injury till the time this myelogram was done there was some time for that stenosis, which is a narrowing of the channel, for that to be aggravated by the injury or its effects to be aggravated by the injury.
>
> Q. I take it Mr. Sanders told you he was in good health prior to this incident of July of 1979?
>
> A. Yes. This is an occurrence which one sees from time to time. People may have a narrow spinal channel and they were fine, have no apparent symptoms and then they are injured and then gradually develop problems.
>
> (Herzberger deposition, pp. 8-9.)

Claimant was hospitalized again from February 24, 1981 to March 4, 1981, during which time Dr. Herzberger performed a decompressive laminectomy of C4 through C7. (He explained that bone spurs are not removed in such procedure.) Claimant's post-operative course was uncomplicated. Dr. Herzberger saw the claimant for follow-up care on March 9, 1981, May 4, 1981, August 17, 1981, October 29, 1981 and March 12, 1982. He released claimant on a p.r.n. basis on the last occasion. Although the medical expert reported that claimant essentially had been doing well, he observed that claimant's return to work between the August and October visits was unsuccessful because claimant attempted work (pouring and polishing concrete) which was beyond claimant's post-injury physical capability. Taking claimant's age into consideration, Dr. Herzberger cautioned that claimant was susceptible to reinjury. As of the October 1981 visit, he recommended claimant pursue light work or retraining.

Upon cross-examination, Dr. Herzberger explained that a spur which protrudes posteriorly into the spinal canal will produce a displacement of the spinal cord itself and a lateral spur, which protrudes into the vertebral foramina, may affect a nerve root at its level. That is, while the location of both types of spurs may be different, they both may result in compromise or impingement of the adjacent nerve roots. Dr. Herzberger generally agreed that the varied hypertrophic changes, evident on the x-rays taken shortly after the accident, predated the work injury but took many months to develop. While agreeing that claimant's ongoing complaints after Dr. Honda's surgery would suggest that, in addition to the disc, the spurring contributed to claimant's condition, Dr. Herzberger implies that Dr. Honda's

operation was less radical and therefore preferrable as an initial surgical attempt to resolve the complaints. Dr. Herzberger assessed claimant's impairment at ten percent based upon his surgery, not that of Dr. Honda.

Upon redirect examination, Dr. Herzberger expressed an aversion to impairment ratings and explained that his rating took into account the atrophy and weakness of the left arm. Dr. Herzberger reiterated his position on the causal connection issue:

> Q. Now, I take it, Doctor, that in your earlier direct testimony you mentioned the fact that this injury of July, 1979 could have aggravated the condition or the bone spurs could have grown afterwards and by answering Mr. Shepler's questions you're just again reconfirming that the injury of July, 1979 aggravated the conditon that was in Mr. Sanders' spine at that time so to speak?
>
> A. Yes, I have seen this very often and a person may have a certain either congenital change or something acquired later on, you know, like bone spurs and they seem to get along very well until they have an injury and then they may have a variable set of symptoms varying from moderate to extremely severe. I've seen people that were paralyzed from the neck down from a fall and then we normally always have this problem that he had this bone spur, whatever, right in the beginning but still he was able to function with that bone spur. Obviously, even in this man's case he has been working totally since whatever accident he had and obviously he had that bone spur. If they have taken an X-ray within a few days or maybe a few weeks from his injury and there was a spur there, obviously the spur has been there maybe for a year or two, whatever, you know, and he has been able to do his work.
>
> Q. So it remains your opinion based upon a reasonable degree of medical certainty that the symptoms that you found him with resulted from the incident of July, 1979 through aggravation or other means?
>
> A. Through aggravation of a preexisting condition.
>
> (Herzberger deposition, pp. 33-34.)

Dr. Weber examined the claimant again on March 29, 1982 at which time he found:

> Although the patient has had two operations for this injured disc he continues to have serious problems. He complains of marked loss of strength in the left arm and left hand. He cannot lean his head backwards which is necessary to run a crane, the job which he was trained for. He has constant pain across the top of both shoulders and numbness which extends down the back of the left upper extremity all the way to the little finger of the left hand.
>
> Because of this loss of motion in his neck and the constant pain and loss of strength in his left upper extremity he finds that he cannot do his regular work which included running a crane, the job which he was trained for. He has constant pain across the top of both shoulders and numbness which extends down the back of the left upper extremity all the way to the little finger of the left hand.
>
> Examination in my office reveals marked muscle wasting of the left upper extremity with the left biceps area measuring 60 centimeters in circumference compared to 90 centimeters on the right. The left forearm measuring 50 centimeters in circumference compared to 70 centimeters on the right. There is visual wasting of the hypothenar eminence on the left hand. He cannot discriminate between sharp pinprick and dull pinprick over the left fourth and fifth fingers and also cannot distinguish between these stimuli over the triceps area of the left upper extremity. There is marked loss of mobility of the neck making it impossible for him to tip his head back and difficult for him to turn his head to the left.
>
> In view of the fact that the patient has had two operations and still continues to have serious problems I feel that these findings are permanent and will not improve in the future and may well get worse as he gets older. It is my belief that because of the type of work that this man does and the impossibility of doing this work with these injuries, it is my belief that he is 100% disabled and I feel this disability is permanent and I also fear that the above mentioned injuries will lead to early onset of arthritis both in the neck and about the left hand, wrist and shoulder and that his disability will become even worse in the future.
>
> (Claimant's exhibit 5; defendants' exhibit A.)

Weber testified that he no longer expected any improvement claimant's condition after that visit. Although he saw the imant on prior occasions after Dr. Herzberger's surgery, he arently did not conduct any examinations.

Dr. Weber opined that claimant suffers from left cervical ve root syndrome with moderate atrophy of the left upper remity, along with secondary persistent pain, due to cervical nosis from C4 through C7 as aggravated by the July 24, 1979 k injury. Dr. Weber emphasized that he had been claimant's ily physician since 1962 (he first treated the claimant in 8) and did not believe the claimant to be a complainer or a ingerer. Dr. Weber testified that to his knowledge the claimant did not have any of his present complaints prior to July 24, 1979.

During cross-examination, Dr. Weber reviewed claimant's cervical x-rays which were taken at his office on July 24, 1979. He observed arthritic spurs at C4, C5, C6 and C7 and narrowing of the disc spaces at C5 and C6. He thought that spurs at C5 and C6 might be encroaching upon the neural foramina at those levels and that spur formations off C6 and C7 might be protruding posteriorly into the spinal canal. He agreed that such hypertrophic changes could be an additional source of compression and that they would have preexisted the July 24, 1979 injury. He acknowledged that the continuation of claimant's symptoms after Dr. Honda's operation (and after Dr. Herzberger's intervention) would suggest the existence of continued compression of the nerve roots.

Dr. Weber emphasized claimant's pain free condition prior to the work injury in support of his position that the work injury aggravated any preexisting nerve root compression. He conceded that he basically had to rely on claimant's stated history of being pain free prior to the work injury because he had not examined the claimant on a regular basis before that date.

During the course of his cross-examination, Dr. Weber discovered a set of x-rays taken by Dr. Marme, another doctor in Dr. Weber's clinic, in 1976. When compared with the 1979 x-rays, the 1976 x-rays revealed somewhat less hypertrophic changes and narrowing. Claimant testified that he saw Dr. Marme for sharp pains in his left arm, not shoulder, in April of 1976. He denied any injury occurred at that time or that discomfort lasted more than a month. He did not recall any recurrence of the pain before July 24, 1979, but indicated that his arm might have been sore once in a while after a day at work.

Claimant is 53 years old and completed three years of high school. Claimant's employment history has been limited to construction work except for some part-time work on a drill press. Claimant did not think he could do construction work without full use of both arms. Claimant estimated that he could carry approximately 20-30 pounds with his left hand if he rested the weight on the top of his arm (40-60 pounds if he did not have to grip the item.) Claimant thought he might be able to operate a backhoe for a short period of time and then referred to difficulty sitting still more than a couple hours. Claimant has not attempted such task since the work injury occurred. Claimant testified that defendant employer informed him that they did not have any suitable light work for him to do. Aside from his attempt to return to work with defendant employer, claimant has not sought employment elsewhere. Concluding that he was not employable, claimant indicated he has not yet registered with Job Service. Claimant went on to testify that he thought he could do light work--25-30 pounds, three to four hours of standing, and two hours of sitting.

Claimant reported that he was unable to put more than three sheets of drywall up at home over a three week period because his arm would become weak and painful when he extended it all the way. Claimant related that he now mows the grass in segments and such chore takes 90 minutes whereas he formerly completed the task in 20 minutes. Claimant testified he could paint side walls but not ceilings.

Claimant's present complaints include neck and shoulder pain and loss of strength in the upper left extremity. He described how tipping his head back caused an electricl shock sensation to permeate his shoulders and arms. He also noted sharp pain when turning his head from side to side. He takes pain pills every four hours. Claimant thought Dr. Herzberger's surgery alleviated his neck pain but did not improve his shoulder condition. Claimant related that he has difficulty finding a comfortable, sleep-inducing position, but once he falls asleep he sleeps well. Claimant testified he rarely has headaches anymore. (Dr. Weber testified that he referred the claimant to Iowa City Hospitals and Clinics for treatment of persistent headaches. Claimant testified that he received a nerve block on the first visit and a prescription on the second visit. Dr. Weber had not yet received a report from Iowa City.)

Claimant's wife of 33 years generally verified claimant's complaints and corroborated his testimony. She has observed the claimant having difficulty reaching to get a coffee cup out of a cupboard, driving, sitting through a movie or wedding reception, attempting to help carry one 2 x 4 board, and vacuuming.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 24, 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).

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 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.

ANALYSIS

That claimant had preexisitng spur formation and stenosis in the cervical spine is confirmed by the x-rays and medical evidence in general. However, the record read as a whole corroborates the medical experts' opinions regarding the causation of claimant's complaints which they treated. Claimant may have had occasional discomfort after working a full day of construction and did seek treatment on one occasion four years before the 1979 injury, yet he did continue to work heavy construction. It may be that the preexisting condition would have disabled the claimant in time. However, that is not the circumstance herein. Rather, the work injury on July 24, 1979, which was severe by description, materially aggravated claimant's preexisting condition. The subsequent course of complaints and treatment were 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 industrial disability. The impairment rating of Dr. Herzberger appears low when compared with other cases the undersigned has reviewed. Of course, Dr. Herzberger was rating the resultant impairment from his surgery only and did not utilize any standardized guides. Likewise, Dr. Weber's conclusion appeared too high--he obviously wished to step beyond the arena of impairment into that of loss of earning capacity. In any event, the doctors seemingly agree that claimant should avoid heavy construction and confirm that claimant has some mild limitation of neck movement and loss of strength in the upper left extremity, with secondary pain. Dr. Honda recommended a 30 pound restriction and avoidance of excessive neck bending and twisting. Indeed, claimant suffered a flareup when he attempted a return to heavy construction work in August of 1981.

Claimant's age, education and limited work experience might make obtaining suitable lighter work or retraining difficult. However, aside from attempting a return to heavy construction, claimant has made no effort to look for suitable work and has not inquired into any retraining programs. That claimant may not be able to complete certain home projects does not establish that he is unable to pursue some form of gainful employment especially in light of the medical record, in general, and Dr. Herzberger's conclusions, in particular. Claimant has at least acknowledged that he feels capable of doing some wall painting, carrying objects in a certain manner with the left hand, and operating a backhoe for short periods of time. As noted by Dr. Honda, the claimant is right-handed. The reason behind claimant's difficulty with sitting and standing for long periods of time is not entirely clear. Nevertheless, it is obvious that he has not made any attempt to find work allowing him to alternate standing and sitting.

Taking into consideration all of the factors of industrial disability discussed above in addition to the severity of the injury, number of surgeries and hospitalizations, and ongoingness of the complaints in the aggravated area, the record supports finding that claimant has suffered a 50 percent loss of earning capacity as a result of the July 24, 1979 work injury.

With regard to the length of healing period, Dr. Honda's statement that claimant reached maximum improvement as of August 13, 1980 is contradicted by subsequent events. Dr. Weber's opinion that medical improvement was no longer anticipated as of his March 29, 1982 examination of the claimant is discounted because Dr. Weber was not instrumental in claimant's care following Dr. Herzberger's surgery until Dr. Herzberger released the claimant from his care on a p.r.n. basis on March 12, 1982. Dr. Herzberger was not asked to state an opinion on the healing period issue. By letter dated December 28, 1981 (defendants' exhibit B) defendants asked Dr. Herzberger for a permanency rating if he felt claimant had reached maximum recovery. Dr. Herzberger responded on January 19, 1982 with a copy of the letter he sent to claimant's counsel on November 9, 1981. The letter contains a permanency rating. (Claimant's exhibit 5.) The January 19, 1982 date will be construed as Dr. Herzberger's evidence on the healing period issue.

With regard to the bill from the University of Iowa Hospitals and Clinics, claimant's testimony and that of Dr. Weber were inconsistent. No report was offered into the record to explain the reasonableness and necessity of the treatment. Claimant has not sustained his burden of proof under 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. Spur formation and stenosis were present in claimant's cervical spine prior to July 24, 1979; claimant sought medical care for sharp pains in his left arm for a brief period of time in April of 1976; claimant occasionally experienced left arm discomfort after completing a day of construction work prior to the date of injury.

FINDING 2. On July 24, 1979 claimant was struck in the back of the head and neck by a heavy cable that had snapped loose from a nearby crane.

FINDING 3. Aside from returning to light duty status from July 26, 1979 to August 9, 1979 and unsuccessfully attempting a return to heavy construction on or about August 1981, claimant has not worked since the date of injury.

FINDING 4. Claimant underwent an anterior discectomy and fusion at C5-6 and C6-7 in November of 1979 and a decompressive laminectomy of C4 through C7 in February of 1981.

FINDING 5. The July 24, 1979 work injury materially aggravated claimant's preexisting condition.

CONCLUSION A. Claimant sustained his burden of proving that the July 24, 1979 injury is the cause of the disability on which he bases his claim.

FINDING 6. Claimant is 53 years old.

FINDING 7. Claimant completed three years of high school.

FINDING 8. Claimant's work history has been limited to construction work except for some part-time operation of a drill press.

FINDING 9. Claimant continues to complain of neck and shoulder pain and loss of strength in the upper left extremity.

FINDING 10. Claimant is not capable of returning to heavy work but is capable of performing light work; he is right handed.

FINDING 11. Claimant has not attempted to look for work, except for his returns to defendant employer mentioned in Finding 3, or to seek retraining.

CONCLUSION B. Claimant has sustained a fifty percent (50%) loss of earning capacity as a result of the July 24, 1979 work injury.

FINDING 12. Significant medical improvement was no longer anticipated as of January 29, 1982.

CONCLUSION C. Pursuant to Code section 85.34(1), claimant's healing period ended as of January 29, 1982.

FINDING 13. Claimant did not establish that treatment at the University of Iowa Hospitals and Clinics was reasonable and necessary.

CONCLUSION D. Pursuant to Code section 85.27, claimant is not entitled to reimbursement of the offered medical expense.

ORDER

THEREFORE, IT IS ORDERED that the defendants pay the claimant two hundred fifty (250) weeks of permanent partial disability at the rate of one hundred ninety-six and 98/100 dollars ($196.98) per week. Pursuant to Code section 85.34(2) permanent partial disability benefits shall begin as of January 30, 1982.

Defendants are ordered to pay the claimant healing period benefits from the date of injury through January 29, 1982 at the rate of one hundred ninety-six and 98/100 dollars ($196.98) per week and minus those periods of time when claimant was working.

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.

Cost 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 28th day of September, 1983.

LEE M. JACKWIG
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HAROLD SANFORD,	:	
Claimant,	:	File No. 530493
vs.	:	R E V I E W
ALLIED MAINTENANCE CORP.,	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
CNA INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Harold Sanford, claimant, against Allied Maintenance Corp., employer, and CNA Insurance Company, insurance carrier, defendants, to recover additional benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of his employment on March 12, 1979. It came on for hearing on May 24, 1984 at the office of the Iowa Industrial Commissioner in Des Moines, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file shows a first report of injury received March 14, 1979. A form 2A received May 8, 1981 shows the payment of twelve weeks and three days of healing period benefits and the payment of 75 weeks of permanent partial disability, representing fifteen percent of the body as a whole.

At the time of hearing the parties stipulated to a rate of $150.80 and to the fairness of the medical expenses.

The record in this matter consists of the testimony of claimant; claimant's exhibit 1, a series of medical expenses; claimant's exhibit 2, a letter from Brian J. Crosser, D.C., dated October 7, 1983; defendants' exhibit A, a letter from Clement J. Hessel, Jr., dated April 15, 1981; defendants' exhibit B, a letter from Dorothy L. Kelley dated February 28, 1983; defendants' exhibit D, notes from Richard T. Beaty, D.O.; defendants' exhibit E, a letter from Dr. Beaty dated March 18, 1983; defendants' exhibit F, a letter from Dr. Beaty dated May 6, 1983 with accompanying record of a CT scan; defendants' exhibit G, a record of computerized tomography from March 22, 1983; defendants' exhibit H, medical records from Orthopaedists Limited, P.C.; defendants' exhibit I, records from Five Points Chiropractic Clinic; and defendants' exhibit J, a letter from Dr. Beaty dated May 20, 1983. Official notice was taken of those matters which can be included in the record as well as the interrogatories. See Iowa Code section 17A.12(6)(a).

Defendants' objection to claimant's exhibit 1 was considered in evaluating that exhibit. Defendants' objections to exhibits 3 and 4 are sustained. However, the undersigned has reviewed those exhibits and finds that their inclusion would not affect the ultimate outcome of this case. Defendants' objection was to the timeliness of those reports.

Industrial Commissioner Rule 500-4.17 provides:

> 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).

A petition for review-reopening was filed February 7, 1983. This matter was preheard on September 29, 1983. On October 3, 1983 a prehearing order was entered which provided that claimant was to receive the report from the Troxell Clinic by October 28, 1983. Depositions were to be set by November 25, 1983. The case was assigned with a nota bene which provides in part:

> No request for continuance based on an allegation that the record will not be completed prior to the date of the hearing will be granted unless filed by May 7, 1984. No provision will be made for the record to remain open after the hearing. Industrial Commissioner Rule 500-4.31. Nor will a report that has not been timely exchanged to allow the opposing party an opportunity to cross-examine be received into evidence.

On March 14, 1984 claimant filed a motion to extend discovery which was denied. Claimant asserts that Dr. Crosser's reports of May 21, 1984 and May 23, 1984 are interpretations of his prior report dated October 7, 1983. Had claimant seen the need for additional explanation, he should have sought it at an earlier time. The reports will not be included in this record.

ISSUES

The issues in this matter are whether or not there is a causal relationship between claimant's injury and any additional disability he now suffers; whether or not claimant is entitled to further permanent partial disability benefits; and whether or not expenses incurred under Iowa Code section 85.27 were authorized.

STATEMENT OF THE CASE

Twenty-three year old married claimant, who has a high school education with a semester in electronics training, testified to work experience while he was in school as a stocker in a grocery store. After his graduation from high school in June of 1978 he went to work for defendant employer where he was classified as a plant serviceman with such duties as driving a forklift, loading trucks and pulling computer cards. He terminated his employment on June 15, 1979 because he felt he was unable to do his job. He was earning $6.40 hourly at the time.

Claimant went to work at a grocery store at a salary of $5.00 per hour as manager of the frozen food and dairy section where he did stocking and ordering. When he began to believe the store would close, he moved to another store where he worked in the same department at $3.35 per hour. He did not lift anything heavier than 25 or 30 pounds. After about six months and because he was tired of working in grocery stores, he moved to Davenport where he eventually found a job working in a stereo store doing repairs and selling home and car stereos. His earnings were $3.25 per hour with a commission after he was on the job three months. He did some lifting and moving of equipment. His next job was selling automotive supplies and running the installation shop with wages of $4.25 per hour. He did no actual installation himself. He answered the phone and placed orders. Claimant's present job is with a beer distributor for whom he drives a truck delivering the palletized beer, sells, keeps books on the inventory and collects money.

Claimant described his injury in his answers to interrogatories signed December 24, 1980 as follows:

> In January, 1979 while at work at Allied Maintenance Corp./Midwest Dispatch I lifted a tractor tire off the floor - I noticed a sharp pain in my lower back and immediately reported my injury to my supervisor. My supervisor sent me to Des Moines General Hospital. X-rays were taken, I was given a prescription and discharged back to work. From then on my back bothered me, however, the pain had not reached a point where I could not work. On or about March 12, 1980 [sic] while at work at Allied Maintenance Corp./Midwest Dispatch I was loading a truck when I again noticed a very sharp pain in my back, this time so severe that I could hardly walk. I immediately reported my injury to my supervisor who again sent me to Des Moines General Hospital. I do not recall any x-rays taken this time. I was then sent to the company doctor who treated me for about a week and one-half. I was then sent to Wilden Clinic in Des Moines where I received hot pack treatments. I was then sent to Dr. Boulden in Des Moines. Allied Maintenance Corp./Midwest Dispatch and/or its compensation carrier should have all these records.

Claimant reported that Dr. Boulden explained to him that he had an unusual condition for a person of his age and that he had two discs in his back which were trying to grow together. Dr. Boulden tried physical therapy, traction and exercises. He gave claimant a TENS and a back brace.

Claimant was wearing the TENS on May 7, 1979 when he tried to go back to work. He was assigned to pulling tires. He was unable to complete the day. Dr. Boulden suggested he try other work. He was unsure if he had discussed with the doctor his plan to return to school.

Claimant acknowledged having an automboile accident in December of 1979 after he fell asleep at the wheel. His car was totaled when he ran into two telephone poles. He claimed that he had neither cuts nor bruises from that incident.

In May of 1980 he saw Dr. Boulden for increased symptoms after heavy lifting at work for one of the grocers. He did not recall filing a compensation claim at that time. Eventually, Dr. Boulden gave him a rating of ten percent and told him he would have to exercise for the remainder of his life.

Claimant filed a petition for additional workers' compensation benefits in October of 1980. He was represented at that time by attorney Harris. He was sent by defendants for evaluation by Dr. Beaty who told him to exercise and to avoid heavy lifting. He assigned an impairment rating of twelve percent.

Claimant described his complaints in December of 1980 thusly:

> I have constant lower back pain. On a scale of one to ten with ten being the most severe, the intensity of the pain varies from three to six. On occasion, the pain has been sufficient enough to wake me up during the night. I am unable to find a comfortable position. I have lower back pain when I am standing, sitting and laying down.

With the advice of Attorney Harris, claimant settled his claim. Settlment documents approved by Deputy Industrial Commissioner E. J. Kelly show an agreed industrial disability of fifteen percent to the body as a whole with defendants having paid all "relevant hospital and medical expenses submitted."

Claimant recalled that after his move to Davenport he began treating with Drs. Troxell, Carr and Crosser with the latter doctor being consulted sometime after August of 1982.

Claimant acknowledged having seen a letter dated April 15, 1981 to his attorney from Clement J. Hessel, Jr., which states: "I feel that any medical other than by the above doctors [Dr. Beaty and Dr. Blacksmith] or by an orthopedic surgeon of our choice will not be authorized." He, likewise, had seen a letter dated February 28, 1983 from defendants' counsel to his present attorney informing him of an examination by Dr. Beaty and offering care by that physician. The letter states that "any other care, without prior approval of the Employer and Insurer will be considered to be unauthorized relative to any payment."

Claimant admitted being told that Dr. Beaty would provide him with treatment. He agreed that he has had no surgery, that

he has been scheduled for no surgery, that he has not seen Dr. Crosser since July 1983 and that he has made no request to the insurance carrier for additional care.

Claimant's interrogatories from May 18, 1983 give as his current complaint "[l]ower back pain causes discomfort most of the time."

Claimant thought that he saw Dr. Crosser beginning after August 1982. He conceded that the doctor did not know his condition before he entered the settlement agreement. Claimant indicated that he understood from the settlement agreement that defendants would continue to pay his medical benefits. He persisted in treatment with Dr. Troxell because he thought he saw improvement in his varying condition. He began seeing Dr. Crosser because it was easier to get in to see him due to his more flexible schedule. Claimant said both that the treatments made him feel better by taking away the pain and that he was not sure if they were helping or hurting him, but he did what the chiropractor recommended. He reported going directly from treatments by Dr. Beaty to treatments by Dr. Crosser.

Claimant denied back problems before an incident at work in January of 1979.

A note from Des Moines General Hospital shows claimant was seen in the emergency room on January 31, 1979 with an acute myofascial back strain.

William R. Boulden, M.D., first saw claimant on April 3, 1979 and took a history like that given by claimant in his interrogatory. Claimant complained of pain in the small of the back with no radiation into his legs or feet. There was neither hypesthesia nor paraesthesia. There was no pain with coughing or sneezing.

Claimant was tender in the lower middle of the lumbar spine at L5-S1. There was no muscle spasm. Forward flexion was limited by pain. Lateral bending was full. Straight leg raising caused pain in the small of the back. Deep tendon reflexes were equal and there was no motor weakness or sensory change. X-rays showed disc space narrowing at L5-S1. Dr. Boulden's impression was degenerative disc disease with myofascial irritation of the lumbosacral region. He proposed that claimant be placed on an anti-inflammatory, an active physical therapy program and a back flexion exercise program.

When claimant was seen the next week, heavy pelvic traction was initiated. As that failed to improve claimant's condition, he was placed on bedrest with Butazolidin Alka. A TENS was then tried.

On May 11, 1979 Dr. Boulden noted claimant's attempt to return to work and expressed the opinion that claimant is incapable of working at lifting heavy objects or stooping. The doctor indicated discussing with claimant claimant's changing jobs or returning to school. Claimant was given a chairback brace which seemed to improve his condition.

Claimant was seen on December 20, 1979 at which time he told of tolerable occasional pain in the lower back with no radiation. There was no neurological deficit. X-rays were viewed as confirmation of a degenerative disc at L5-S1 with no progression. Claimant was given a permanent partial disability rating of ten percent.

Claimant returned on March 24, 1980. His examination at that time was unremarkable and it was recommended that he reinstitute the back flexion exercise program.

A letter from Dr. Boulden dated May 27, 1980 reports a follow-up on claimant's degenerative disc disease after claimant was doing heavy lifting at work and projects a release for a return to work on May 30. The letter indicates fusion of L5 to S1 was discussed with claimant.

Richard T. Beaty, D.O., reported his findings relating to claimant in a letter dated February 9, 1981. Claimant gave a history which is essentially that set out in his interrogatories. Claimant complained of low back and right leg pain worsened by bending, coughing and sneezing. Measurement of claimant's lower extremities were equal. Claimant forward flexed to 15° at which point he had pain. Lateral flexion to the right and left was to 15° with pain. Rotation was to 30° right and left. Straight leg raising was to 65° on the right and to 90° on the left. Orthopedic testing was negative.

Dr. Beaty's impression was chronic lumbar myofascial strain with the possibility of a degenerative disc or herniated nucleus pulposis not totally excluded. He recommended that claimant continue exercises and avoid prolonged standing or heavy lifting. Claimant was given a permanent partial disability of twelve percent based on a "clinically established disc with residuals, [and] lack of motion as those measured today."

Dr. Beaty saw claimant on March 18, 1983 at which time claimant complained of chronic low back pain with no radiation. Straight leg raising was positive at 60° bilaterally. No reflex changes, sensory loss or radicular pain were elicited with testing.

X-rays showed a batwing deformity of the fifth lumbar vertebra with attempts at sacralization. There was narrowing of the L5-S1 interspace. Otherwise, x-rays were negative for fracture or dislocation. Dr. Beaty ordered a CT scan.

The CT scan was done on March 22, 1983 and was interpreted by G. G. Green, M.D., as revealing the "[s]uggestion of slight stenosis of the lateral recesses between L4 and L5." There was no evidence of a herniated intervertebral disc.

Dr. Beaty was unsure whether or not the stenosis seen in the CT scan was responsible for claimant's pain. Arrangements were made for claimant to have whirlpool, hot packs and progressive resistive exercises three times a week for a month. Claimant failed to return for re-evaluation on May 3, 1983.

On May 20, 1983 Dr. Beaty wrote: "I would continue to rate his percentage of impairment at approximately 10%, based primarily on limitation of motion of the lumbar spine."

Claimant was seen at the Five Point Chiropractic Clinic on August 19, 1980 at which time some testing of the dorso-lumbar spine was positive. Motion in that area produced pain at L4-5. Flexion was to 80 degrees, extension 20 degrees, left and right lateral flexion to 35 degrees and left and right rotation to 20 degrees.

On November 5, 1980 testing was done again at which time fewer tests were positive. Dorso-lumbar motion was flexion 65°, extension 25°, left and right lateral flexion 20° and left and right rotation 20°.

Claimant was seen on February 4, 1983 at which time he told of headaches, tiring of his legs, stiffness over the last days and months, sharp pain in the low back, pain in the base of the neck, a breathing problem and an increased heart rate. Range of motion testing was confined to the cervical spine where there was a decrease in extension and right and left lateral rotation.

A letter from Brian J. Crosser, D.C., appears to discuss claimant's examination of March 24, 1983. At that time claimant complained of lower lumbar pain, headaches every other day from muscle tension in the low back causing pain to the top of his head and pain down the back of his legs. Many of the tests performed were positive. All motions of the dorso-lumbar spine produced pain. Flexion was to 55°, extension to 30°, left lateral flexion to 30°, right lateral flexion to 45°, left rotation to 25° and right rotation to 30°. Findings were of a misalignment of 5L, 6T and 1T with disc protrusion and pressure on the corresponding spinal nerve roots. Recommended care was for treatment two times weekly for six weeks and once weekly for eight weeks.

X-rays showed a batwing anomaly at L5 bilaterally. There was loss of normal A/P cervical and lumbar curvature. There was disc thinning at L5. A right scoliosis in the lumbar spine and a compensatory left scoliosis in the thoracic spine were seen. Vertebral subluxations were observed at L4 and 5, T7 and C7.

Dr. Crosser's diagnoses were a traumatically induced acute lumbar strain/sprain with myofascial residuals and lumbar disc syndrome. Claimant was given a permanent partial disability rating of twenty percent based on x-ray studies, motion, palpation of the lumbosacral spine and the orthopedic, neurologic and physical examinations.

APPLICABLE LAW AND ANALYSIS

Iowa Code section 86.14(2) mandates:

> 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.

An agreement for settlement ended the litigation in a prior arbitration proceeding filed October 30, 1980. In that agreement the parties agreed that claimant had a personal injury in the form of a low back strain arising out of and in the course of his employment; that claimant was paid healing period from March 16, 1979 through June 7, 1979; that claimant was paid a fifteen percent body as a whole industrial disability; and that all relevant medical expenses had been paid.

Settlement was approved on April 15, 1981.

The case law relating to review-reopening proceedings is rather extensive:

The opinion of the Iowa Supreme Court in Stice v. Consolidated Indiana Coal Co., 228 Iowa 1031, 1035, 291 N.W. 452 (1940) stated: "That the modification of...[an] award would depend upon a change in condition of the employee since the award was made." The court cited the law applicable at that time which was "if on such review the commissioner finds the condition of the employee warrants such action, he may end, diminish, or increase the compensation so awarded" and stated at 1038:

> that the decision on review depends upon the condition of the employee, which is found to exist subsequent to the date of the award being reviewed. We can find no basis for interpreting this language as meaning that the commissioner is to re-determine the condition of the employee which was adjudicated by the former award.

The court in Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957) at 69, cited prior decisions and added a new facet to review-reopening law by stating:

> But it is also true that unless there is more than a scintilla of evidence of the increase, a mere difference of opinion of experts or competent observers as to the percentage of disability arising from the original injury would not be sufficient to justify a different determination by another commissioner on a petition for review-reopening. Such is not the case before us, for here there was substantial evidence of a worsening of her condition not contemplated at the time of the first award. [emphasis added]

Further clarification was provided:

> In the matter before us the claim is not from temporary disability to permanent partial, but for a greater degree or 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. It is claimant's position that she offered substantial competent evidence that her physical disability resulting from the original injury was not 20% as originally believed, and upon which she received compensation, but now proves to be 25%. Defendant-employer's contention before the commissioner, before the district court, and now before

us is that the evidence did no more than confirm the original findings of disability and that no competent facts were related to confirm a change in claimant's condition. This was the basis of the district court's judgment, but one in which we cannot agree. Some progressive deterioration was related by the claimant and confirmed by the doctor. It was sufficient evidence to permit the commissioner to determine whether the percentage of permanent partial disability had actually been underestimated in the former award. The doctor's opinion that the disability considering her history was 5% in excess of the 20% apparently originally determined after the first operation justifies the review reopening.

In Henderson v. Iles, 250 Iowa 787, 794, 96 N.W.2d 321, (1959), questions to be asked were listed in the opinion and included:

[Did] claimant, by sufficient competent evidence, show a change since the award was made, in his capacity to perform gainful labor? Was there a change in the degree of his industrial disability--a reduction of earning capacity?

A major pronouncement came in the case of Gosek v. Garmer & Stiles Co., 158 N.W.2d 731, 732 (Iowa 1968). The opinion there said that "[o]n a review-reopening hearing claimant has the burden of showing by a preponderance of the evidence his right to compensation in addition to that accorded by a prior agreement or adjudication." The opinion went on to discuss the common understanding that "if a claimant sustained compensable injuries of which he was fully aware at time of prior settlement or award, but for some unexplainable reason failed to assert it [sic], he cannot, for the first time on subsequent review proceedings, claim additional benefits." The opinion continued at 733 "[b]ut according to the apparent majority view, if a claimant does not know of other employment connected injuries or disability at time of any prior agreement or adjudication, he is not ordinarily barred from later asserting it [sic] as a basis for additional benefits." The court went on to hold at 735 that "cause for allowance of additional compensation exists on proper showing that facts relative to an employment connected injury existed but were unknown and could not have been discovered by the exercise of reasonable diligence, sometimes referred to as a substantive omission due to mistake, at time of any prior settlement or award."

Further refinement was provided by the Iowa Court of Appeals in Meyers v. Holiday Inn, 277 N.W.2d 24 (Ct. App. Iowa 1978). The per curiam opinion in that case at page 26 discussed the problem and the solution thusly:

The question we must decide is whether a mistaken assessment of the extent of a claimant's disability later modified to correspond with findings made in subsequent medical evaluation will support an increased award on review reopening. It is clear that if the subsequent evaluation results from an unexpected deterioration of the claimant's physical condition, a review reopening will lie. [Citation] But does the same hold true when the later evaluation results from the failure of a diagnosed condition to improve to the extent anticipated.

....

It makes little difference from the standpoint of the injured claimant whether a physical condition resulting from an injury progressively worsens beyond what was anticipated or fails to improve to the extent anticipated. Either situation results in the industrial commissioner being unable to fairly evaluate the claimant's condition at the time of the arbitration hearing.

More recently, the court said that "[a]n increase in industrial disability may occur without a change in physical condition. A change in earning capacity subsequent to the original award which is proximately caused by the original injury also constitutes a change in condition...." Blacksmith v. All-American, Inc., 290 N.W.2d 348, 350 (1980); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (1980).

Claimant has the burden of proving by a preponderance of the evidence that increased incapacity which entitles him to additional compensation is a proximate result of the original injury. 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).

It is necessary to examine claimant's condition at the time of his settlement and his condition at present to see if there has been a change under the Iowa case law which warrants an increase in the compensation agreed upon.

Claimant is older than at the time of settlement, but his aging was certainly to be anticipated. At the time of the settlement claimant had a high school education and was taking an electronics course. He subsequently completed that course. Presumably, an increase in education would likely lower claimant's industrial disability as more job opportunities would be available to him. Claimant had terminated his employment with defendant employer prior to his settlement. At that time he had work experience in grocery stores and in the service department of a stereo store. Claimant now has additional work experience in selling automotive parts and in working with a beer distributor. Claimant's complaints at the time of his settlement were constant low back pain which was present whether he was standing, sitting or lying down. His current complaint is of "[l]ower back pain [which] causes discomfort most of the time." Prior to the settlement, claimant had a restriction against heavy lifting.

Dr. Beaty saw claimant both before his settlement was entered and after his present action was instituted. In 1981 straight leg raising was accomplished to 65° on the right and 90° on the left. In March of 1983 straight leg raising was positive at 60° bilaterally. X-rays in 1983 showed a batwing deformity, but no x-rays were available in October of 1981. Dr. Beaty found no radicular pain. The orthopedic surgeon continued to rate claimant's impairment at approximately ten percent.

Claimant's range of motion on comparison between early 1981 and March of 1983 are as follows: forward flexion 1981, 15 °; 1983, 55°; extension 1981, 15°; 1983, 30°; right rotation 1981, 30°; 1983, 30°; left rotation 1981, 30°; 1983, 25°; right lateral flexion 1981, 15°; 1983, 45°; and left lateral flexion 1981, 15°; 1983, 30°.

Dr. Crosser found radicular pain along the sciatic nerve distribution. No atrophy was present. There were no sensory changes. There were no reflex changes. Dr. Crosser assigns a functional impairment rating of 20 percent.

The tone of Dr. Beaty's letters suggest that claimant's functional impairment remains about the same as in 1981. Claimant's range of motion in almost all cases substantially improved. Dr. Crosser, who did not see claimant until after the settlement agreement, assigns an impairment of 20 percent. That rating is high in the experience of the undersigned for someone who has not had back surgery.

Applying the Iowa case law to the facts here presented does not result in finding a change of condition. Stice v. Consolidated Indiana Coal Co., 228 Iowa 1031, 291 N.W. 452 (1940) makes it clear that in a review-reopening situation the commissioner is not to redetermine what has gone on before. What industrial disability claimant might have been awarded had he taken his case to hearing initially is irrelevant. He, with the advice of counsel, settled his first claim.

In Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959) the court said to ask whether "sufficient competent evidence" shows a change in claimant's capacity for gainful labor and whether there has been a further reduction in earning capacity. Based on the evidence offered by claimant herein, those questions must be answered in the negative.

Neither does this case encompass a situation in Gosek v. Garmer & Stiles Co., 158 N.W.2d 731, 732 (Iowa 1968). In Gosek, the court held at 735 "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." The claimant's initial complaint was of his back. No new injury has been discovered. Recent medical evidence speaks of a batwing anomoly but whether that was a newly developed condition related to claimant's injury or preexisting or congenital problem is not apparent. In all likelihood, it is the latter. Dr. Beaty was aware of the condition and did not increase his impairment rating.

Meyers v. Holiday Inn, 277 N.W.2d 24 (Ct. Ap. Iowa 1978) dealt with an unexpected deterioration in claimant's physical condition or in the alternative a failure to improve. The matter sub judice presents neither situation. Dr. Boulden anticipated a lifetime of exercises for claimant. Dr. Crosser recently found radicular pain, but his other findings are not supportive of a neurological problem. Dr. Beaty, an orthopedic surgeon, doing the same testing found no radiculopathy. Claimant's condition neither has deteriorated nor failed to improve.

Blacksmith v. All American, Inc., 290 N.W.2d 348 (1980) offers claimant a new avenue of recovery by stating that a change in a review-reopening may be something other than a physical change. Claimant at the time of his settlement was working at a job that paid less money than his work at the time of his injury. His job situation in all probability has been improved with his move to employment by the beer distributor.

Overall, claimant's circumstances are most like those of the claimant in Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). In that case the supreme court pronounced that "a mere difference of opinion of experts or competent observers as to the percentage of disability arising from the original injury would not be sufficent to justify a different determination by another commissioner on a petition for review-reopening." This case appears to boil down to a difference in impairment ratings between Dr. Crosser who did not see claimant until after his settlement and Dr. Beaty who saw claimant both before and after the settlement. Bousfield prohibits changing industrial disability on a mere difference of opinion.

Claimant has failed to show a change in condition since his settlement agreement which would entitle him to additional compensation under the Iowa Workers' Compensation Act.

The remaining issue is claimant's entitlement to benefits under Iowa Code section 85.27. More specifically, that issue is whether or not claimant's treatment at the Troxell Chiropractic Clinic was authorized. Claimant offered a bill which as of March 14, 1984 totaled $1,023.00.

Iowa Code section 85.27 provides 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.

On the date of settlement claimant's former counsel was sent a letter authorizing care only by Dr. Beaty, Dr. Blacksmith or an orthopedic surgeon of the carrier's choice. Claimant's

present counsel was told in a letter dated February 28, 1983 that only care by Dr. Beaty would be approved. This deputy would have preferred claimant had been sent a letter as well, but he acknowledged having seen those sent to his attorneys. He has made no request of defendants for alternative care. When claimant was seen by Dr. Beaty in 1983, he was treated with therapy and he was to return to see the doctor. He did not keep a later appointment. There is no indication any treatment sought by claimant was on an emergency basis.

The statute sets out the procedure to be followed when an employee is dissatisfied with care. Claimant has been represented by counsel and that procedure has not been followed. Payments of expenses with the Troxell Chiropractic Clinic cannot be authorized.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant had a sharp pain in his lower back as he lifted a tractor tire at work in January of 1979.

That claimant was treated in the emergency room for an acute myofascial back strain.

That claimant had a very sharp pain in his back as he was loading a truck at work on March 12, 1979.

That claimant filed a petition in arbitration on October 30, 1980.

That claimant settled his claim relating to that petition on April 15, 1981.

That the agreement for settlement fixed claimant's industrial disability at fifteen percent (15%).

That claimant was twenty (20) years of age at the time of his settlement.

That claimant is now twenty-three (23) years of age.

That claimant had a high school education and was taking an electronics course at the time of his settlement.

That claimant has now completed his semester in electronics.

That claimant terminated his employment prior to his settlement.

That claimant had work experience in grocery stores and in the service department at a stereo store at the time of his settlement.

That claimant now has additional work experience selling automotive supplies and distributing beer.

That claimant's present job is working for a beer distributor.

That claimant had a rating of ten percent (10%) from Dr. Boulden and of twelve percent (12%) from Dr. Beaty at the time of his settlement.

That claimant had a restriction against heavy lifting at the time of his settlement.

That claimant's complaints shortly before his settlement were of constant lower back pain which was present whether claimant was standing, sitting or lying down.

That claimant's current complaint is of "[l]ower back pain [which] causes discomfort most of the time."

That x-rays of claimant's lumbar spine in April of 1979 showed narrowing at L5, S1.

That claimant has degenerative disc disease.

That claimant has a batwing deformity in the fifth lumbar vertebra.

That claimant's range of motion has improved.

That claimant has no atrophy and no sensory or reflex changes.

That claimant was aware of a letter from the insurance carrier and a letter from defendants' counsel which told him that only care by Dr. Blacksmith, Dr. Beaty or any other orthopedic surgeons of defendants' choice would be authorized.

That claimant sought care from Drs. Troxell and Crosser.

That claimant has not requested medical care from defendants.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed to show a change of condition which will entitle him to further permanent partial industrial disability benefits.

That claimant's treatment at the Troxell Chiropractic Clinic was unauthorized.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay the following medical expenses:

Richard T. Beaty, D.O., P.C.	$ 124.00
Riverside Rehabilitation, Inc.	108.00
Franciscan Medical Center	346.00
Radiology Associates of Rock Island	104.50

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 13 day of June, 1984.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY A. SCHILLING, Claimant, vs. JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY, Employer, Self-Insured, and THE SECOND INJURY FUND OF IOWA, Defendants.	File No. 639538 REVIEW-REOPENING DECISION

INTRODUCTION

This is a proceeding in review-reopening brought by Gary A. Schilling, claimant, against John Deere Dubuque Works, a self-insured employer, and the Second Injury Fund of Iowa, for the recovery of further benefits as the result of an injury on April 29, 1980. Claimant's rate of compensation as indicated in the memorandum of agreement previously filed in this proceeding is $226.10. A hearing was held before the undersigned on March 6, 1984. The case was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant, M. L. McClenahan, M.D., Robert B. Havertape and Thomas J. Blosch; claimant's exhibits 1 through 4; defendant's exhibit 5 and State of Iowa exhibits 6 through 9.

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 to which he is entitled; whether or not the disability in claimant's right wrist is the proximate result of the injury to his left wrist; and whether claimant is entitled to benefits from the second injury fund.

EVIDENCE PRESENTED

Claimant testified he is 31 years of age, a graduate of high school and supports one child, age nine. Claimant advised that following high school he enlisted in and served two years in the United States Navy as a security policeman. He said that after his discharge from the Navy he went to work pouring brass in a foundry. This job, he stated, was basic manual labor. Claimant revealed that when he left the job at the foundry he went to work for John Deere. He recalled that he worked in the foundry at John Deere for a little over 90 days before he transferred into the welding department. He contended that he had no special skills or training other than that which he obtained at John Deere.

Claimant disclosed numerous injuries to his right hand commencing in 1975. He listed the injuries as follows: February 10, 1975-injured practicing karate; May 7, 1975-injured playing basketball; May 30, 1975-injured playing basketball; July 7, 1975-kicked practicing karate; June 1977-injured in auto accident; July 1976-air-conditioner fell on hand; July 1977-tire iron hit back of hand; September 1977-clutch spring hit back of hand; December 1977-slipped on steps; September 1978-fighting. Claimant testified that these injuries culminated in surgery on his right wrist on September 25, 1979. Claimant asserted that following this surgery his right wrist was in excellent shape and he suffered no difficulties or restrictions as a result of his injuries or surgery.

Claimant explained that as a result of the September 1979 surgery he was off work until March 10, 1980 when he returned on light duty; he returned to regular work on March 30, 1980. Claimant disclosed that he worked his regular job until April 29, 1980 when he injured his left wrist at work. He advised that as a result of this injury he was placed on light duty work and continued in that status until he went off work again in June 1980. Claimant stated that surgery was performed on his left wrist in September 1980. Claimant advised he was off work as a result of this problem until January 1981. He again returned to work on light duty.

Claimant indicated that he continued to work light duty until May 1981. At this time claimant again suffered problems with his hands. He went off work and remained off work until February 1983. Claimant said he was released to return to work in February 1983, but was laid-off when he presented himself for work.

On cross-examination, claimant conceded that he had been paid compensation for time-off work as a result of the left wrist injury. He stated that he had never received compensation for his right wrist. Claimant contended throughout the hearing

that he never suffered any permanent disability to his right wrist until it was injured at work.

M. L. McClenahan, M.D., testified he is the medical director at John Deere Dubuque Works and the custodian of employee medical records. He stated he personally knows the claimant and is familiar with claimant's medical records. Dr. McClenahan revealed the following history of injuries and complaints concerning claimant's right hand from the date of his employment to April 29, 1980:

1. February 10, 1975 - ruptured blood vessels and torn cartilage right hand (home injury).

2. May 7, 1975 - contusion right hand (basketball).

3. May 30, 1975 - contusion right hand (basketball).

4. July 7, 1975 - sprain right hand (karate).

5. October 7, 1975 - hit right forearm on fixture at work, right hand swollen.

6. June 7, 1976 - contusion right hand (auto accident).

7. July 12, 1976 - contusion right third finger (air-conditioner fell on hand).

8. August 10, 1976 - torn ligament right hand (carrying air-conditioner).

9. July 18, 1977 - tendonitis right hand (changing tire).

10. September 6, 1977 - tendonitis right hand (struck by handle of clutch arm on truck).

11. December 11, 1977 - tendonitis right hand (fell down steps at home).

12. April 16, 1978 - recurring inflammation right hand karate).

13. June 27, 1978 - right wrist injury (playing football nd fight outside bar).

14. July 11 and 12, 1978 - tendonitis and swelling right rist.

15. September 10, 12 and 13, 1978 - dislocated bone in rist, swelling slipped on oil at work September 13, 1978).

16. October 2, 1978 - dislocated bone right wrist (fighting).

17. October 19, 1978 - right wrist hurts (fell through roken pallett).

18. September 9, 1979 - auto accident.

Dr. McClenahan testified that he was uncertain of the estrictions, if any on claimant's right wrist following the irgery. He revealed that the first permanent impairment rating ven claimant's right wrist was in 1982.

Robert B. Havertape testified he is the safety manager at hn Deere Dubuque Works. He stated he is in charge of the rkers' compensation file of claimant. Mr. Havertape testified at claimant had received compensation for his left wrist jury. He outlined compensation payments from 1980 through 83 as follows:

1. From date of injury on April 29, 1980 to June 12, 1980, aimant continued to work.

2. From June 13, 1980 to January 14, 1981 claimant was paid mpensation, except for about three weeks in September 1980, en claimant worked.

3. From January 15, 1981 to May 18, 1981 claimant worked.

4. From May 19, 1981 to February 27, 1983 claimant was paid mpensation.

Mr. Havertape advised that no compensation had been paid for juries to the right wrist.

Thomas J. Blosch testified that he is a supervisor of wages l employment at the John Deere Dubuque Works. He stated that of his duties is to place and assign injured employees. He vealed that he was aware claimant was released to return to k on February 23, 1983. He stated that at that time there l been substantial layoffs and there was no work for claimant.

Mr. Blosch disclosed that since February 23, 1983 people h less seniority than claimant have been called back to work. stated that so far no job had become available which would the restrictions imposed on claimant. He further stated t he was uncertain whether there were any jobs which claimant ld do at the plant.

Numerous medical reports were submitted concerning claimant's atment over the years. Of particular significance is the ort of James H. Dobyns, M.D. Dr. Dobyns states in his report February 23, 1984:

"Mr. Schilling returns for biomechanical laboratory testing and functional capacities evaluation prior to a final report for purposes of his coming disability assessment court appearance in March 1984. Biomechanical laboratory findings compared to about two years ago show some deterioration of strength of a fairly equal nature. Pinch strength had also deteriorated somewhat. Dexterity tests revealed fairly normal dexterity on a short-term but quick fatigue and incoordination. Functional evaluation testing revealed a very low percent on manipulation testing and considerable difficulty with strength, such that anything over 10 pounds was carried with both hands, 15 pounds was the limit for lifting, 10 pounds was the limit for carrying with the right hand and 7-8 pounds was the limit for carrying with the left hand. Grip strength tested today was 32 kg right and 18 kg left but also fatigues quickly.

Patient has now noted clicking in both wrists and can demonstrate this on the right with supination-pronation between neutral and 30 degrees each way, particularly when musculotendinous force is maintained. With digit musculotendinous units relaxed there is no clicking. The same is true on the left wrist, not only with supination-pronation in the above-described arc but also with ulnar deviation. Again with muscle relaxation this does not occur.

DIAGNOSIS: Painful wrists, bilaterally, with instability and post-traumatic arthritis, both secondary to multiple injuries and cumulative stress.

RECOMMEND: (1) 25% right and 30% left permanent partial impairment of wrist and hand.

(2) Complete disability for his usual occupations because of requirements for repetitive or constant or forceful activity associated with all available jobs plus patient's inability to spare/protect either wrist because of bilateral involvement

(3) Work-related association bilaterally -- on the right due to cumulative stress since initial injury, aggravated by prolonged and persisting incapacity of the left wrist -- on the left initial injury, repeat injury and cumulative stress are all work related.

(4) Re-training or re-education for alternate occupation.

(5) Part-time use of support/protective wrist splints.

(6) Internal medical review annually for approximately 5 years.

APPLICABLE LAW

Section 85.26(1), 1979 Code of Iowa provides:

No original proceedings for benefits under this chapter, chapter 85A, or 86, shall be maintained in any contested case unless such proceedings shall be commenced within two years from the date of the occurrence of the injury for which benefits are claimed except as provided by section 86.20.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 29, 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 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 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).

A cause is proximate if it is a substantial factor in bringing about the alleged harm. Oak Leaf Country Club, Inc. v. Wilson, 257 N.W.2d 739 (Iowa 1975).

An injury to a wrist under the workers' compensation act is compensated as an injury to the hand. Elam v. Midland Manufacturing, Vol. II, Industrial Commissioner Biennial Report, 141.

Section 85.64, The Code, provides:

If an employee who has previously lost, or lost the use of, one hand, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no pre-existing disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the degree of

permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

Any benefits received by any such employee, or to which he may be entitled, by reason of such increased disability from any state or federal fund or agency, to which said employee has not directly contributed, shall be regarded as a credit to any award made against said second injury fund as aforesaid.

It is the purpose of the second injury fund to encourage employers to hire handicapped workers. Anderson v. Second Injury Fund, 262 N.W.2d 789, 791-792 (Iowa 1978).

If claimant's present condition constitutes an industrial disability of the body as a whole, then it must be determined what degree of disability to the body as a whole of claimant is caused by the second injury. Second Injury Fund v. Mich Coal Company, 271 N.W.2d 300, 304 (Iowa 1979).

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, II Iowa Industrial Commissioner Report 39 (1981); Enstrom v. Iowa Public Services Company, II Iowa Industrial Commissioner Report 142 (1981); Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981).

ANALYSIS

At the beginning of the hearing in this case the defendant stipulated that it was liable for the injury to claimant's left wrist and that claimant has suffered a permanent partial impairment to the left wrist and hand of 30 percent. Accordingly, little will be discussed concerning the injury to the left wrist.

Claimant does not predicate his claim for compensation for his right wrist upon a work-related injury or aggravation of a preexisting condition. Indeed such an approach would be unsuccessful because of the expiration of the statute of limitations. Since claimant last worked in May 1981 and did not file his petition for compensation until August 1983, there is no way he could claim on the basis of separate injury to his right wrist. Claimant instead asserts that his injury to his right wrist and ensuing disability were proximately caused by the injury to his left wrist.

Claimant's contention must be considered in light of the considerable medical evidence submitted. It is clear that claimant's initial injury was not related to his employment, but rather to his personal activities in sports, fights, auto accidents and home injuries. The history of injuries to his right wrist is extensive and the injuries are severe. He was eventually required to undergo surgery to correct this self-inflicted damage. Claimant contends that in spite of all of these problems he suffered no permanent impairment to his right wrist except that caused because of the injuries to his left wrist. This argument cuts two ways and it could be argued with equal vigor that the injury to the left wrist "arose out of" the right wrist injury. This is, however, an academic question in light of the defendant's stipulation concerning liability for the left wrist.

In any event, the medical records introduced do not support claimant's position that he suffered no permanent disability to his right wrist as a result of the initial injuries. State's exhibit 8 and defendant's exhibit 5 contain a report from Dr. Dobyns dated March 5, 1980. At that time claimant's grip strength on the right was 40 kg. The same exhibits also contain a report from Dr. Dobyns dated April 29, 1980 at which time claimant's grip strength had increased to 55 kg; however, endurance testing showed rapid drop in grip strength to 40 kg by 15 repetitions and to 20 kg by 25 repetitions. Testing was stopped after 26 reptitions due to numbness, paleness and coolness in the finger tips. In January 1981 Dr. Dobyns described claimant's wrist as weak with a grip strength of 50 kg. One year later it was at 54 kg. Dr. Dobyn's last report found claimant's grip strength on the right to be 32 kg.

The employer's medical files of claimant show that he returned to work on March 10, 1980. He was at that time restricted to limited use of and no lifting with the right hand. Claimant requested and was allowed to try regular work starting March 30, 1980. It is unclear what, if any, restrictions continued on the right hand, but it is clear that on May 16, 1980 claimant had a five pound lift limit on his right hand. Claimant went off work in June 1980. The records reflect some pain and swelling in his right wrist on June 11, 1980. Clearly, claimant was suffering continued impairment of his right wrist at that time. He continued under restrictions when he worked briefly in September 1980.

The medical records from John Deere reflect that when claimant returned to work on January 15, 1981 he had a "permanent" restriction on his right hand which restricted him from repeated twisting or lifting over 30 pounds. This restriction was placed on claimant as per the instructions of Dr. Dobyns. By April 1981 claimant's right wrist was under a two pound lift limit. The last weight restriction appears to have been 10 pounds.

These records clearly demonstrate that claimant suffered permanent impairment of his right wrist following the initial injury. There is no indication of a complete recovery and his contention otherwise is at best gross self-deception. Indeed, Dr. Dobyns found claimant's right wrist disability to be associated with cumulative stress since the initial injury was aggravated by the prolonged loss of use of the left wrist. While this shows that claimant's disability may have been aggravated by the left wrist injury, the proximate cause of that disability was the initial injury. Claimant has failed to carry his burden of proof. His effort to establish his employer's liability for a disability he himself caused must fail. At most claimant has demonstrated a temporary aggravation of a preexisting condition. He has been fully compensated for that temporary exacerbation.

Claimant has established a present industrial disability for which he may recover against the Second Injury Fund. The record establishes that he is no longer employable in his occupation as a welder. It seems unlikely that claimant will be able to return to work at John Deere in any capacity. He has clearly suffered a loss of earning capcity.

Claimant's wrist injuries are such that they may significantly interfere with any job which requires even a minimal amount of dexterity. His prior work experience appears limited to manual labor, although his service experience as a police officer could prove valuable and within his limitations. While claimant does not have post high school education, he appears and acts intelligent and could probably pursue academic training if sufficiently motivated. Claimant's age would allow him to undertake additional training and return to the work force with a number of productive years still ahead of him. Claimant indicated that he desired to return to school and seemed motivated to do so. Considering all relevant factors applicable to a determination of industrial disability, claimant has established a disability of the body as a whole for industrial purposes of 33 percent.

The claimant's industrial disability as a result of his second injury does not exceed the scheduled loss of 57 weeks. The evidence supports a finding that claimant's impairment to his right wrist was 25 percent, which is equal to 47 1/2 weeks of compensation. Accordingly, the second injury fund is liable to claimant for 60 1/2 weeks of compensation.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

1. On April 29, 1980 claimant injured his left wrist at work.

2. As a result of that injury, claimant was off work from June 13, 1980 to September 3, 1980; from September 22, 1980 to January 15, 1981; and from May 18, 1981 to the present.

3. Claimant was paid compensation for his time off up until February 27, 1983.

4. Claimant achieved maximum recovery on February 24, 1983.

5. Claimant suffered a 30 percent permanent partial impairment of his left wrist.

6. Claimant's rate of compensation is $226.10.

7. Claimant's injury to his left wrist caused a temporary aggravation of his right wrist.

8. Claimant's permanent disability to his right wrist was not proximately caused by the injury to his left wrist.

9. Claimant's present condition is such that he suffers an industrial disability of 33 percent of the body as a whole.

10. The combined compensable value of claimant's injuries is 104 1/2 weeks.

CONCLUSIONS OF LAWS

WHEREFORE, IT IS CONCLUDED:

On April 29, 1980 claimant received an injury to his wrist which arose out of and in the course of employment.

Claimant's injury caused a permanent partial disability of the left wrist of thirty-three (33) percent.

Claimant's injury to his right wrist and disability to his right wrist were not proximately caused by the injury to the left wrist.

Claimant is entitled to payments from the Second Injury Fund totalling sixty and one-half (60 1/2) weeks.

ORDER

THEREFORE, defendant shall pay unto claimant compensation
r permanent partial disability to his left wrist for fifty-
ven (57) weeks at the rate of two hundred twenty-six and
/100 dollars ($226.10) commencing on February 25, 1983,
crued payments to be made in a lump sum together with statutory
terest. The second injury fund will pay unto claimant sixty
d one-half (60 1/2) weeks of compensation at the same rate
ter payment of the aforementioned fifty-seven (57) weeks.

Costs are taxed to defendant John Deere pursuant to Industrial
mmissioner Rule 500-4.33.

Defendant John Deere and the Second Injury Fund are to file
final report upon completion of this award.

Signed and filed this 8th day of May, 1984.

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

Y A. SCHILLING,

Claimant,

N DEERE DUBUQUE WORKS OF
RE & COMPANY,

Employer,
Self-Insured,

SECOND INJURY FUND OF IOWA,

Defendants.

File No. 639538

N U N C

P R O

T U N C

O R D E R

Upon review of the findings of fact and conclusions of law
forth in the decision filed herein on May 8, 1984, it is
d certain errors and omissions were made therein for which
ification is necessary.

IT IS THEREFORE ORDERED that the findings of fact and
lusions of law therein be amended and restated as follows:

WHEREFORE IT IS FOUND:

1. On April 29, 1980 claimant injured his left wrist at
.

2. At the time of the injury to his left wrist, claimant
an existing impairment to his right wrist of 25 percent.

3. As a result of the injury to his left wrist, claimant
off work from June 13, 1980 to September 3, 1980; from
ember 22, 1980 to January 15, 1981; and from May 18, 1981 to
present.

4. Claimant was paid compensation for his time off to
uary 27, 1983.

5. Claimant's left wrist achieved maximum recovery on
uary 24, 1983.

6. As a result of the injury to his left wrist, claimant
ered a 30 percent permanent partial impairment to that wrist.

7. Claimant's industrial disability as a result of the
ry to his left wrist is equal to the compensation payable
the scheduled loss or 57 weeks divided by 500 weeks (11.4%).

8. Claimant's injury to his left wrist caused a temporary
avation of his preexisting right wrist impairment.

9. Claimant's permament impairment to his right wrist was
eexisting condition and not proximately caused by the injury
is left wrist.

10. As a result of claimant's preexisting impairment to his
wrist and subsequent injury to his left wrist, he is
ntly suffering an industrial disability to the body as a
of 33 percent.

11. Claimant's rate of compensation is $226.10.

WHEREFORE IT IS CONCLUDED:

On April 29, 1980 claimant received an injury to his left
which arose out of and in the course of his employment.

Claimant's injury caused a permanent partial impairment to
eft wrist of thirty (30) percent.

Claimant's impairment to his right wrist was not proximately
d by the injury to his left wrist.

Claimant's present industrial disability as a result of the impairments to his wrists is thirty-three (33) percent to the body as a whole.

Claimant is entitled to payment from the Second Injury Fund for compensation equal to sixty and one-half (60 1/2) weeks which is the number of weeks by which his industrial disability, one hundred sixty-five (165) weeks, exceeds the combined value of the impairment of his right wrist (first injury) of forty-seven (47) weeks plus the industrial disability caused by his left wrist (second injury) of eleven point four (11.4) percent or fifty-seven (57) weeks.

The order of the review-reopening decision of May 8, 1984 shall remain in full force and effect.

Signed and filed this 17thday of May, 1984.

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN L. SCHMITZ,

Claimant,

vs.

MACDONALD ENGINEERING CO.,

Employer,

and

AMERICAN MUTUAL LIABILITY
COMPANY,

Insurance Carrier,
Defendants.

File No. 482424

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 John L. Schmitz, the claimant, against his employer, MacDonald Engineering Co., and the insurance carrier, American Mutual Liability Insurance Company, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury he sustained on July 12, 1977.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Industrial Commissioner's office in Des Moines, Iowa on June 30, 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 January 6, 1978. A memorandum of agreement was also filed on that date. According to defense counsel's letter of September 30, 1983 the claimant has received healing period benefits for the period July 13, 1977 through June 4, 1980, a total of 138 weeks. He has also been paid permanent partial disability benefits for a 150 week period. This last payment represents compensation for a disability extending to 30% of the body as a whole.

The record in this case consists of the testimony of John Schmitz, Margaret Schmitz; claimant's exhibits 1 through 7 inclusive; and defendants' exhibits A, B, C and G. A transcript of this proceeding was provided the undersigned.

Pursuant to claimant's motion, those portions of the employer's brief which might be construed as containing data not in the record will not be considered.

ISSUE

The issue to be resolved is the extent of claimant's disability. There is no issue of causal connection.

REVIEW OF THE EVIDENCE

At the time of hearing the parties stipulated that the applicable rate of healing period and permanent total is $246.42. The applicable permanent partial disability is $228.00. The parties agreed that claimant has not returned to work since the date of injury. It was stipulated that the medical bills reflected in this record are fair and reasonable.

Claimant, John Schmitz, testified that he is 52 years of age, married, and a resident of Mason City, Iowa. Claimant has an eighth grade education. He confirmed that on the date of injury he was an employee of the defendant herein. On that date he was employed as an ironworker.

The record reveals that claimant worked for American Crystal Sugar Company for a period of time as a laborer. Subsequently, he learned the trade of a carpenter. This carpentry work was utilized primarily in building silos and storage tanks. All of this work was performed off the ground. As the silo rose in length claimant was required to work higher and higher. Lifting, bending and stooping were required in this position. Mr. Schmitz indicated that it was critical to the performance of this job that an individual have good balance. Many times the workers would operate off a platform only 18 inches wide. Workers have fallen from these platforms.

On the date of injury claimant was working as an ironworker, building a grain silo. He was putting reinforcement rods into cement. Claimant reiterated that when working on a tower 125 to 140 feet high balance is crucial. Substantial lifting, pushing, pulling, stooping and bending were required in this position.

The record reveals that prior to this injury date Mr. Schmitz had no physical condition which ever prevented him from performing the aforedescribed work.

On the date of injury claimant had been assisting in the construction of a silo. While claimant was getting a drink of water on the ground the earth collapsed and claimant was buried in sand up to his neck. Two co-workers excavated him from the sand. According to Mr. Schmitz, if his co-workers had not assisted him he would have suffocated. After this incident claimant experienced extreme pain in his right hip. Claimant came under the care of N.W. Hoover, M.D., who hospitalized him. According to claimant he underwent surgery and a new hip was installed. Mr. Schmitz indicated the surgical incision extends from his back to above his right knee. Extreme pain was experienced post-surgery. Subsequently, two additional surgeries were performed on the hip. Post-surgery the claimant continues to experience substantial pain. Mr. Schmitz related that during the third surgery he suffered a heart attack. Claimant admitted that he had some prior heart problems in 1971. He reiterated, however, that he recovered from any prior difficulties and worked continually until the date of the incident under discussion in this decision.

Today claimant indicated his condition is deteriorating. He has continuous complaints of pain in his back and hip. He walks with a cane. Claimant's physical activities are severely limited post-injury.

Mr. Schmitz stated he would like to do some form of work but does not know what he can do. He believes he can not return to carpentry or ironworker. Claimant intended to continue to do ironwork until he was at least 65 years of age. Claimant stated that no ironworker uses a cane.

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

Margaret Schmitz, the claimant's spouse, testified on his behalf. She confirmed that prior to the date of injury he was very robust. She described him as a hard worker. Post-injury his activities have been severely curtailed. She confirmed that claimant misses his position as an ironworker.

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

John R. Walker, M.D., reported in a letter dated March 21, 1983 in which he stated his agreement with Dr. Hoover's position of November 2. He stated claimant will not be able to do heavy lifting, carrying, stooping, bending or standing over long periods of time. He believed claimant is fit for "sedentary sit-down" type jobs in which he can change positions.

N. W. Hoover, M.D., reported on November 2, 1982 that claimant has a permanent impairment of 60% of the lower right extremity which equates to 30% of the whole man. He confirmed claimant cannot return to his usual occupation. He indicated claimant's back may be aggravated by his limp and that any degenerative lumbar disc disease claimant has was not caused by this incident but "may be" aggravated by his abnormal gait.

In a surgical notation by Dr. Hoover dated November 2, 1982 he indicated that he has no reason to believe otherwise that claimant's back pain is attributable to his abnormal gait. He noted "this seems to be an aggravation of an existing degenerative lumbar disc disease."

The balance of the exhibits have been reviewed and considered in the final disposition of this case.

APPLICABLE LAW

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."

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, 255 Iowa 1112, 1121, 125 N.W.2d 251, (1963).

Lente v. Luci, 275 PA 217, 222, 119 A132, 134 is a case relied on by the Iowa Supreme Court. In Schell v. Central Engineering Co., 232 Iowa 424, 425, 4 N.W.2d 339 (1942) it was noted, "there must be a destruction, derangement or deficiency in the organs of the other parts of the body" where the claim is made that some other part of the body is affected by the injury to a member.

ANALYSIS

The employer and insurance carrier filed a memorandum of agreement in this case. By that unilateral act they acknowledge that on that date of injury claimant was their employee. They further admit that on that date he sustained a personal injury which both arose out of and in the course of his employment.

The record reveals that claimant has been paid a substantial amount of healing period benefits. He was also being paid compensation for a disability extending to 30% of the body as a whole.

The only issue to be resolved is the extent of claimant's disability. Causation is not an issue.

Initially, the question of whether this is a scheduled member loss or a body as a whole case must be examined. Dr. Hoover is claimant's treating physician. As a consequence of this close physician-patient relationship, substantial weight will be accorded his testimony. It is noted that Dr. Walker is in agreement with Dr. Hoover's position in this case. Dr. Hoover indicates in the aforequoted medical data that claimant's back has been aggravated by the change in gait precipitated by the injury. Claimant testified to continuous complaints of back discomfort. This, in the opinion of the undersigned, is sufficient to require evaluation of this case in terms of industrial disability.

Claimant is 52 years of age. He has an eighth grade education. Claimant's main work background involves the carpentry trade and ironwork. The focus of the testimony indicates that he has been involved in building silos and above ground grain storage bins for many years.

A thorough analysis of claimant's description of the job requirements of a carpenter or ironworker in the silo building business has been made. It is clear to the undersigned that based on claimant's present physical complaints and restrictions he will never return to these forms of employment. Both Dr. Hoover and Dr. Walker express the opinion that claimant cannot return to this type of work.

Importantly, however, both physicians express the opinion that claimant can do some form of sedentary work. It is for this reason that claimant will not be found to be permanently and totally disabled at this point in time. Again, for the record it is clear that his disability is extensive.

Based on the record as a whole and taking into consideration the aforecited industrial disability considerations, it is the opinion of the undersigned that claimant has sustained an industrial disability of 65% of the body as a whole.

FINDINGS OF FACT

That claimant is 52 years of age.

That claimant has an eighth grade education.

That claimant has no particular training in any field other than carpentry and ironwork.

That claimant, during his career, has done carpentry work and ironwork in conjunction with the construction of silos and grain storage bins.

That much of claimant's work is done at great heights above

the ground.

That claimant, due to his injury, cannot return to the business of silo construction.

That claimant's injury and consequential disability has aggravated his low back, primarily due to a change in gait.

That both of claimant's physicians express the opinion that he can do sedentary work.

CONCLUSIONS OF LAW

That claimant has sustained his burden of proof and established an industrial disability of 65% of the body as a whole.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay unto claimant three hundred twenty-five (325) weeks of permanent partial disability at the stipulated rate of two hundred twenty-eight dollars ($228.00) per week.

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

That defendants shall pay unto claimant the following medical charge:

Orthopedic Specialist $115.00

That defendants shall pay claimant mileage expenses in the total amount of one hundred ninety-two and 48/100 dollars ($192.48). No award will be made for mileage expense incurred in coming to the hearing.

That interest shall accrue from the date of this decision.

That the costs of this action are taxed to 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 ____ day of November, 1983.

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN F. SCHRECKENGAST, Claimant,	:	File No. 697105
vs.	:	A P P E A L
HAMMERMILLS, INC., Employer,	:	D E C I S I O N
and	:	
SENTRY INSURANCE, Insurance Carrier, Defendants.	:	

By order of the industrial commissioner filed August 24, 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 consists of the transcript of the testimony at the hearing; claimant's ehxibits 1 through 16, inclusive; and defendants' exhibit A, B and C, all of which evidence was considered in reaching this final agency decision. It should be mentioned that claimant's exhibits 12, 13, 14 and 15 were depositions of practitioners and that the only deposition not marked as an exhibit was that of Michael Taylor, M.D., which was nevertheless a part of the record and 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.

REVIEW OF THE EVIDENCE

Claimant, age 57 at the time of the hearing, worked for the employer some 31 years before he became disabled by a psychiatric disorder known as unipolar major affective disorder, a form of depression. Claimant had had psychiatric problems during World War II when he was in the Navy and was hospitalized in a psychiatric ward for 12 weeks. However, after his discharge he was able to function all right for many years, and the evidence did not reveal that his problem during World War II was in any way the cause of his unipolar major affective disorder.

He began work for the employer, Hammermills, Inc., in 1950 and progressed quickly from a laborer to a position in the engineering department where he was a drawer or draftsman. In 1963, he became a salesman for the employer, and in 1964 he briefly worked for another firm in Canada. He returned soon to Hammermills, Inc.

His duties included working with sales quotations, drawing and designing machines, and some travel to meet with prospective customers. The record is in dispute as to whether or not he often worked evenings and weekends an whether or not he traveled as much as two weeks every month. The evidence was clear that claimant worked a full 40 hour week and more and that his schedule could be characterized as heavy. He was responsive to the needs of others by helping fellow employees at the sacrifice of his own work. There were vexacious changes in assignment and priorities. The evidence was in dispute as to whether or not any of these circumstances resulted in lost sales. Claimant developed a fear of flying (again the cause was disputed) which resulted in his being less able to travel about the country in his work.

His psychological problem began to occur in early 1979. He last worked at the employer's place of business on April 15, 1981. He receives social security disability.

The lay evidence supports the proposition that the claimant's work was sometimes hectic and provoking. Kirk Shearer, a fellow employee, testified as to the changes in priorities and deadlines. This witness was the recipient of a verbal attack by claimant, who blamed the witness for claimant being pulled off a project. According to Barbara Dickson, the credit manager at the employer, claimant had a good attendance record, had good relationships with his fellow workers and was quite conscientious.

Paul Noring, the sales manager at the employer, said that the usual work week exceeded 40 hours but that there was liberal time off for personal business. The witness conceded that claimant's work was at times frustrating and stressful. Ralph F. Murray, the president of Hammermills, testified that deadlines were changed at times and that workloads increased for everyone.

Thomas Smith, the director of the pain treatment center and biogenic therapy department at Mercy Hospital in Cedar Rapids, testified that claimant's results on the Minnesota Multiphasic Personality Inventory test showed claimant had considerable problems and that claimant was not employable.

The major expert evidence in this case comes from five practitioners, four medical doctors and one psychologist. Actually, except for differing opinions on causation, their evidence was not very divergent. That is, they all agreed that claimant suffered from a major depressive disorder, although two of them did not use the term unipolar major affective disorder. Despite that difference, it is clear that all five had the same concept of claimant's problem: depression.

John L. Banks, M.D., a specialist in family practice, testified that he first saw claimant on February 13, 1978 for abdominal complaints. These complaints and subsequent treatment culminated in claimant being referred to a psychiatrist. According to the history, claimant complained of being under pressure to complete contracts and make sales. When asked about the discharge diagnosis for a hospitalization of June 5, 1979, Dr. Banks answered that the discharge summary was dictated by Dr. Penningroth, a psychiatrist and was listed as unipolar affective disorder, Dr. Banks explained that the disorder is unipolar instead of bipolar because it has only a depressive syndrome with no maniac phase. He stated that the cause of such a depression was a chemical imbalance within the brain but that no one really knows the true etiology of depression.

R. Paul Penningroth, a qualified psychiatrist, testified that he first saw claimant in June 1979 and diagnosed the unipolar affective disorder, depressed type. In that doctor's opinion, such a depression is not caused by external events but is ocassioned by a change in the biochemistry of the brain. Defendants asked Dr. Penningroth a long hypothetical question, which contained a fair summary of certain facts of the case, and he again opined that the work was not the cause of claimant's depression. Dr. Penningroth undertook the treatment of claimant and finally suggested electric shock therapy. Claimant thereupon decided to seek other advice.

William J. Moershel, M.D., a qualified psychiatrist, first saw claimant in July of 1981. Dr. Moershel specifically stated that claimant's problem was not a recurrence of his mental difficulties during World War II. His opinion as to causation was a bit equivocal. He stated: "And [sic] unipolar disorder is supposed to be due to internal rather than external causes. Although, in my experience in either case, no matter how severe the depression, there is usually some external factor precipitating or being about the -- triggering the depression." (Dep., pp. 17-18) Dr. Moershel went on to say "that the most significant stressor was his inability to say no to the demands of many of his co-workers that his co-workers put on him." (Dep., p. 19)

Todd F. Hines, Ph.D., a qualified clinical psychologist, testified that he saw claimant on July 29, 1982. His diagnosis was primary affective disorder, major depressive episode of recurrent nature, which he characterized as being essentially the same diagnosis as a unipolar affective disorder. (Dep., p. 13, 42) In Dr. Hines' opinion, the cause of the recurrent depressive episode is "stress related to his work conditions." (Dep., p. 29)

Michael J. Taylor, M.D., a qualified psychiatrist, testified that he examined claimant on December 30, 1982. In Dr. Taylor's opinion, claimant was suffering from a major depressive episode which had no causal relationship to the work. He testified further that claimant's difficulties represented the symptoms of the depression rather than the cause thereof. He went further and stated that "in a majority of cases, environmental circumstances have absolutely nothing to do with the onset of major depressive episode." (Dep., 32)

ISSUES

Claimant states the issues thus:

1. Whether on appeal to the Iowa Industrial Commissioner issues of fact are to be considered de novo.

2. Whether a latent illness or injury or predisposition to illness or injury, if lighted-up, accelerated or aggravated by job stress constitutes a compensable injury.

3. Whether in determining if a psychiatric or psychological injury "arises out of" the employment, the appropriate legal standard to be applied is subjective or objective--that is, whether the proper test is (1) "was the job stress incident to the work, sufficient to substantially contribute to this Claimant's injury," or (2) was the job stress sufficient to cause similar injury to the average employee possessed of no predisposing vulnerabilities.

4. Regardless of which legal standard is applied to determine causation, the subjective, as Claimant contends it should be, or the objective as apparently applied by the deputy, was job stress a substantial contributing cause to the unipolar major affective disorder or a lighting-up, acceleration or aggravation thereof.

5. Whether imposition upon a claimant of a burden of proof requiring that a job-stress caused aggravation of a pre-existing psychiatric or psychological condition be shown to be the sole proximate cause is contrary to Iowa law. The deputy referred on at least three occasions to "the" cause as distinguished from "a" cause and in so doing imposed a burden of proof of sole proximate cause which Claimant contends is contrary to law.

6. Because the appeal is de novo, the issue of notice may again be before the Commissioner. Claimant contends this issue was correctly determined by the Deputy for the reasons stated in the opinion and his trial brief.

7. Because the appeal is de novo, the issue of extent of disability may again be before the Commissioner. Claimant contends this issue was correctly determined by the Deputy in finding that Claimant is permanently, totally disabled for the reasons stated in the opinion and his trial brief. Claimant relies upon his argument set forth in his trial brief on this issue and has not repeated it herein.

Defendants state the issues thus: (1) whether claimant sustained an injury or disease arising out of and in the course of his employment, (2) nature and extent of disability, (3) set-off of group benefits, and (4) application of the statute of limitations in Section 85.26(1) and notice requirements in Section 85.23, Code."

The issues concerning notice and the statute of limitations can be handled summarily. Both defenses are affirmative and defendants have the burden of proof. An examination of the record shows no particular testimony or written evidence which supports defendants contention. Claimant testified as to his having problems in 1979 and 1980 and his distress was obvious. Paul Noring, the sales manager, disputed this contention to some extent but not to the extent that any defense of notice or the statute of limitations was proved. Defendants therefore fail on those contentions.

APPLICABLE LAW

Claimant has the burden to prove 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); 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 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. 34 (1934). "The incident or activity need not be the sole proximate cause, if the injury is directly traceable to it." Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974); Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971). "A cause is proximate if it is a substantial factor in bringing about the result." Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

The question of whether a gradual stimulus causing a nervous injury is compensable is covered in Larson, The Law of Workmen's Compensation Law, Vol. 1B, p. 7-637 and following, §42.23(b). According to Larson, there is no question but what a gradual stimulus which causes a nervous injury is compensable; the problem is one of proof. The polarity in cases is exemplified in Swiss Colony v. Department of ILAR, 72 Wis.2d 46, 240 N.W.2d 128 (1976) and Carter v. General Motors Corporation, 261 Mich. 577 106 N.W.2d 105 (1960). Wisconsin, which represents the so-called objective view, ruled that "in order for nontramatically caused mental injury to be compensable in a workmen's compensation case, the injury must have resulted from a situation of greater dimensions than the day-to-day mental stress tensions which all employees must experience." 240 N.W.2d at 130, quoting 215 N.W. 2d at 373. Michigan, holding with the subjective test, ruled that a claimant who had prior emotional trouble was eligible for workers' compensation where the evidence showed his inability to keep up on the assembly line and subsequent berating by his foreman made him fear losing his job and resulted in a psychosis.

Larson cites the Wisconsin rule with approval. Another case holding with the objective theory cites the "floodgates" argument that the allowance of workers' compensation on a subjective test would create a voluntary retirement program for any employee who was ready to give up active employment. Seitz v. L & R Industries, Inc., 437 A.2d 1345 (R.I., 1981)

ANALYSIS

This appeal decision is certainly de novo in all respects, a proposition which needs no further discussion. The second issue, concerning the lighting-up of a latent condition entitling a claimant to workers' compensation, is certainly not a question in Iowa law. An aggravation of a preexisting condition is compensable under the rationale of the Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962).

One of the most difficult issues in the case is that of the extent of the burden of proof. Claimant argues, logically: "If an employee lifts ten pounds and thereby injures his back we don't deny recovery because the vast majority can lift fifteen without the injury." (Claimant's brief, p. 8) In claimant's view, the same test should apply to the case of the mental stimulus allegedly causing a mental injury. Defendants counter that not all injuries are judged by the standard claimant urges. For instance, the compensability of heart attacks has a different standard from other injuries. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). Also, defendants argue, that such conditions as pneumoconiosis and brucellosis are treated differently by statute as are lung and heart conditions of firemen and policemen.

The facts are taken to show that claimant had a position in the modern business world which is somewhat common: it was hectic and demanding. (The facts also show that claimant himself emerges as a man who is a good worker, conscientious and well liked. There is no evidence at all of any malingering.)

Neither the Iowa Court nor the Industrial Commissioner has ruled upon the issue of which standard should apply in such cases in Iowa. The objective standard has the virtue of clarity and is recommended by Larson. It will be adopted here.

Claimant asserts that the arbitration decision imposed upon claimant the burden to prove the work was the sole proximate cause of the injury. Although it is true that the citation of applicable law in the arbitration decision contained neither a discussion of the substantial factor rule or a statement that the incident or activity need not be the sole proximate cause, application of the substantial factor rule under the objective test discussed above dictates a ruling in defendants favor.

Defendants prevail because the first two treating physicians, Dr. Banks and Dr. Penningroth, do not connect the illness to the work, while the third treating physician, Dr. Moersel was at least somewhat equivocal in his opinion as to causation. Then, if Dr. Moersel's opinion is taken as equivocal, only Dr. Hines' opinion stands for claimant. His testimony, while impressive, does not in any way refute arguments the cause relates to a chemical imbalance in the brain. Thus, although one does not like to conceive of the brain in such a mechanistic fashion, the testimony supports such a model, and it is clear that claimant cannot prevail under the objective test adopted here. That is, claimant has not shown that his work was a substantial factor in causing his unipolar major affective disorder.

FINDINGS OF FACT

1. Claimant was age 57 at the time of the hearing.

2. Claimant had mental problems dating back to World War II including 12 weeks confinement in a psychiatric ward.

3. Claimant began work for the employer in 1950 as a laborer and became an engineering draftsman.

4. After about 15 years, claimant began work in sales.

5. After a short hiatus in 1966, claimant returned to work for the employer.

6. Claimant worked for the employer 31 years.

7. After rising from laborer and engineering drawer, claimant worked as a salesman, which included working with sales quotation, drawing and designing machines and travelling around the country. His work week was at least 40 hours and at times more than 40 hours. He had a heavy schedule. Claimant was willing to help fellow employees at the expense of his own work. Claimant's work involved the deadlines and the reassignment of priorities by higher ups.

8. Claimant suffers from unipolar affective disorder, depressive type.

9. Of the five physicians who testified in the case, three (Dr. Banks, Dr. Penningroth and Dr. Taylor) stated there was no causal relationship between claimant's work and his depressive disorder; Dr. Moersel was somewhat equivocal in his testimony that there was a causal relationship between the work and the depressive disorder; Dr. Hines opined that there was a causal relationship between the work and the depressive disorder.

10. Claimant's work for the employer did not cause the unipolar affective disorder.

11. Claimant's work for the employer did not exacerbate the unipolar affective disorder.

12. There is no relationship between claimant's unipolar affective disorder and the work.

CONCLUSIONS OF LAW

The conditions of claimant's work were not a substantial factor and therefore not a proximate cause of claimant's illness.

Claimant did not sustain an injury which arose out of and in the course of his employment.

Defendants failed to carry the burden of proof to show lack of notice or knowledge under §85.23, The Code, and failed to carry the burden of proof to show that the statute of limitations had run under §85.26(1).

ORDER

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

The parties are ordered to pay the costs of producing their own witnesses and defendants are ordered to pay the costs of the shorthand reporter at the hearing.

Signed and filed at Des Moines, Iowa this 29th day of November, 1983.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

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

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RUTH E. SCHROMEN,

Claimant,

vs.

A. Y. McDONALD MFG. CO.,

Employer,

and

FIREMAN'S FUND INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

File No. 601117

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from a proposed arbitration decision wherein claimant was awarded 200 weeks of permanent partial disability benefits, healing period benefits, and medical expenses.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Robert Luthro, and Arthur Winne, claimant's exhibits A, D, E, G, H, and I; defendants' exhibits 1 through 24; and the briefs and filings of all parties on appeal.

ISSUES

1. Whether an award of industrial disability in the amount of 200 weeks, or 40 percent of the body as a whole is excessive, unreasonable, arbitrary and capricious, and contrary to the law.

2. Whether the deputy's finding of an industrial disability must be reversed because the record contains no evidence regarding actual reduction in earnings and the proposed decision fails to set forth, in sufficient detail, how the generalized elements of industrial disability were relied upon to arrive at the percentage of industrial disability.

3. Whether the deputy's failure to rule on an objection by defendants' counsel resulted in an incomplete and incoherent record.

REVIEW OF THE EVIDENCE

At the time of the hearing the parties stipulated the applicable workers' compensation rate, in the event of an award, to be $129.20 per week. The parties also stipulated as to the time off work and the fairness of the medical bills.

Claimant, age 58 at the time of the hearing, is a widow with a ninth grade education. She testified that she first began working in 1969 as a laborer at Standard Brands and later at Mallet Poultry. Claimant began working for defendant employer in April of 1971. Her job entailed smoothing out the rough surfaces on metal castings with a circular grinder. She explained that after each casting was ground, it would be thrown down a chute and into a movable pan. Claimant would be required to move the pan whenever it became full of castings. She recalled that the pans weighed 25 pounds when empty, but was unable to estimate their weight when filled with castings. (Transcript, pp. 8-14)

Claimant testified that prior to starting the job with defendant employer she underwent a preemployment physical examination. She believed herself to have been in good health at that time. Claimant testified that she hurt her back on many occasions while working for defendant employer. She recalled first hurting her back in January of 1973 while shoveling sand, and being hospitalized for six weeks. She testified that between 1973 and 1979 there were numerous times when she was injured, but had always been able to return to work. (Tr., pp. 16-18)

Claimant testified that she felt her back snap while pulling a pan full of castings on June 11, 1979. She recalled that she was unable to straighten up due to pain and muscle cramps. The injury was reported to claimant's supervisor, and an appointment was made for her to visit Luke C. Faber, M.D., that afternoon. (Tr., pp. 18-20) Claimant testified that she was hospitalized for four or five days, and was told by Dr. Faber that she should not return to her work:

> Q. Tell us what he prescribed or what he told you.
>
> A. He didn't tell me to do anything except -- Well, he did say, "Get out of A. Y.'s." He said, "Go to work in the laundry or something." He said, "That work down there is too heavy for you."
>
> Q. How many times would you say you were seen by Dr. Faber following this incident, your best recollection?
>
> A. Maybe four.
>
> Q. Did you ever discuss with him the matter of returning to work at A.Y. McDonald Manufacturing Company?
>
> A. Oh, yes. He just kept saying, "Get out of A. Y.'s."
> (Tr., p. 21)

Claimant denied on both direct and cross-examination ever being released by Dr. Faber to return to work. (Tr., pp. 22, 35) Defendants' exhibit 24, however, appears to be a release form signed by Dr. Faber on July 30, 1979 authorizing claimant to return to work on July 31, 1979. Claimant was to have been restricted from lifting over 30 pounds under the terms of the release. (Defendants' Exhibit 24)

On March 25, 1981 a letter signed by Nancy Gullet, defendant employer's personnel manager, was sent to claimant requesting a meeting on March 30, 1981. (Claimant's Ex. D). Claimant testified that her employment was terminated upon meeting with Gullet on March 30, 1981. An "employee change of status" form prepared by defendant employer on April 8, 1981 indicates that claimant received a medical termination on March 30, 1981. (Cl. Ex. E) Claimant testified that while she had spoken with her union steward on many occasions following her July 11, 1979 mishap, she had not had any contact with defendant employer prior to the meeting on March 30, 1981. (Tr., pp. 22, 35)

Claimant testified that the condition of her back has not improved since the July 11, 1979 mishap. She complains when she reaches or bends too quickly muscle cramps develop and she is unable to stand up. Claimant testified that she has attempted, without success, to find work as a clerk or in a clerical position where lifting is not required. She stated that she was ineligable for unemployment benefits because she had been off work for too long. (Tr., pp. 25-28)

Arthur Winne, vice-president of personnel and industrial relations for defendant employer, testified at the hearing that claimant would have been paid in the vicinity of $5 per hour had she been working at the time of the hearing. (Tr., pp. 58-59)

In a July 24, 1980 letter addressed to defendant insurance carrier, Luke C. Faber, M.D., wrote:

> Ruth Schromen was admitted to The Finley Hospital on April 15 with a history of recurrent back pain as stated in her hospital admission physical.
>
> Tests conducted at that time including lumbar venogram and lumbar myelogram show no evidence of permanent physical findings. Electroneuromygraphic examination was also normal.
>
> Ruth Schromen was referred to Dr. Julian Nemmers 444 North Grandview, Dubuque, Iowa, for orthopedic consultation.
> (Def. Ex. 3)

In a September 7, 1979 letter addressed to defendant insurance carrier, Julian G. Nemmers, M.D., wrote:

> Ruth Schromen was examined by me on August 21, 1979, on referral from Dr. L.C. Faber for an injury she sustained to her back on May 9, 1979, while lifting or pulling pans at the A.Y. McDonald, Co. Ms. Schromen stated at the time of examination that May 9 was the date of injury and she had been off work since that date. I notice a discrepancy in these dates between your records and mine. X-rays at the time of examination revealed a generalized disc space narrowing and grade I to II osteoarthritis of the lumbar spine. I feel this is of minimal degree and is aggravated by the injury described above. I do not feel that her injury is based on this condition or relative to it. I feel that her problem is a lumbosacral strain superimposed on this pre-existing condition but not necessarily contributing to it or relative to it.
> (Cl. Ex. G; Def. Ex. 8)

Claimant was examined by Dr. Nemmers again on August 4, 1981. In an August 5, 1981 letter addressed to claimant's counsel, Dr. Nemmers wrote:

> A complete lumbar spine series was obtained today and they show minimal spurring and early degenerative changes of the entire lower lumbar

spine. There is narrowing of multiple disc spaces. I feel that these changes have not increased significantly (over and above normal wear and tear) since the examination of August, 1979.

It is my opinion that the present x-ray findings and a work relationship are very difficult to establish. The fact that she has degeneration of multiple discs indicates a wear and tear type of process involving the lumbar spine and the fact that it has not increased appreciably since 1979 indicates to me that the trauma has not been an aggravating factor. Treating this on the basis of disability, it would be my opinion that she has a 10% whole body disability.
(Def. Ex. 2)

Claimant was also examined by William J. Robb, M.D., on December 22, 1981. In a December 24, 1981 letter addressed to claimant's counsel, Dr. Robb reported:

Diagnoses: 1. LUMBOSACRAL STRAIN, RECURRENT.
2. DEGENERATIVE DISC DISEASE, LOWER LUMBAR SPINE.

Interpretation. Degenerative changes in the lumbar spine are an aging process of the spine itself and therefore the lumbosacral strain of 1973 and subsequently 1979 constitute an aggravation of a preexisting condition.

The patient's symptoms as described are considerably greater than the objective findings evident in the examination.

In view of the fact that this patient is not engaging in a physical fitness program or regular exercise, I would not anticipate any improvement in the function of her low back.

This patient will carry an approximately 10 percent permanent impairment of function of the body as a whole as a result of injury or lumbosacral strain occurred initially in 1973 and aggravated on several occasions since that time.
(Cl. Ex. H; Def. Ex. 1)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 11, 1979 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). Claimant need not prove that an employment injury be the sole proximate cause of the disability, but only that it is directly traceable to an employment incident or activity. Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971).

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).

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 said:

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. Id. at 192

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).

Administrative findings of fact must be sufficiently certain to enable a reviewing court to ascertain with reasonable certainty the factual basis on which the administrative officer or body acted. Catalfo v. Firestone Tire and Rubber Co., 213 N.W.2d 506 (Iowa 1973).

In Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1974) the Iowa Supreme Court stated:

Regarding the evidence he relied on, the agency made particular note of claimant's age, his inability to continue in his present job, and his limited employment opportunities available by virtue of his pain and inability to walk or ride in a vehicle for any appreciable length of time. We do not require the findings to contain greater specificity. The findings must be specific enough to enable the reviewing court to determine with reasonable certainty the factual basis on which the commissioner acted, Catalfo, 213 N.W.2d at 509, and these findings fulfill the purpose.

ANALYSIS

The first issue on appeal is whether the award in this case of industrial disability in the amount of 40 percent to the body as a whole is excessive, unreasonable, arbitrarily capricious, and contrary to the law. Upon review of the record it is determined that the award is none of these and the deputy's finding as to the extent of industrial disability is affirmed. While it appears that claimant's employment incident of June 11, 1979 resulted in only a temporary aggravation of a preexisting condition which did not contribute to any permanent functional impairment, claimant's loss of earnings appears to be directly traceable to that incident. Claimant need not prove that the incident of June 11, 1979 was the sole proximate cause of her disability.

Factors considered in determining industrial disability, in addition to functional impairment, include the employee's age, education, qualifications, experience, and inability to engage in employment for which she is fitted, as well as the efforts made by the employer to provide work with the employee's limitations. These factors are considered collectively in arriving at the determination of the degree of industrial disability. There are no set guidelines whereby age, for example, is weighed at ten percent of the total, education at five percent, etc. It therefore becomes necessary to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability.

Claimant was released to return to work with a 30 pound lifting restriction. She was ultimately given a medical discharge by defendant employer following the June 11, 1979 incident. Claimant has completed only the ninth grade, and at the age of 58 is an unlikely degree candidate in any type of schooling. Her work experience has been limited to laboring jobs, the nature of which she has become unfitted for due to her age and degenerative disc disease. Claimant has testified to being unable to find employment as a clerk or in a clerical position. Despite the fact that the employment incident of June 11, 1979 did not contribute to the permanent functional impairment of claimant, she has endured an actual loss of earnings as a result of the medical termination which was occasioned by the injury. The collective consideration of the forementioned criteria supports the deputy's finding that claimant has sustained a 40 percent industrial disability.

The second issue on appeal is whether the deputy's finding of industrial disability must be reversed because the record contains no evidence regarding actual reduction in earnings, and the proposed decision fails to set forth in sufficient detail how the elements of industrial disability were relied upon to arrive at the percentage of industrial disability. With regard to evidence concerning an actual reduction in earnings, the record indicates that claimant earned in excess of $5.00 per hour while laboring for defendant employer. The record further indicates that claimant is no longer employed and is ineligible to draw unemployment benefits. It is quite evident from the foregoing that claimant has had an actual reduction in her earnings. Defendants' contention that the deputy failed to set forth in sufficient detail how the specific details of industrial disability were relied upon to arrive at the percentage of industrial disability is also without merit. As was noted in the preceding section of this analysis, there are no set guidelines whereby each element is accorded a specific weight as against the total. The deputy made particular note of claimant's age, education, work experience, and inability to find other suitable employment. Under Catalfo the deputy's findings are not required to contain greater specificity. The findings must be specific enough to enable the reviewing court to determine the factual basis on which the deputy acted. The deputy's findings of fact in the arbitration decision meet the requisite standard.

The final issue on appeal is whether the deputy's failure to rule on objections by defendants' counsel resulted in an incomplete and incoherent record. Defendants specifically point to three objections. Examination of the record indicates that the deputy received the testimony on all three objections and noted defendants' objections. None of the matters objected to, however, appear material to the proposed decision of the deputy or to the ruling herein. No reversible error is found.

FINDINGS OF FACT

1. Claimant began working for defendant employer in April of 1971.

2. Claimant's job required that she perform some lifting.

3. Claimant aggravated a preexisting back condition while working on June 11, 1979.

4. Claimant was released to return to work on July 30, 1979 with a 30 pound lifting restriction.

5. Claimant received a medical termination from defendant employer on March 30, 1981.

6. Claimant earned in excess of $5.00 per hour while working for defendant employer.

7. Claimant has a ninth grade education.

8. Claimant is 58 years old.

9. Claimant's work experience is limited to laboring.

10. Claimant has been unable to obtain employment since eing discharged by defendant employer.

11. Claimant has suffered no functional impairment as a esult of the June 11, 1979 aggravation to her back.

12. Claimant has suffered an actual loss of earning as a esult of the June 11, 1979 aggravation of the preexisting back ondition.

13. Other findings in the arbitration decision not disputed n appeal are adopted.

CONCLUSION OF LAW

Claimant has met the burden of proving that she has suffered industrial disability of forty percent (40%) as a result of er June 11, 1979 aggravation of her preexisting condition.

WHEREFORE, the deputy's decision filed October 29, 1982 is firmed.

THEREFORE, it is ordered that defendants pay unto claimant wo hundred (200) weeks of permanent partial disability benefits a rate of one hundred twenty-nine and 20/100 dollars ($129.20) r week and seven (7) weeks and one (1) day of healing period nefits at a rate or one hundred twenty-nine and 20/100 dollars 129.20) per week.

Defendants are to be given credit for any payments previously de.

Defendants are to reimburse claimant one hundred fifty-eight llars ($158) for the examination by Dr. Robb and they are also reimburse claimant thirty-two dollars ($32) for the cost of avel.

Accrued benefits are to be made in a lump sum together with atutory interest at the rate of ten percent (10%) per year rsuant to section 85.30, Code of Iowa, as amended.

Costs are taxed to defendants pursuant to Industrial Commissioner le 500-4.33.

Defendants shall file a final report upon completion of yment of this award.

Signed and filed this 29th day of July, 1983.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

ealed to District Court;
nissed by claimant for
lement

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

L A. SCHUTT,

Claimant,

ERSIDE BOOK & BIBLE,

Employer,

UMINOUS INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 666100

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from a review-reopening decision wherein imant was awarded 75 weeks of permanent partial disability efits.

The record on appeal consists of the hearing transcript ch contains the testimony of claimant, Russell Lee Serls, and ion S. Jacobs; claimant's exhibits 1 through 6; defendants' ibits A and B; and the briefs and filings of all parties on eal.

ISSUES

1. Whether the deputy erred in finding that claimant has ained an industrial disability of 15 percent of the body as ole.

2. Whether the deputy erred in predicating his decision on mant's successful completion of a college education.

REVIEW OF THE EVIDENCE

At the time of the hearing the parties stipulated the icable workers' compensation rate, in the event of an award, e $142.86. (Transcript, p. 2)

Claimant, who was 28 years old at the time of the hearing, uated from high school in 1973. At the time of the hearing mant was enrolled as a full time student at Ellsworth Community College. (Tr., pp. 5-6)

Claimant first worked as a spray painter after finishing high school. He later worked as a laborer for a concrete company and began driving a dump truck for Hallett Construction in the spring of 1975. In September of 1975 claimant suffered injuries to his back and neck as the result of a driving accident. Claimant testified that he was off work for approximately one and a half years, and was the recipient of extensive medical treatment and workers' compensation benefits. After recuperating claimant drove a dump truck for a time and later worked as a laborer for a tile company. (Tr., pp. 7-14)

Claimant began working for Riverside Book and Bible in February of 1979. After starting out as a janitor, claimant was eventually put in charge of stock and supplies at two warehouses. Claimant testified that on March 9, 1981 he was loading two truck shipments of bibles onto pallets when he felt pain in his back, neck, and left shoulder while reaching down to lift a box. Claimant remained at work for the remainder of the day and did not seek immediate medical treatment. Claimant returned to work on the following day, but left early due to pain in his left shoulder and the effects of drinking too much the previous evening. He visited Dr. Richey, a chiropractor on March 10, 1981. Claimant testified that he returned to work on March 11, 1981 for approximately two weeks, but continued to see Dr. Richey for manipulation of his back and shoulder about every other day during that period. (Tr., pp. 16-27).

Claimant testified that he was also seen by Dr. Lawrence at the Ackley Medical Center on two occasions and left work on that physician's advice. He testified that Dr. Lawrence prescribed pain killers and muscle relaxants, but did not take x-rays. Dr. Lawrence referred claimant to Norman W. Hoover, M.D., an orthopedic surgeon. (Tr., pp. 27-28)

Claimant testified that he was first examined by Dr. Hoover in April of 1981, approximately three to four weeks after his injury. He recalled that Dr. Hoover prescribed physical therapy and heat packs in addition to restricting him from returning to his job. Claimant received workers' compensation benefits until July of 1981 when Dr. Hoover released him to return to work. He testified that he returned to Riverside and was assigned to work in a shipping department where backorders for bibles are boxed. Claimant found that pulling the lever on a tape machine caused severe pain in his shoulder, and remained on the job only three days. He returned to see Dr. Hoover who again restricted him from working. Claimant testified that a TENS unit was prescribed, but that he was told to discontinue it a month later after it proved to be of no assistance. (Tr., pp. 28-31)

Claimant testified that in August or September of 1981 Dr. Hoover again released him for work, but suggested that he find a job in a different field. He returned to Riverside on several occasions during September and October of 1981 seeking work, but was told that there was no position for him. Claimant indicated that he doubted that he would have been physically capable of performing any work for Riverside had a position been offered. (Tr., pp. 31-33)

Claimant testified that he was also examined by A. J. Wolbrink, M.D., at the request of the insurance carrier. He recalled that he had perviously been examined by Dr. Wolbrink after his 1975 truck accident. Claimant stated that Dr. Wolbrink advised him in 1982 not to do any lifting. (Tr., pp. 36-37)

At the time of the hearing claimant was into his third semester at Ellsworth Community College where he is majoring in agronomy and genetics. Claimant indicated that he wished to complete the five year master's program in his major. Claimant had achieved a GPA of over 3.8 on a 4.0 scale during his first two semesters. (Tr., pp. 34-35)

Claimant testified that he now does only light lifting of objects such as groceries, and avoids activities such as housecleaning or yard work. He stated that sitting for long periods, standing, stooping, and reaching cause pain in his shoulder and numbness in his left arm. Claimant noted that the numbness had occurred after his injury in 1975, but that the complaints of shoulder pain have existed only since the March of 1981 injury. (Tr., pp. 37-39)

Claimant revealed that his work at Riverside was interrupted for three and a half months starting in May of 1979 while he served part of a prison term. (Tr., pp. 33-34)

On cross-examination claimant testified that he had unsuccessfully sought full time employment at a number of places prior to enrolling in college and had enlisted the services of Job Service of Iowa. He testified that he had also looked for part-time positions once enrolled in college, but had found only a few hours of minimum wage work through the college's work-study program. Claimant stated that his college expenses were being paid through student loans, work study grants, and government aid. (Tr., pp. 46-53)

Russell Serls, who works as the warehouse manager for Riverside, testified that while most of the lifting in the warehouses where claimant worked was done by a forklift, claimant's job required one or two hours of physical lifting each day. Serls testified that most of the boxes which were lifted by hand weighed 15 to 30 pounds apiece. Serls also denied knowledge of claimant's requests for work being denied in September and October of 1981. (Tr., pp. 59-65)

In a December 28, 1981 letter to Bituminous Insurance Companies, Dr. Hoover wrote:

> I am certainly sorry about your "shock and astonishment", but I am afraid I don't understand it. The patient was injured on March 9, 1981, when he developed pain in his mid dorsal area which has been persistent with radiation to his interscapular area, neck, and left shoulder.
>
> Your fragmentary quotation from my record perhaps explains your misunderstanding of the problem. Mr. Schutt has had pain since the time of his injury, and the incidents which you have cited were entered in the record only as evidence that

the patient has not yet reached a point of tolerance of physical activity sufficient to allow him to work. These are not references to reinjury nor even of aggravation but only demonstrated evidence of his continuing incapacity. He did have earlier injuries and has evidence of some old degenerative change related either to that or to pre-existing juvenile epiphysitis, but that does not change in any way the fact that he has pain now which occurred as a result of the injury occurring in March 1981 and persisting to the present time.

I place no emphasis at all upon the patient's discharge from employment. Your reference to "the injury of 3/9/81 involving his low back" misinterprets my record. Recurrence of 5/9/81 was only an aggravation of the paraspinal pain which had existed prior to his return to work.

Evaluation of Mr. Schutt's real disability based upon what seems to be some physical impairment is certainly not easy and straightforward. He is prone to functional behavior and while I have no evidence of malingering, he certainly does tend to over-react to pain. Nevertheless I have been forced to conclude that his pain is sufficiently severe that he cannot go back to doing the kind of work that he was doing prior to his injury and therefore that he is physically impaired and occupationally disabled. (Claimant's Exhibit 3)

In a March 18, 1982 letter addressed to claimant's counsel, Dr. Hoover wrote:

First let me point out that one cannot separate the pain in the cervical area from that in the shoulder. Therefore, the total amount of physical impairment is 12% of the whole person, not 7%. Furthermore, this is based only upon limitation of range of motion and not as Dr. Wolbrink's evaluation is upon "his cervical spine symptoms."

Mr. Schutt's present condition of functional incapacity or disability due to physical impairment and pain is of the order of 20% of the whole person, 10% of which preexisted the injury of March 9, 1981. The residual 10% is attributable to that injury. (Cl. Ex. 2)

In a February 11, 1982 letter to Bituminous Insurance Company, Dr. Wolbrink wrote, in part:

I saw and examined Mr. Schutt on February 10, 1982. I did review the history with him and also had Dr. Hoover's notes which you had referred to me. He repeated the history that he had the onset of symptoms while he was lifting boxes of books from the floor of a truck, bending to floor level. He felt pain in the left shoulder region at that time and has had progressive symptoms since then. He has had chiropractic manipulation and has also had a time of rest and progressive activity. However, as related in some of your notes, he has had recurrence of symptoms with doing some lifting at home and also riding the lawn mower. He continues to have pain predominantly in the left scapular region. He will notice paresthesias into the arm if he is reaching for something, but these are quite transient. Has been doing a little weight lifting and says that he can tolerate curls; but if he is pressing he will develop pain with a popping sensation in his shoulder.

....

It is my impression that Mr. Schutt did suffer a partial rupture of a cervical disc in an injury which occurred while lifting at work. He does have previous history of significant cervical spine injury. I would estimate tht he has a total permanent impairment of 25% of the man as a whole due to his cervical spine symptoms. However, the majority of this is due to his previous injuries. It is somewhat difficult to sort out just how much of this is a progression, but I would estimate that no more than 5% of his present problem is due to the injury which occurred while lifting at work. (Cl. Ex. 1)

Marion S. Jacobs, a vocational consultant specializing in rehabilitation and employment placement of industrially disabled persons, testified to having had access to the medical records introduced as claimant's exhibits 1 through 6. The conclusions from a disability report prepared by Jacobs concerning claimant read as follows:

A. Pre-injury Earning Capacity:

Mr. Schutt was earning $5.00 per hour at the time of his March 9, 1981 injury. Had he not been injured, today Mr. Schutt would be earning approximately $5.50 per hour.*

B. Post-injury Earning Capacity:

My survey of the 3 labor markets (Iowa Falls, Hampton and Eldora) indicates that Mr. Schutt's post-injury earning capacity ranges from approximately $3.35 per hour to approximately $6.97 per hour.

In a "normal" economy Mr. Schutt's job opportunities and earnings should be greater.

C. Age:

Mr. Schutt is 27 years old. Assuming a retirement age of 65, he can expect to work for an additional 38 years.

D. Qualifications:

Mr. Schutt's current endeavor to further increase his earning capacity is commendable. Given his high ACT scores and 3.82 grade point average, in my opinion, Mr. Schutt was intellectually underemployed from 1973-81.

Assuming that Mr. Schutt completes the necessary schooling, he should be able to function in a work world that will provide viable job opportunities, increased earning capacity and career advancement. In the event Mr. Schutt voluntary or involuntary discontinues his schooling, his present skills and past work experience should qualify him for the following job possibilities:

Entry-level bookkeeper: $3.35 - 5.00 per hour.
Entry-level cashier: $3.35 - 4.50 per hour.
Order entry: $3.35 - 4.95 per hour.
Supervisor, shipping/receiving: $5.45 - 6.97 per hour.
Computer operator: $5.00 per hour.
Inspector: $3.35 - 4.95 per hour.
Custodian/maintenance (with lifting limits or co-worker assistance): $4.00 - 5.41 per hour.

NOTE: Increasingly, as shipping/receiving and inventory control departments become more automated, workers with pre-employment skills in data entry and retrieval will be given hiring preference.

E. Nature of Disability:

Mr. Schutt's disability, though physically limiting, is not disfiguring.

F. Ability to Engage in Employment:

Employers who are aware of Mr. Schutt's frequent injuries, job changes and disability may convertly discriminate against Mr. Schutt.

On the other hand, Mr. Schutt is eligible for CETA and Targeted Jobs Tax Credits; both programs act as hiring incentives and it is reasonable to expect Mr. Schutt to benefit from either of these programs if he were to return to the work world in the near future.

In my opinion, all of the above factors are relevant in determining the "industrial disability" of Mr. Schutt. (Defendants' Ex. B)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 9, 1981 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).

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.

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, 252 Iowa 613, 106 N.W.2d 591.

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, 255 Iowa 1112, 1121, 125 N.W.2d 251.

In Parr v. Nash Finch Co., (Appeal decision, October 31, 980) the Industrial Commissioner, after analyzing the decisions McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) and acksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980), ated:

> 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 work to a claimant after he suffers his affliction may stify an award of disability. Similarly, a claimant's inability find other suitable work after making bona fide efforts to nd such work may indicate that relief would be granted. Spadden, 288 N.W.2d 181.

ANALYSIS

The stated issues on appeal are whether the deputy erred in nding that claimant has sustained an industrial disability of percent of the body as a whole and whether the deputy erred predicating his decision on claimant's successful completion a college education. The issues in this matter shall be dressed together herein.

It is clear from the evidence presented that claimant had eexisting back and neck problems which relate back to his jury in 1975. While claimant may not recover for his preexisting nditions, per se, he is entitled to recover for an aggravation the preexisting conditions to the extent of impairment caused cing his employment. Doctors Hoover and Wolbrink estimated degree of claimant's physical impairment to the body as a le resulting from the March 9, 1981 injury and aggravation to back and left shoulder, to be ten percent and five percent spectively. It is also clear that claimant is permanently abled from performing his former job at Riverside Book and le, as well as most any job which he has held since graduating m high school, due to his disabling back and shoulder injuries. imant has been unable to find employment of any nature bsequent to his departure from Riverside, nor has he achieved college degree, to date, which would serve to enhance his loyment opportunities. It is apparent, even in light of the nclusion drawn by Marian Jacobs, that claimant has suffered a s of earnings as well as a loss of earning capacity as a ult of his March 9, 1981 injury.

Based upon the facts and circumstances of this case it would have been unreasonable for the deputy to have found claimant have an industrial disability in excess of 15 percent of the y as a whole. At the same time, it was not unreasonable for deputy to minimize his finding as to industrial disability ed upon claimant's intellectual potential and pursuit of a lege degree. Careful reading of the deputy's decision eals that claimant's pursuit of further education and his ential for employment in an area of expertise serve to igate the size of claimant's award of industrial disability. such, the decision of the deputy shall be affirmed.

FINDINGS OF FACT

1. Claimant was an employee of Riverside Book and Bible.

2. Claimant suffered an injury to his back and left shoulder March 9, 1981 which arose out of and in the course of his loyment.

3. Claimant had a preexisting injury to his cervical spine a result of an industrial accident which occurred in 1975.

4. Claimant is unable to perform his job at Riverside as a ult of his March 9, 1981 injury.

5. Claimant has subsequently been unable to find other loyment.

6. Claimant has a high school degree.

7. Claimant's work resume includes only laboring and ing jobs.

8. Claimant currently is a candidate in a college degree ram.

9. Claimant has suffered an industrial disability of 15 cent of the body as a whole.

CONCLUSION OF LAW

Claimant has sustained the burden of proving an industrial bility of 15 percent of the body as a whole as a result of March 9, 1981 injury.

WHEREFORE, the deputy's decision filed May 31, 1983 is rmed.

THEREFORE, it is ordered:

That the defendants shall pay unto claimant seventy-five weeks of permanent partial disability benefits at the ulated rate of one hundred forty-two and 82/100 dollars 2.82) per week.

That interest shall accrue pursuant to section 85.30 of the .

That the costs of this action are taxed to the defendants.

Signed and filed this 30th day of September, 1983.

Appealed to District Court;
Dismissed by defendant

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD R. SCHWARTZ,	:	
Claimant,	:	
vs.	:	File No. 691965
SIOUX TOOLS, INC.,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
CNA INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

By order of the industrial commissioner filed March 8, 1984 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 consists of the transcript of the hearing testimony; the evidentiary depositions of Sandra J. Miller and Mark A. Mattox; claimant's discovery deposition; and claimant's exhibit 1 consisting of 183 pages, 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 reached in the arbitration decision.

ISSUES

The arbitration decision awarded temporary total benefits paid to claimant for a period of 62 3/7 weeks and awarded medical and allied benefits under §85.27, The Code.

Defendants state the issue on appeal: "There is one issue involved in this appeal which is: 'Did the employee-claimant sustain an injury which arose out of or in the course of his employment with his employer Sioux Tools, Inc.?'"

FACTS PERTAINING TO THE APPEAL

Defendants argue that claimant's inconsistent versions of the possible cause for injury comprise a failure to carry the burden of proof.

Claimant's family doctor, A. Katz, D.O., states the history as follows:

> [H]e was leaning over an industrial machine and developed a slight spasm in his left proximal shoulder and base of the neck, in the cervical-dorsal vertebral area with subluxation, severe spasm and left brachial neuralgia; attributed it to a cold draft blowing here, because he experienced similar conditions before; the blower and on Monday mornings when the heat had been turned off over the weekend, it took several hours for the stream of air to warm up.

Dr. Katz consulted with R. McLarnan, M.D., who took the following history:

> The patient was leaning over an industrial machine and developed this tight spasm in his left proximal shoulder and at the base of the neck. He attributed this to a cold draft blowing on his neck. In fact, he had attempted to ward off this draft because he had experienced a similar sensation the week before. The blower is directly overhead and on Monday mornings when the heat has been turned off over the weekend, it takes several hours for this stream of air to warm up.

Then, in a letter of March 23, 1982 Dr. McLarnan states: "The etiology for this patient's complaint has not been established."

Cesar H. Rojas, M.D., and Horst G. Blume, M.D., both neurosurgeons from Sioux City, took a history more compatible with claimant's version which is described below and which causally related the incident to the ensuing disability.

The oral deposition testimony of Sandra J. Miller and Mark Alan Mattox stood for the proposition that claimant had hurt his back when he fell on some ice in a non-work connected incident.

Claimant's testimony on direct and cross-examination is lengthy but should be set out in substantial part:

The direct evidence states:

And I knew the second time it [a machine] made a rattle it was time to head for cover, because that's a true indication that something is coming apart in the machine. You don't have the time to ascertain what it is or whether it is a safe condition.

So I took and grabbed the handle and shut the work head off, which stops the piece from spinning into the wheel, takes stock off, and tried to get below the work station, so that if anything come out of the machine I wouldn't get hit by the flying debris.

And I think in the period of time that that happened I kind of slipped on the mat. And I felt a sharp pain in my upper back in the base of my neck. (Tr., p. 8 ll. 4-15)

After I reached up to turn off the head to try and stop what was going on in there so something wouldn't turn tear up the machine or me, I ducked. (Tr., p. 11 ll. 16-18)

Well, those things happen quite fast and you don't really know. You know, you just kind of pick yourself up and put it back together or try to. (Tr., p. 12 ll. 9-11)

A. Well, when that happened, when I stretched down and got out of the way, I felt a sharp pain run down my arm from the base of the neck, the upper back area.

Q. Which arm are you talking about?

A. My left arm. The one I reached over and shut the machine off with. And I experienced it for just an instant when it happened. And I'd had some discomfort that morning from the cold blowing on my neck and you felt stiff, and I think it's kind of in relation to the action that I took being stiff that happened what did. (Tr., pp. 13-4 ll. 10-25 and 1-4)

A. I called them at 7 o'clock that morning [the 12th] and told them I wouldn't be in, that I wasn't feeling good, that I was experiencing a problem. (Tr., p. 17 ll. 3-5)

The cross-examination of claimant states:

A. Well, I told him [a supervisor] what was bothering me, but I didn't tell him because I didn't know.

Q. You told him what was bothering you?

A. Uh-huh (yes).

Q. Which was what? Your neck?

A. The base of my neck.

Q. All right. But you didn't tell him what happened, how it happened or what occurred or when it occurred?

A. I told him about the accident that had happened, but I didn't relate the pain to the accident. I didn't tie a connection between the two. (Tr., p. 24 ll. 3-13)

Q. Now, as I understand it, you said you heard a rattling sound for a second time. You said, "It was time to head for cover," end of quote. You grabbed the handle to shut it off. "I think I kind of slipped on the mat." I quote that directly, right?

A. That's true.

Q. You're not really sure about that slip?

A. It happened so fast, I don't remember. (Tr., p. 27 ll. 17-24)

Q. Have you seen what Dr. Katz says in his report? It's page 120 of the exhibit. Quote, "The patient was leaning over an industrial and developed this tight spasm in his left proximal shoulder and at the base of the neck. He," meaning Mr. Schwartz, "attributed this to a cold draft blowing on his neck. In fact, he had attempted to ward off this draft because he had experienced a similar sensation the week before. The blower is directly overhead. And on Monday mornings when the heat has been turned off over the weekend, it takes several hours for this stream of air to warm up," end of quote.

A. That's true.

Q. He doesn't say anything about slipping on a mat or reaching over and twisting and that, does he?

A. No, he doesn't.

Q. Is that right?

A. That's true.

Q. He attributes this to your telling about some cold draft on your neck, right? Is that right?

A. I told him about the stiffness condition that I had had. (Tr., pp. 28-29 ll. 16-25 and 1-10)

[Q.] Again, I'll start out with the quote. "Well, on 1-11-82 a.m. I was running a grinding machine and had a piece spin out of control. And I reached with my left hand to shut the machine off and with my right hand to back the feed off and twisted my neck to get out of the way in case the piece came flying out, and I incurred a snap in my upper neck area.

"And shortly thereafter a spasm began to occur, and by two hours later it had reached the point where I knew I had to seek assistance, and I contacted Dr. Katz. And I seen him at 2 o'clock that afternoon. And he treated me for an alignment problem, what he thought was an alignment problem. And then I came back the following day at noon, and he seen that it was so severe that he hospitalized me at St. Vincent's Hospital 1-12-82 and since I was hospitalized until 1-21-82. And I seen Dr. Katz again 1-24-82 after leaving the hospital, and I have been going to physical therapy daily until today at this time," end of quote. That's the first time there is anything in your medical records talking about this twisting and turning.

THE WITNESS: I realize that. (Tr., pp. 30-31 ll. 12-25 and 1-5)

A. I didn't tell them that I had had that injury at home. (Tr., p. 31 l. 15)

A. I don't remember telling them I fell on the ice at home and hurt my neck. They asked me if I ever fell at home. And I told them the truth, that two weeks ago I had, but I never fell on my neck or hurt my neck. (Tr., p. 41 ll. 19-22)

The testimony of Gale Custer, an eyewitness, reads as follows:

A. Well, I heard a weird sound. The fact of the matter, the way he was grinding, if the wheel -- something goes wrong, if the wheel grabs that piece and it proceeds to throw it out of the machine, it will start making a funny noise. And the wheel will go arork (indcating). About the second arork you better look out. Throws many of them out.

I heard it and I ducked and I looked around and I seen no Richard. I wondered what had happened. And I looked and there he was; but, understand me now, all I could see of him was operating the machine. Now, I couldn't see how any one could see anything, because I was -- well, he wasn't blinded from me, but I was at this angle and he was over at this angle. I was facing east. He was facing south.

Q. But you heard --

A. Yes.

Q. -- the noise?

A. Yes.

Q. And you ducked?

A. I sure did. (Tr., pp. 46-47 ll. 14-25 and 1-7)

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 Co., 236 Iowa 296, 18 N.W.2d 607 (1945).

Where an expert's opinion is based on an incomplete history, the opinion is not pending upon the industrial commissioner. Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967). See also Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Others propositions of law are stated in the arbitration decision and are adopted herein.

ANALYSIS

The exact question becomes whether or not a compensable incident occurred. Claimant explains away the alleged fall at home on the ice by saying that, whatever happened, occurred some two weeks prior to January 11, 1982, and that explanation is acceptable.

Perhaps the more difficult problem in claimant's testimony and in the histories given is the ambivalent versions: On the one hand claimant says the cold air caused his neck to be stiff, and on the other hand he says that he hurt his neck when he made a quick movement. Thus, the history taken by Dr. Katz and that taken by Dr. McLarnan (which defendants wrongly attribute to Dr. Katz) both describe a spasm which developed while bending over a machine in the cold while the history given to Drs. Rojas and Blume describes a quick, avoiding movement which caused claimant to snap his neck.

Although these versions are contradictory, claimant's frankness in stating he did not know what caused his neck problem tends to show he did not mean to conceal anything. Finally, the most convincing evidence which backs up claimant is that of the independent eye witness, Gale Custer. To repeat, he said: "I heard it and I ducked and I looked around and I seen no Richard. I wondered what had happened. And I looked and there he was...." Although defendants deny this language supports claimant's version of the incident, the witness' not seeing claimant and then seeing claimant an instant later supports the view that claimant made a quick movement.

Therefore, one finds that claimant's testimony about his

quick movement as supported by that of the independent witness sufficiently shows that he made that movement. He subsequently developed pain and the evidence of his two main treating physicians, Drs. Rojas and Blume, supports a causal connection. The issue on appeal is thus determined in claimant's favor.

The findings of fact (except 8, 9 and 10) and order found in the arbitration decision are adopted below. The conclusions of law is that of the undersigned.

FINDINGS OF FACT

1. That this agency has jurisdiction of the parties and the subject matter.

2. That the claimant fell at his residence in early January, 1982 and that as a result of that fall required no medical attention.

3. That as a result of that fall claimant missed no time from his normal duties at work.

4. That the claimant has been employed by the defendant employer for 18 years.

5. That it is common knowledge on the part of the claimant that the grinding wheels he works with on a daily basis will malfunction from time to time.

6. That on January 11, 1982 claimant made a sharp involuntary movement down to a crouch position in order to avoid being struck by a portion of his grinding wheel.

7. That during claimant's attempt to avoid injury he sustained an injury to his cervical spine and began to experience neck and arm pain within two to three hours after claimant's sudden movement.

CONCLUSIONS OF LAW

That on January 11, 1982 claimant sustained an injury arising out of and in the course of his employment which caused temporary total disability for sixty-two and three-sevenths (62 3/7) weeks and which resulted in certain treatment and services under §85.27, The Code.

That the proper rate of weekly compensation is two hundred fifty-three and 12/100 dollars ($253.12) per week.

ORDER

THEREFORE, it is ordered that the defendants pay the claimant temporary total disability for a period of sixty-two and three-sevenths (62 3/7) weeks duration at the weekly rate of two hundred fifty-three and 12/100 dollars ($253.12) together with statutory interest from January 23, 1982.

Defendants are to pay the following medical charges:

American Prosthetics	$ 83.00
Dr. Aaron Katz	322.00
Marian Health Center	6,822.30
Dr. Horst Blume	5,365.00

Costs as contemplated by Industrial Commissioner's Rule 500-4.33 are charged to the defendants.

Defendants are ordered to file an activity report within twenty (20) days from the date below.

Signed and filed this 26th day of June, 1984.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RUBY SEAGER,	:	
	:	File No. 639890
Claimant,	:	
	:	A P P E A L
vs.	:	
	:	D E C I S I O N
ARMOUR-DIAL, INC.,	:	
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

By order of the industrial commissioner filed December 15, 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. Defendant appeals and claimant cross-appeals a review-reopening decision of November 18, 1983.

The record on appeal consists of the transcript of the hearing; claimant's exhibits 1; defendant's exhibits 1 through 4, inclusive; the depositions of Koert R. Smith, M.D., Harold L. Schrier, M.D., and Mark Joseph Williams, D.C., all of which evidence was considered in reaching this final agency decision.

This final agency decision will modify the review-reopening decision in that a lower award will be ordered.

ISSUES

The review-reopening decision awarded claimant workers' compensation benefits for a 35 percent permanent partial disability for industrial purposes which is the equivalent of 175 weeks in payments, at the rate of $224.50.

Defendant states the issues thus:

1. The Deputy Commissioner erred in finding a functional impairment of 15%; such award to Claimant is excessive and not supported by the evidence.

2. The Deputy Commissioner erred in finding an industrial disability of 35%; such award to Claimant is excessive and not supported by evidence.

3. The Deputy Commissioner erred in making his finding of "part-time or as needed" employment.

Claimant states the issues thus:

1. The Deputy Commissioner erred in finding a functional impairment of 15%; such award to Claimant was not enough and should have been 25% as supported by the evidence.

2. The Deputy Commissioner erred in finding an industrial disability of 35%; such award was not sufficient and a 60% award was in fact, supported by evidence and should have been awarded.

3. The Deputy Commissioner did not err in making his finding of "part-time or as needed" employment.

EVIDENCE PRESENTED

Claimant was injured at the employer's plant when she lifted a box of lids weighing some 40 to 50 pounds. She felt a pull in her back, dropped the box and fell into an empty trash box. (Tr., 9) At the time of the hearing, she had complaints of pain in her low back and was wearing a therapeutic corset. (Claimant also has cervical spine problems, but these are apparently not connected to the injury.) She returned to work for some time and was able to perform her duties, although she stated she had to have help lifting some of the boxes over an extended period of time. (Tr., 22) She stated that she had applied for a job in the quality control division of the employer's plant and was told that she would be a "poor risk." (Tr., 29)

At the time of the hearing, she was 43 years old and had worked at the employer's plant some seven years. Her background showed that she had a high school education, a beautician's license and had worked at Shaeffer Pen Company in Fort Madison. At the time of the hearing, she was under no work restrictions at the employer's plant.

James Lemek, a janitor on the second shift at Armour-Dial, testified that claimant might have to lift boxes weighing between 25 and 30 pounds. (Tr., 47)

Sandra K. Iverson testified that she was a friend of claimant's and that claimant was not as active as before the injury.

Carrie Lynn Seager, claimant's daughter age 14, Richard Dean Seager, claimant's son age 17, and Leroy Allen Seager, claimant's husband, testified that claimant, since the accident, is not as active in performing her work about home and in enjoying leisure time activities since the injury.

Richard Leroy Leverington, the second shift supervisor at the employer's plant, testified that to his knowledge claimant had no problems performing her work after the injury. He also conceded that he did not actually see claimant's work station.

Martin Lyle Graber, the employee relations manager for the employer, stated that claimant was on layoff at the time of the hearing and that her senority number was 145. Since there are some 130 people working at the present time, she is able to come in on a temporary basis. He also testified that claimant's personnel file shows no work restrictions.

Harold L. Schrier, M.D., testified that he had a restricted general practice. He saw claimant on June 25, 1980 and took a history which was consistent with claimant's version of the injury. He diagnosed a low back strain (Dep., p. 5). He later

referred her to the Steindler Clinic in Iowa City. With respect to claimant's prior condition and her condition after the injury, he testified as follows:

> Q. Doctor, would you say within a reasonable medical certainty then that the June 25th, 1980, incident aggravated that preexisting condition?
>
> A. It accentuated it-- It brought on the pain at that time, as far as I know.
>
> Q. All right. Now, you said that she had some difficulty prior to that as related back to 1979; is that correct?
>
> A. Uh-huh.
>
> Q. And what incident do you give reference to in 1979?
>
> A. All right. July 5th, 1979, back problem started Monday night. States she must have picked up some meat and twisted the wrong way at Armour-Dial. Went to Dr. Whitley due to pain. She was also taking-- well, you wouldn't care about that. X ray was taken. She was given medication and returned-- and physiotherapy and sent back to light duty. (Schrier dep., p. 9 ll. 8-23)

Mark Joseph Williams, a chiropractor, testified that he saw claimant first on February 2, 1981 and treated her with spinal manipulation. He formed the opinion that claimant had "lumbar complications" and that these complications were connected to the injury of June 25, 1980. (Dep., p. 8-9) Using the American Medical Association Guides to the Evaluation of Permanent Impairment, Dr. Williams opined that claimant had a 25 percent impairment of the whole person. (Dep., p. 9) The reports of Dr. Williams were also a part of the record and did not differ from his testimony.

The evidence of Koert R. Smith, M.D., a qualified orthopedic surgeon, was presented by reports and deposition. A report of April 7, 1982 states that any cervical difficulties were not related to claimant's injury. A report of October 29, 1981 stated that she had a probable chronic cervical and lumbar strain syndrome with some mild underlying degenerative changes in the lumbar spine. With respect to the cause and extent of the permanent impairment, the report of April 7, 1982 stated:

> Based on the AMA Guides to the Evaluation of Permanent Impairment, she would not have any permanent impairment because she does have normal motion with no neurologic abnormalities, even though she does describe some tenderness present. Based on the Manual for Orthopaedic Surgeons in Evaluating Permanent Physical Impairment, published by the American Academy of Orthopaedic Surgeons, she might possibly rate a 10% whole man impairment based on a healed sprain or contusion with persistent muscle spasm, rigidity and pain substantiated by demonstrable degenerative changes. However, our records do indicate that these osteoarthritic changes were present at the time of her injury, therefore, would be pre-existing and it would be my opinion that all, or at least the vast majority of any impairment that exists at this time, would have been pre-existing to her injury in 1980.

On those same questions, Dr. Smith testified:

> A. And it's difficult to percentage-wise determine how much of her present complaints are related to the pre-existing condition, and how much to the aggravation.
>
> Q. If we would lump them together, disregarding that part of it is due to pre-existing condition and part of it is due to aggravation, would you have an opinion within a reasonable degree of medical certainty as to what her impairment is?
>
> A. Yes, I do.
>
> Q. And what would that opinion be?
>
> A. My opinion is ten percent whole man impairment based on the American Academy of Orthopedic Surgeons Manual for Orthopedic Surgeons in evaluating permanent physical impairment.
>
> Q. And that would be a permanent physical impairment?
>
> A. Yes. (Smith dep., p. 14 ll 4-19)

A report from University Hospitals of Iowa City of January 20, 1981 recites claimant's prior low back problems and results of the examination with the following impression:

> The patient was seen and examined with Dr. Cooper. We feel that she has a lumbosacral instablity. This is superimposed on some osteoarthritic changes which are relatively mild. She was advised to use aspirin as needed for the discomfort. She was also instructed in doing sit-ups with the hips and knees flexed to strengthen her muscles and to use a corset PRN. She was advised to avoid twisting, bending and lifting which increase her discomfort. She was given a PRN return and was scheduled to see Neurology for evaluation of the numbness on her right upper extremity.

APPLICABLE LAW

A personal injury is an impairment of health which results from the employee's work and may include an aggravation of a preexisting condition. Jacques v. Farmers Lumber and Supply Co., 242 Iowa 548, 47 N.W.2d 236 (1951); 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).

Claimant must show that her health impairment was probably caused by her 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. Claimant also has the burden to prove the extent of any permanent disability. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963).

Matters of causal relationship are essentially within the realm of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). "The incident or activity need not be the sole proximate cause, if the injury is directly traceable to it." Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974); Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971). "A cause is proximate if it is a substantial factor in bringing about the result." Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

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).

Industrial disability is the reduction of earning capacity, and not mere functional impairment. Such disability includes considerations of functional impairment, age, education, qualifications, experience and claimant's inability, because of the injury, to engage in employment for which she 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).

ANALYSIS

The medical evidence shows claimant had a preexisting condition and that it was aggravated by her work incident. Although there is no evidence to show the extent of the preexisting condition as opposed to that of the aggravation, the medical evidence is equally clear that the work injury was a significant factor in contributing to her overall permanent impairment. As such, there is a causal relationship between the work injury and the resulting industrial disability, and the extent of the industrial disability must be established.

Claimant's loss of earning capacity stems from the pain she has incurred on account of the injury. The review-reopening decision granted an award of 35 percent industrial disability, part of which seems to be based on the McSpadden theory that the employer's refusal to give any sort of work to a claimant may justify an award (or, presumably, an increase in an award).

This does not seem to be a case where that rule is applicable. There have been layoffs at the employer's plant, and claimant is just far enough down the senority list that she is unable to get full-time work. Economic conditions which lower the job potential of the general work force cannot be taken into account to show an increase in industrial disability. Webb v. Lovejoy Construction Co., 2 Iowa Industrial Commissioner Report page 430, October 20, 1981. See also 2A, Arthur Larson Law of Workmen's Compensation, §57.63. Likewise, the fact that defendant declined to hire claimant in the quality control department is not a refusal to give claimant any sort of work.

Contrasted to claimant's pain and permanent partial impairment are her relative youth (age 43), the fact that she has had no surgery, the fact that she has not been terminated from her employment, the fact that she is a high school graduate and appears to be an intelligent person, and the fact that she has no work restrictions. She has a beautician's license which exemplifies her intelligence and retrainability. She also has experience in another light manufacturing plant which should increase her employability.

Considering all these factors, then, an award of 35 percent seems too high. Nevertheless, claimant's disability resulting from her pain and impairment, are real and, further, the review-reopening decision has significance which should be considered. With respect to that significance, see Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293 (Iowa 1982). Her permanent partial disability for industrial purposes is found to be 25 percent.

FINDINGS OF FACT

1. Claimant sustained an injury at work when she pulled her back while lifting some heavy boxes and fell into an empty trash box.

2. As a result of that work incident, she has been treated by various practitioner's and has a functional impairment of 10 to 15 percent of the body as a whole.

3. The work injury aggravated a preexisting back strain.

4. Claimant has pain and discomfort in the lumbar area of her spine.

5. Claimant is employed by defendant at those times when her senority permits. Of about 130 presently employed full-time employees, claimant's senority is No. 145.

6. Claimant requested a transfer to defendant's quality control department and was refused on the basis she was a "poor risk."

7. Claimant has had no surgery, has not been terminated om her job, is intelligent, is age 43, is a high school aduate, and has no work restrictions.

8. In addition to her work at the employer's plant, she has beautician's license and prior experience in light manufacturing.

CONCLUSIONS OF LAW

Claimant sustained an injury which arose out of and in the urse of her employment on June 25, 1980 and which resulted in industrial disability of twenty-five (25) percent.

Her proper rate of weekly compensation is two hundred enty-four and 50/100 dollars ($224.50).

ORDER

WHEREFORE, defendant is hereby ordered to pay weekly compen- tion benefits unto claimant for a period of one hundred enty-five (125) weeks at the rate of two hundred twenty-four d 50/100 dollars ($224.50) per week for the permanent partial sability, accrued payments to be made in a lump sum together th statutory interest from November 18, 1983.

Costs are charged to defendant under Industrial Commissioner le 500-4.33, I.A.C., and shall include expert witness fees in e sum of one hundred fifty dollars ($150) each payable to the llowing practitioners: Mark J. Williams, D.C., Koert R. Smith, D., and Harold J. Schrier, M.D.

Defendant is further ordered to file a report of payments to te within twenty (20) days of this decision and to file a nal report upon completion of payments.

Signed and filed at Des Moines, Iowa this 20th day of March, 84.

ppealed to District Court;
ending

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILMA J. SEYMOUR, Claimant, vs. UNITED BRICK AND TILE, Employer, and WAUSAU INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	FILE NO. 705518 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 Wilma J. Seymour, claimant, against United Brick and Tile, employer, and Wausau Insurance Companies, insurance carrier. Claimant seeks benefits as a result of an injury which occurred on August 31, 1981.

The hearing commenced on January 16, 1984 at 1:00 p.m. in the hearing room at the Industrial Commissioner's office in Des Moines, Iowa. The case was considered fully submitted at the conclusion of the hearing.

The record in this proceeding consists of the testimony of the claimant, Wilma J. Seymour and the manager for the defendant employer, Mark B. Mahoney. Claimant's exhibits 1 through 27 inclusive and defendants' exhibit A constitute the balance of the record.

Claimant's rate of compensation in the event of an award is $191.75 per week as established by stipulation of the parties at hearing.

ISSUES

The issues presented by the parties at the time of hearing are whether or not claimant sustained an injury arising out of and in the course of her employment on August 31, 1981. In the event that it is established that the accident in which claimant was involved on such date occurred arising out of and in the course of her employment, the nature and extent of such disability is then an issue, including the existence, or lack thereof, of any permanent disability and any applicable healing period or period of temporary disability. It has been stipulated that all medical bills submitted as contained in claimant's exhibits were incurred for treatment of the injuries sustained in the August 31 accident, that such treatment was reasonable for the injuries and that the charges therefore were fair and reasonable with the only exception thereto being exhibit 8, the charges made by Dennis F. Rolek, D.O.

REVIEW OF THE EVIDENCE

It is established by the pleadings that this agency has jurisdiction of the subject matter of this proceeding and its parties.

Claimant testified that she is a married female with five children who was 44 years of age at the time of the accident. She graduated from high school in 1955 and did general clerical work until 1960. Claimant testified that she has been employed by the defendant employer since 1960 and performed clerical work consisting of filing, dispatching, typing and customer relations on a part-time basis until 1978 when she was placed in a full time position as a salesperson, which position she continued to hold at the time of hearing. She described her present duties as involving calling on customers to sell bricks which are manufactured by the employer. She stated that her duties have not changed since 1978 although her territory has changed.

Claimant said that her sales activities normally consisted of displaying the products made by the employer on a daily basis, averaging four or five times per day. She described the samples which she would display as consisting of brick slabs mounted on cardboard and occasionally a sample would also include what she described as a "strap" of brick which she estimated to weigh anywhere from 25 to 70 pounds. She claimed that she loaded, unloaded and displayed the samples herself without any assistance except as may occasionally be offered by a customer. Claimant described her sales territory as south central Iowa. Claimant testified that as part of her work she was provided with a car by the employer and the employer paid all operation and maintenance expenses for the car except gasoline used on matters such as a family vacation. Claimant described the free use of the vehicle as an incident of her employment and felt she was authorized to use the vehicle, at her employer's expense, for personal matters such as trips to the grocery store.

Claimant testified that she was normally expected to be on the road by 8:00 a.m. each morning and that work after 5:00 p.m. was not unusual. Claimant stated that she was expected to be available to customers at all hours and that it was not unusual for her to return to the office or meet customers after normal business hours.

Claimant stated that she and the other salespersons for the employer normally carried samples in the company vehicles assigned for their use and also maintained offices in their homes. Claimant testified that she used her home office to receive phone calls from customers, to store and display samples.

Claimant said that on August 31, 1981 she had commenced the day by going to Perry, Iowa to meet a customer and then stopped at the Adel plant operated by her employer to pick up product samples. The samples which she picked up at the Adel plant were for her use in her sales to customers and also included samples to be delivered to the Des Moines office. Claimant testified that she loaded about 50 cardboard samples into her vehicle, decided to deliver them to the Des Moines office immediately and proceeded to do so. Upon arrival at the Des Moines office she unloaded the samples which were to remain there and may have made phone calls to prospective customers. She stated that at approximately 5:00 p.m. she headed home driving the company-owned vehicle which contained some product samples. Claimant was injured in an accident at about 5:30 p.m. while traveling toward her home. She testified that she had made no stops while enroute and was traveling directly home.

Claimant stated that she did not have plans to meet customers or receive calls from customers at home on the evening of August 31 but that either could occur without prior arrangements.

Claimant testified that she intended to unload the samples when she arrived at her home although there is no explanation in the record to indicate why the samples could not have remained in the company vehicle. Claimant stated that she would have gone home at that time and place even if she were not transporting the samples. Claimant also testified that if she had not delivered samples to Des Moines she probably would have traveled directly home from Adel by a different route.

Claimant related that she was not required to stop at the office in Des Moines every day and would travel directly from her home to make calls upon customers and return to her home without ever stopping at the office on an average of four days each week.

Claimant testified that she was compensated on the basis of a base salary plus commission and admitted greater earnings in 1983 than in 1982.

At hearing claimant related her complaints to be problems with her neck and back which resulted in pain. She found it particularly noticeable when she was driving for extended distances or when she had to sit in meetings for an extended period of time. Claimant described receiving injections at the pain center at Mercy Hospital which give her relief from her symptoms. With the injections she felt that her activities are essentially unrestricted. Without the injections she stated she can still do everything she did before the accident but experiences pain in doing so.

Claimant denied any present problems resulting from her knee injury.

Claimant stated that she missed work on the three days she was in the hospital but still received her base pay.

Claimant summarized the medical care she had received and listed the doctors she had seen for the injuries of which she complained. She related that she saw Dr. Rolek on the recommendation of her attorney and not by referral from any other doctor.

Mark Mahoney testified and described himself as manager of United Brick and Tile and claimant's supervisor and that he had held those positions two years. He claimed knowledge of the company policy on use of company cars and generally verified claimant's testimony on the subject. He confirmed that sales persons normally carry product samples in the car and kept them at home. He stated that claimant's 1983 gross sales were up by approximately one-third over 1982 and that claimant was a valued employee.

Mahoney stated that sales persons were expected to be "on the job" at 8:00 a.m. and that the normal day ended at 5:00 p.m. but that it frequently runs over. He related that employees are considered "on call", are expected to receive calls at home and are authorized to make after-hours calls. He related that the company trades cars at about 100,000 miles and that occurred every two or three years for claimant's company car.

Claimant's exhibits 1 through 15 appear as medical bills while exhibits 16 through 27 are medical reports. Defendants' exhibit A is a highway map of Warren County, Iowa.

Exhibit 27 consists of records of Mercy Hospital concerning claimant. They reflect that she was seen in the emergency department on August 31, 1981 at 8:00 p.m. X-rays disclosed a normal cervical spine, and she was released at 8:40 p.m. It shows that she complained of headache, dizziness and pain in her left hip. Multiple bruises and contusions are noted, including on her right leg.

Claimant was seen again for a recheck. Noted are complaints of pain in the right shoulder area and weakness of the right hand.

The records show that she was seen again at the Mercy Emergency Department under the direction of William Shirley, M.D., on November 28, 1981 at 7:25 p.m. and was released at 9:00 p.m. following a fall at home. Her complaints were noted to be pain in the cervical area and dizziness when she stands. X-ray revealed a normal cervical spine.

The records reveal that claimant was hospitalized December 16 - 18, 1981. Her history given at that time notes problems with vision, nausea, light headedness and occasional emesis. Examination and tests which were administered disclosed nothing abnormal. Disgnosis on discharge is shown as acute myofascial strain of the cervical spine.

Claimant was again referred to Mercy for testing during the period of July 13 - 25, 1983 and also on September 1, 1983. The results shown in exhibit 26 reveal nothing abnormal. Exhibit 26 appears to be connected with the December, 1981 hospitalization. It makes reference to right knee surgery in February, 1980 but is otherwise cumulative of the typewritten history for that same hospitalization.

Exhibit 17 is a report of Albert L. Clemens, M.D., dated October 19, 1983 which excludes the possibility of thoracic outlet syndrome.

Exhibit 18 is a report of Daniel A. Keat, D.C., dated October 11, 1982. The report notes claimant's complaints as pain in the area of the neck and upper back, headaches and fatigue. The history notes the fall at home in November and the August accident. The diagnosis shown consists of acute sprain/strain of the cervical and thoracic spine, accompanied by ligamentous instability, myofascitis and evidence of nerve root irritation. It reveals a possibility of spondylitis at the injury site and probable loss of motion due to inelastic scar tissue forming in the healing process of the injured soft tissue. He expects recurrent symptoms. In the report, Dr. Keat opines that the injuries and symptoms were sustained in the August 31 accident, that they were aggravated in the November 28 fall at home and that the blacking out which caused the fall is directly related to the August 31 accident.

Exhibits 19, 20 and 21 are reports from Stuart R. Winston, M.D. The first, exhibit 19, dated July 22, 1982, contains a history but no further diagnosis or prognosis. The second, exhibit 21, dated September 14, 1983 notes an earache as a problem but discloses no abnormal test results. Dr. Winston goes on to discount the possibility of thoracic outlet syndrome and opines that claimant is suffering from chronic myofascial strain. In exhibit 20, dated September 28, 1983, Dr. Winston relates claimant's condition to the August 31 accident and rates claimant as having a permanent partial disability of five to seven percent based on chronic pain.

Exhibit 22 is the report of David L. Friedgood, D.O., dated September 22, 1982. In it he notes complaints of dizziness and suggests a post-traumatic labyrinthitis involving claimant's right ear.

Exhibit 24 is a report of Roger Lin, M.D., which notes mild leukopenia indicating a possible viral infection.

Exhibit 25 is the report of Dr. Shirley, claimant's treating physician. In the report he makes the diagnosis of a post-traumatic labyrinthitis of the right and chronic myofascial strain. He relates both conditions to the auto accident.

Exhibit 23 is the report of Senesio Misol, M.D., who rates claimant as having a ten percent permanent partial impairment of the right knee attributed to the auto accident of August 31 and he also attributes the blacking out at her home to the auto accident.

Exhibit 16 is the report of Dr. Rolek dated September 22, 1983. He describes claimant as having a cervical spine strain, acute and chronic. He also suspects a herniated cervical disc but advises against performing the myelogram necessary to confirm or refute that possibility. He opines that claimant is permanently partially impaired to the extent of 50 to 60 percent and does not feel that she will be able to perform the duties of her employment.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on August 31, 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).

The words "in the course of" refer to the time, place and circumstances of the injury. McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971).

"An injury occurs in the course of 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 (Iowa 1971), Musselman, 261 Iowa 352, 154 N.W.2d 128 (1967).

Generally, travel between home and the place of employment is not considered to be in the course of employment if the employee has a fixed place of work and fixed hours of work. Halstead v. Johnson's Texaco, 264 N.W.2d 757 (Iowa 1978). Exceptions to this general rule may arise depending upon the facts in each case. I find this to be one of those exceptional cases.

The important considerations are:

1.) That claimant had no fixed place of work;

2.) Claimant's work primarily consisted of calling on customers at various locations away from her employer's office;

3.) Claimant was traveling in an employer-owned vehicle at the employer's expense, returning home from a day of ministering to the employer's business;

4.) Claimant had not deviated from her direct travel home.

The fact that claimant had no fixed place of work is, in and of itself, sufficient to place her in the course of her employment at the time of the accident. In general, employees whose work entails travel away from the employer's premises are within the course of employment continuously during the trip. 1 A Larson, The Law of Workmen's Compensation, sections 19.29, 25.00. The fact that claimant had stopped at the office does not convert the office into a fixed place of employment as to render her travel home outside the course of her employment. The fact that the employer provided the vehicle and all expenses of its operation could also support an award of benefits in this case. Prybil v.Standard Electric Company, 67 N.W.2d 438 (Iowa 1954). 1 Larson, The Law of Workmen's Compensation, section 17.00. See also: Farmers Elevator Co. v. Manning, 286 N.W.2d 174 (Iowa 1979); Lamb v. Standard Oil Company, 96 N.W.2d 730 (Iowa 1959).

The employer had determined that it was for its own benefit to provide claimant with a vehicle, at company expense, in order to allow claimant to travel to call upon customers without making an obligatory stop at the office each morning and evening. The employer chose to have the company vehicle available for claimant's use if claimant chose to meet with a customer at times other than during the normal work day. Travel to and from the places where claimant would meet with customers was a part of the employer's business and part of claimant's job duties. There is no specific evidence in the record as to whether or not claimant was specifically paid for her travel time but it appears that claimant was considered to be performing her job duties if she were "on the road" at 8:00 a.m. in order to travel to a customer's location.

There is no evidence in the record to suggest that claimant had deviated from a reasonably direct route home or otherwise took the journey outside the course of her employment.

I find the maintenance of a home office, transportation of samples, storage of samples at her home, conducting of business at home and work after normal work hours to be consistent with claimant's occupation and with the absence of any fixed place of employment. I do not find such to necessarily make the home an extension of the employer's premises. The fact that claimant was "on call" is not controlling. Hansen v. State of Iowa, 249 Iowa 1147, 91 N.W.2d 555 (1958).

Accordingly, I find that claimant did sustain an injury arising out of and in the course of her employment.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 31, 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, 261 Iowa 352, 154 N.W.2d 128 (1967).

Claimant's fall at home on November 28, 1981 is related to the auto accident by Drs. Misol and Keat. Their opinions are adopted as correct, thereby bringing the fall into the realm of compensability. DeShaw v. Energy Manufacturing Co., 192 N.W.2d 777 (Iowa 1971).

The medical evidence discloses that claimant underwent a series of x-rays of the head and spine, CT head scan, an EEG and several other tests, all of which failed to disclosed any physiological basis for claimant's complaints beyond the muscle spasm and tenderness in the cervical area. The doctors who expressed the opinions concerning the source of claimant's dizziness, headache and cervical pain were consistent in their diagnoses of a myofascial cervical strain. The undersigned adopts that diagnosis as a fair statement of the claimant's medical condition.

Dr. Winston also noted a complaint of a right earache. Dr. Friedgood found evidence of a post-traumatic labyrinthitis involving claimant's right ear and Dr. Shirley confirmed that such was a source of claimant's dizziness. Claimant's complaints of dizziness had existed since the date of the accident. The

ndersigned adopts the labyrinthitis diagnosis as an additional ource of claimant's complaints.

Dr. Misol found claimant to have a 10 percent permanent artial impairment of the right leg arising from an injury to er knee which occurred in the August 31 accident. This diagnosis s adopted by the undersigned.

All the medical personnel who expressed an opinion concerning he causation for claimant's complaints found that the complaints iagnosed as the myofascial strain, labyrinthitis and knee njury were a result of the August 31 accident. Those conclusions re adopted by the undersigned.

As claimant has an impairment to the body as a whole, an ndustrial disability has been sustained. Industrial disability as defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 93, 258 N.W. 899, (1935) as follows: "It is therefore plain hat the legislature intended the term 'disability' to mean industrial disability' or loss of earning capacity and not a ere 'functional disability' to be computed in the terms of ercentages of the total physical and mental ability of a normal an."

Functional disability is an element to be considered in etermining industrial disability which is the reduction of arning capacity, but consideration must also be given to the njured employee's age, education, qualifications, experience nd inability to engage in employment for which he is fitted. lson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 51, (1963).

Dr. Winston, a neurosurgeon, found claimant to have a five o seven percent permanent partial impairment based upon chronic ain arising from the myofascial strain.

Dr. Rolek's opinion concerning the extent of claimant's isability is rejected. It is irreconcilable with the A.M.A. uides and appears to be an attempt to evaluate industrial isability.

The undersigned adopts Dr. Winston's rating and reference to he A.M.A. Guides translates the two permanent impairments to an mpairment of the body as a whole in the range of nine to eleven ercent.

The evidence establishes that claimant missed three days of ork following the accident and was hospitalized for tests from ecember 16, 1981 to December 18, 1981. She has lost no pay as result of any absence from work connected with the accident. laimant remains employed with United Brick and Tile and is onsidered by the employer to be a valued employee. She still oads and unloads her brick samples. She has retained the same osition and duties as she held before the accident. Her 1983 ales were up approximately one-third over 1982. Claimant ppears intelligent, was well dressed at the hearing and exhibited businesslike demeanor.

Claimant is a 1955 high school graduate with no other formal ducation. She has worked for this employer since 1960 and her ntire work history prior to entering the sales staff in 1978 as in the clerical-office work field. The undersigned finds hat claimant's ability to perform in her present employment has ot been substantially affected by the injury. Although this mployer has been in operation for many years there is no uarantee of its continued existence in the future nor of laimant's continued employment with it. Claimant's work elling brick would be extremely limited if her employment with his employer should cease. Hers is not a common occupation. ccordingly, some award of permanent partial industrial disability s warranted.

FINDINGS OF FACT

1. Claimant was injured in an auto accident on August 31, 1981.

2. Claimant was employed by defendant employer as a sales erson with no fixed place of employment.

3. At the time of the accident claimant was returning home fter concluding her business transactions for the day.

4. Claimant was traveling in a vehicle owned by her mployer and operated at her employer's expense.

5. Claimant was traveling directly home without deviating rom that purpose.

6. Claimant maintained an office in her home where she onducted business for the employer after normal business hours nd stored samples of the employer's products.

7. Claimant was considered by her supervisors to be orking at the times she was traveling to meet customers.

8. Claimant's employer expected her to be available to talk to or meet with customers after normal business hours.

9. Claimant's normal hours were 8:00 a.m. to 5:00 p.m., ut after hours work was common.

10. Claimant sustained injuries to her head, cervical spine nd right knee in the auto accident.

11. Claimant's head injury produced a post-traumatic labyrinthitis which produced no permanent impairment.

12. The injury to claimant's spine produced a chronic myofascial cervical strain resulting in a permanent partial impairment of six percent of the body based upon chronic pain.

13. The injury produced a knee injury which resulted in a permanent partial impairment of ten percent of the right leg.

14. The accident caused claimant to become permanently partially impaired to the extent of ten percent of the body as a whole.

15. Claimant retains her same employment position and performs all duties of her employment which she performed prior to the injury.

16. Claimant has lost no earnings or pay raises.

17. Claimant suffers from pain in her neck and back which is aggravated by extended sitting and driving.

18. Claimant receives injections which relieve her pain.

19. Claimant is a 47 year old female whose employment consists of selling brick to persons in the construction industry and requires travel throughout south central Iowa.

20. Claimant is a 1955 high school graduate with no other formal education.

21. Claimant's only other work experience is limited to office and clerical work, primarily with this same employer.

22. Claimant is well motivated and intelligent.

23. Claimant's healing period consisted of September 1 through 3, 1981 and December 16 through 18, 1981 for which she has received payment via continuation of her base salary.

24. The following medical care expenses were incurred by claimant for treatment of the injuries she sustained in the accident and are fair and reasonable:

EXHIBIT NO.	FROM	AMOUNT
1	Neuro-Associates, P.C.	$100.00
2	Orthopedic Associates, P.C.	78.00
3	Shirley Medical Clinic,	202.00
4	Daniel A. Keat, D.C.	164.00
5	Albert L. Clemens, M.D.	35.00
6	Neurological Associates of Des Moines, P.C.	75.00
7	Chest, Infectious Diseases & Internal Medicine Associates, P.C.	239.00
9	Mercy Hospital Medical Center	105.00
10	Mercy Hospital Medical Center	489.50
11	Mercy Hospital Medical Center	115.99
12	Mercy Hospital Medical Center	813.67
13	Mercy Hospital Medical Center	705.00
14	Mercy Hospital Medical Center	132.15
15	Bullard Vision Center, P.C.	5.00

25. The charges from Dr. Rolek as shown on exhibit 8 were not incurred for purposes of treatment.

26. Claimant fell at home on November 28, 1981 and that fall was caused by effects from the auto accident.

27. The injuries sustained in the fall at home were limited to an aggravation of those injuries sustained in the auto accident and are not separable from those of the auto accident.

CONCLUSIONS OF LAW

Claimant sustained an injury arising out of and in the course of her employment with defendant employer, United Brick and Tile, in an automobile accident which occurred on August 31, 1981.

Claimant sustained an industrial disability of 10 percent of the body as a whole in that August 31, 1981 accident. Claimant's disability is to be evaluated industrially and is not to be evaluated as a scheduled member disability for the leg and a separate disability of the body as a whole based upon the cervical strain.

Claimant's healing period ended upon her return to work. Defendant employer shall receive credit for the wages they continued to pay to claimant and no additional award of healing period benefits is payable. All medical expenses submitted by claimant at hearing, namely those evidenced by exhibits 1 through 15, except for exhibit 8, are payable by defendants under the provisions of section 85.27. The bill of Dr. Rolek was not for treatment and appears to have been for purposes of evaluation in order to submit his testimony as evidence at the hearing of this case. As such, it is not compensable under section 85.27.

The aggravation claimant sustained in the fall at home on November 28 is a result of the injuries sustained on August 31, 1981. As such they are injuries incurred arising out of and in the course of claimant's employment. Those injuries are considered in the award made in this case.

IT IS THEREFORE ORDERED that defendants pay claimant fifty (50) weeks of permanent partial disability benefits at the rate of one hundred ninety-one and 75/100 dollars ($191.75) in a lump sum. Interest shall accrue from the date each installment came due commencing September 10, 1981 and continuing each Thursday thereafter until the full fifty (50) weeks would have been paid. Interest shall be computed pursuant to section 85.30.

IT IS FURTHER ORDERED that defendants shall pay claimant's medical bills evidenced by exhibits 1 through 7 and 9 through 15.

The costs of this proceeding are assessed against the defendants per Rule 500-4.33.

Defendants shall file a final report within twenty (20) days.

Signed and filed this 9th day of February, 1984.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY R. SHUTE,	:	
Claimant,	:	
vs.	:	File No. 674580
CONSOLIDATED FREIGHTWAYS,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
HOME INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Defendants appeal from a proposed review-reopening decision wherein claimant was awarded permanent partial disability benefits based upon a finding of 30 percent industrial disability.

Claimant cross-appeals from the same proposed review-reopening decision.

The record on appeal consists of the transcript of the review-reopening proceedings which contains the testimony of claimant, Bernard DeWerth, Robert Powell, Roger Kromphardt and Don McClouskey; claimant's exhibits 1 through 16; defendants' exhibits A and B; and the briefs and filings of all parties on appeal.

ISSUES

For defendants:

1. Whether claimant's disability is causally related to his injury of June 16, 1981.

2. Whether claimant has sustained a permanent partial disability as a result of that injury.

For claimant, the sole issue is whether he has been fully compensated for the industrial disability he suffered.

REVIEW OF THE EVIDENCE

The parties stipulate that the rate of compensation is $292.48 per week. (Transcript, p. 4)

Claimant was 48 years old at the time of the hearing and has a GED obtained through his military service. (Tr., pp. 46, 55) His previous work experience has included fry cooking, farm work, pin setting and delivery work. (Tr., pp. 53-54) Claimant served three years in the Marine Corps as a gunner in a combat troop. (Tr., p. 71) After service, claimant worked in masonry and siding, truck driving, and his own home improvement business. When his business failed, claimant loaded equipment for a railroad and delivered freight for Iowa Parcel. (Tr., pp. 56-59) He was hired by defendant employer as a truck driver and dock loader and worked for eight and a half years. (Tr., p. 60) In 1970 or 1971, claimant injured his right hand. Claimant sustained two back injuries in 1974, a right shoulder injury in 1975 and an acute cervical sprain in March of 1977. (Tr., pp. 77-79) Again in 1977, claimant suffered a nonwork-related back injury which resulted in a spinal laminectomy and discectomy on November 30, 1977. (Smith operative report, Defendants' Exhibit A) Claimant was off work for seven months and returned to his regular work duties without limitations for defendant employer. (Tr., pp. 51-52) In September of 1978 claimant's arms, back and neck were injured and in December 1980 claimant injured his lower back. (Tr., pp. 79-80) On June 16, 1981, while in the employ of defendant employer, claimant suffered a back injury as he unloaded a 200 pound cabinet. (Tr., p 46) Claimant reported his injury to Bernard DeWerth, terminal manager for defendant employer and left work to see David Miller, D.C., for treatment. (Tr., pp. 48-49) Dr. Miller advised claimant to remain off work and claimant continued under his care until March of 1982. Claimant returned to work on July 7, 1981. (Miller letter of October 26, 1982, Def. Ex. A) A return to regular work duties resulted in continued back pain. Claimant was again advised to discontinue working by Dr. Miller on October 20, 1981 and returned to work on November 9, 1981. (Miller letter dated November 2, 1981, Def. Ex. A) On March 23, 1982 claimant saw Dr. Miller with a complaint of acute low back pain. He was advised to discontinue working on March 26, 1982, "to avoid aggrevation [sic] and for spinal stabilization". Dr. Miller stated: "I feel that Mr. Shutes [sic] present condition of recurring pain is related to the work injury of June 16, 1981." (Miller letter dated April 13, 1982, Def. Ex. A) Dr. Miller advised that claimant remain off work. (Miller letter of April 13, 1982, Def. Ex. A)

At the request of defendant insurer to Dr. Miller, claimant was referred to Koert Smith, M.D., an orthopedic surgeon. Claimant saw Dr. Smith on May 4, 1982 and reported he was experiencing constant pain in his back which radiated down to his buttocks and thighs. Claimant was placed on Naprosyn and advised to find "less heavy type of employment." (Smith May 4, 1982 clinical notes, Def. Ex. A) Dr. Smith's May 21, 1982 report states in part:

> My assessment is status post op laminectomy with recent strain and recurrence of sciatica. Treatment is outlined and basically consists of anti-inflammatory medications and gradually increasing his activity as the pain, both in his back and his legs, subside [sic]. At the time of my last evaluation on May 17, I felt he was not ready to return to work at that time.
>
> The prognosis for Mr. Shute is that intermittently with strenuous use of his back, he is likely to encounter repeated episodes of acute pain in his back and leg as he is presently experiencing. I feel that in the long run, he would get along much better with limiting his lifting, bending and prolonged sitting types of activities. For the short term, I am sure we can get him over this acute episode and have him go back to his previous employment, but I think there is a strong likelihood that intermittently he will have repeated episodes of pain if he does this. (Def. Ex. A)

Claimant remained under the care of Dr. Smith and was treated with Clinoril and Talwin. Claimant rested during the days and engaged in limited activity. Claimant reported that increased activity, lifting or bending resulted in increased pain in his back and legs. (Smith June 3, 1983 clinical notes, Def. Ex. A)

Dr. Smith has stated that it was difficult to establish a causal relationship between present findings and complaints and claimant's injury. He adds: "At best, the June 12, [sic] 1981 episode would be aggravation of a pre-existing condition which was his laminectomy which had been done in 1977." (Smith letter of October 14, 1982, Def. Ex. A)

Dr. Smith gave claimant a rating of 20 percent whole body impairment.

> I do believe at this time that Mr. Shute's condition is stable and an impairment rating is indicated. Based on the American Academy of Orthopaedic Surgeons' Manual for Orthopaedic Surgeons in Evaluating Permanent Physical Impairment, at this time he would rate 20% whole body impairment with surgical excision of a disc, no fusion, moderate persistent stiffness and pain aggravated by heavy lifting with necessary modification of activities. The same Manual allows a 10% whole body impairment with surgical excision of a disc, no fusion, good results, no persistent sciatic pain. With these references in mind, I think it appropriate to attribute 10% of his permanent impairment to the surgery performed in 1977 and an additional 10% to his incident in June, 1981. (Smith letter of October 20, 1982, Def. Ex. A)

Dr. Smith determined claimant's lifting and carrying capacity to be ten pounds frequently and up to 24 pounds occasionally. Claimant could push/pull light weights frequently but could bend, squat and climb only occasionally. (Cl. Ex. 12) Dr. Smith recommended that claimant seek lighter work or vocational training. (Smith August 4, 1982 clinical notes, Def. Ex. A)

Claimant testified he has not worked for defendant employer since March of 1982. (Tr., p. 62) He has constant pain in his lower back and leg and can only stand for periods of 15 - 30 minutes. (Tr., p. 61) He can sit with comfort up to an hour before having to move about. (Tr., p. 61-62) Claimant testified he could no longer lift, climb or stand for long periods of time. (Tr., p. 63) He has been looking for work that he can do, but has not found anything within his functioning restrictions. (Tr., pp. 64-66)

Bernard DeWerth, terminal manager for defendant employer, testified that claimant is considered to be off work with an industrial injury. (Tr., p. 11) Mr. DeWerth stated that there was no light duty work available with defendant employer and that drivers were presently laid off. (Tr., pp. 11-12) When asked to review a list of claimant's physical limitations, Mr. DeWerth asserted that claimant could not perform his previous work duties for defendant employer. (Tr., p. 13)

Robert Powell, Job Service placement worker, testified that in the present economy there were no job openings for truck drivers. (Tr., p. 21) Vocational tests administered at Southeastern Community College indicates claimant has moderately high reading and math skills. The test evaluator, Charlotte Rashid, reported that claimant has potential for post secondary training. (Evaluation report, Cl. Ex. 5) Roger Kromphardt, counselor for Crawford Rehabilitation Services, Inc., and testifying under subpoena, stated that he had not been able to place claimant in a job due to claimant's physical limitations and the sagging economy. (Tr., pp. 33-34) Without further training, claimant would be able to perform jobs such as security guard, radio dispatch, gas station attendant, inventory clerk, and light duty assembly work. (Tr., pp. 95-96) With training claimant could do small engine and appliance maintenance and repair. (Tr., p. 97) Mr. Kromphardt reported that claimant was not interested in factory work and had thrown away an application for a position with a factory. (Tr., pp. 31-32) Claimant also did not want indoor work and did not want to work for minimum wages. (Tr., p. 96) Mr. Kromphardt stated that claimant's job preferences limited the counselor's ability to help claimant find employment. (Tr., p. 98)

Don McClouskey, counselor with the Iowa Division of Rehabilitation, testified that he was unable to place claimant in a job because of claimant's back problems. (Tr., p. 42)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 16, 1981 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, 760-761 (1956). If the claimant had a preexisting condition or disability that is aggravated, accelerated, worsened or lighted

so that it results in disability, claimant is entitled to cover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 2, 815 (1962).

When an aggravation occurs in the performance of an employer's rk and a causal connection is established, claimant may cover to the extent of the impairment. Ziegler v. United States psum Co., 252 Iowa 613, 620, 106 N.W.2d 591, 595 (1960).

If claimant has an impairment to the body as a whole, an dustrial disability has been sustained. Industrial disability s defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 3, 258 N.W. 899, 902 (1935) as follows: "It is therefore ain that the legislature intended the term 'disability' to an 'industrial disability' or loss of earning capacity and not mere 'functional disability' to be computed in the terms of rcentages of the total physical and mental ability of a normal n."

Functional disability is an element to be considered in termining industrial disability which is the reduction of rning capacity, but consideration must also be given to the jured employee's age, education, qualifications, experience d inability to engage in employment for which he is fitted. son v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 1, 257 (1963).

ANALYSIS

Claimant has testified that before the June 16, 1981 injury, was able to do all the work assigned to him by defendant ployer in his capacity as a truck driver and dock loader. He utinely engaged in a number of physical tasks in the course of s employment with defendant. The injury, itself, is the sult of trying to prevent a 200 pound cabinet from falling as aimant unloaded a trailer.

The record gives no indication that claimant's work tasks re in any way restricted by a preexisting back condition that paired his capacity to sit, stand, lift or carry. Claimant d previously suffered back injuries and underwent a laminectomy 1977, but there is no evidence that prior to the June 16, 981 injury, claimant suffered physical limitations which evented him from performing the driving and heavy lifting ties necessary to his work.

Following the June 16, 1981 injury, claimant encountered in when he engaged in strenuous work. He was released from rk in October 1981 by Dr. Miller when lifting continued to ggravate claimant's back problems and effect recurring pain. returned to work in November and was once again released from rk in March 1982 on a complaint of acute back pain. Claimant as unable to return to work and when he consulted Dr. Smith in ay 1982 he was experiencing constant pain in his back and legs. laimant continued on rest and medication under Dr. Smith's care rough October 1982, at which time Dr. Smith gave claimant a ting of 20 percent of whole body impairment. Clearly, claimant as sustained an aggravation to his preexisting back condition s a result of his employment.

As has been stated on numerous occasions a finding of mpairment to the body as a whole found by a medical evaluator oes not equate to industrial disability. This is so as impairment nd disability are not identical terms. Degree of industrial isability can in fact be much different than the degree of mpairment because in the first instance reference is to loss of arning capacity and in the later to anatomical or functional normality or loss. Although loss of function is to be considered nd disability can rarely be found without it, it is not so that industrial disability is proportionally related to a degree impairment of bodily function.

Factors considered in determining industrial disability nclude the employee's medical condition prior to the injury, fter the injury, and present condition; the situs of the njury, its severity and the length of healing period; the work xperience of the employee prior to the injury, after the injury nd potential for rehabilitation; the employee's qualifications ntellectually, emotionally and physically; earnings prior and ubsequent to the injury; and age, education, motivation, and unctional impairment as a result of the injury and inability ecause of the injury to engage in employment for which the mployee is fitted. Loss of earnings caused by a job transfer or reasons related to the injury is also relevant. These are atters which the finder of fact considers collectively in riving at the determination of the degree of industrial isability.

There are no weighting guidelines that are indicated for ach of the factors to be considered. There are no guidelines nich give, for example, age a weighted value of ten percent of otal, education a value of fifteen percent of total, motivation five percent; work experience - thirty percent, etc. Neither s a rating of functional impairment entitled to whatever the egree of impairment that is found to be conclusive that it irectly correlates to that degree of industrial disability to he body as a whole. In other words, there are no formulae nich can be applied and then added up to determine the degree f industrial disability. It therefore becomes necessary for he deputy or commissioner to draw upon prior experience, eneral and specialized knowledge to make the finding with egard to degree of industrial disability. See Birmingham v. irestone Tire & Rubber Company, II Iowa Industrial Commissioner eport 39 (1981); Enstrom v. Iowa Public Services Company, II owa Industrial Commissioner Report 142 (1981); Webb v. Lovejoy onstruction Co., II Iowa Industrial Commissioner Report 430 1981).

Claimant contends on appeal that a 30 percent industrial isability rating is not adequately compensable to his present imitations of employment and earnings. Claimant's restrictions o, in fact, preclude him from the higher paying driving and nloading duties in which he has experience, and the skills he as developed do not readily transfer to more sedentary employment. is vocational test scores suggest, however, that claimant is apable of retraining to enlarge his marketable skills and ncrease his earning capacity. Defendants have aggressively ursued rehabilitation which is to their credit. The possibility f jobs has been offered claimant, but he has been inclined to e restrictively selective in what employment he would perform.

Claimant's employment opportunities have been limited by the slow economy, but such limitations are shared by all workers and are not a factor applicable only to the industrially disabled. Claimant is not entitled to additional compensation benefits because job opportunities in the public generally are temporarily restricted. See Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner's Report 430, 434 (1981) (district court affirmed, supreme court appeal dismissed).

The evidence is sufficiently convincing to support the findings and conclusions of the deputy and the proposed review-reopening decision should be affirmed.

FINDINGS OF FACT

1. Claimant is 48 years old and has a GED.

2. Claimant's previous work experience included farm work, fry cooking, pin setting and delivery work. He has also worked in home improvements and truck driving.

3. Claimant has worked for defendant employer for eight and a half years as a driver.

4. Claimant's duties involve heavy lifting and moving tasks.

5. On June 16, 1981 claimant injured his back while working for defendant employer.

6. Claimant was treated by David Miller, D.C.

7. Claimant was unable to continue his work duties without constant pain in his back and legs.

8. Claimant estimates he can stand for periods of 15-30 minutes and can sit for up to an hour.

9. Claimant's lifting and carrying capacity is 10 pounds frequently and up to 24 pounds occasionally.

10. Claimant has sustained a permanent partial disability as a result of the June 16, 1981 injury.

11. Claimant was given an impairment rating of 20 percent of the body as a whole, 10 percent of which was a result of the industrial injury and 10 percent which was attributed to a previous nonwork-related injury.

12. Claimant's previous injuries have included two back injuries in 1974, a right shoulder injury in 1975, two back injuries in 1977 and additional back injuries in 1978 and 1980. One injury resulted in a spinal laminectomy and discectomy in 1977.

13. Claimant's functional impairment has diminished his earning capacity.

14. Claimant does not want indoor work and does not want to work for minimum wage.

15. Claimant has the potential for vocational retraining.

16. There are jobs claimant could do without additional training.

17. Claimant's industrial disability is 30 percent of the body as a whole.

18. The rate of compensation is $292.48 per week.

CONCLUSIONS OF LAW

Claimant has sustained the burden of proving that his present disability is causally related to his injury of June 16, 1981. Claimant is entitled to permanent partial disability benefits based upon a finding of 30 percent industrial disability.

WHEREFORE, the proposed review-reopening decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay unto claimant one hundred fifty (150) weeks of permanent partial disability benefits at a rate of two hundred ninety-two and 48/100 dollars ($292.48) per week.

That defendants be given credit for amounts previously paid.

That defendants pay interest pursuant to Iowa Code section 85.30 as amended.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

That defendants file a final report at the time this award is paid.

Signed and filed this 28th day of March, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD L. SIGNS, Claimant	
vs.	File No. 532243
L. K. COMSTOCK & CO., Employer,	A P P E A L
and	D E C I S I O N
NATIONAL UNION FIRE INSURANCE CO., Insurance Carrier, Defendants.	

STATEMENT OF THE CASE

Claimant appeals from a proposed decision in a combined proceeding in review-reopening and arbitration wherein claimant was found to have failed to sustain his burden of proof in establishing that he suffered a personal injury which arose out of and in the course of his employment with defendant employer. Claimant was also denied additional permanent partial benefits beyond those already paid by defendant employer for a previous work-related injury.

The record on appeal consists of the transcript of the proceeding which contains the testimony of claimant, Glenese E. Signs, John Kanealy and Roger Marquardt; claimant's exhibits 1 through 37, 39, 40 and 41; defendants' exhibits A through D; and the briefs and filings of all parties on appeal.

ISSUES

Claimant states the issues as follows:

> Claimant is entitled to industrial disability in excess of 17.5 percent for the admitted work injury to his left shoulder causing his left shoulder complaints.
>
> Claimant's right shoulder condition is causally related to the injury of January of 1979 and results in additional industrial disability.
>
> Medical expenses relating to the January 16, 1979 injury to the left shoulder should have been ordered paid.
>
> Mileage relating to the left shoulder should be reimbursed to claimant.
>
> Medical expenses and mileage to be reimbursed relating to the right shoulder injury.

REVIEW OF THE EVIDENCE

The parties stipulate that claimant's weekly compensation rate for healing period benefits is $265 and the applicable rate for permanent partial disability benefits is $244 per week. (Transcript, pages 3-4) The parties agree that claimant has received compensation benefits for the period of January 16, 1979 to March 30, 1980. (Tr., p. 4) The parties further agree to limit the additional disability benefits period at issue from March 22, 1982 onward. Charges for medical services rendered are stipulated to be fair and reasonable, but it is not stipulated such charges are causally related to the principal work injury. (Tr., pp. 5-6)

Claimant was 58 years old at the time of the hearing and has a tenth grade education. (Tr., pp. 15-16) Through his union halls, claimant has attended job-related courses in welding, national electric code, pipe bending, and motor control. (Tr., pp. 16-17) Claimant has received certificates of course completion but does not have a GED. (Tr., p. 17) During the years 1943-1945 claimant served with the U.S. Army Tank Destroyers and then worked for 20 years as a sign hanger. (Tr., p. 18) For the next 18 years claimant worked as an industrial electrician for various contractors through his union hall. (Tr., p. 18) Claimant worked on a full-time basis in jobs that involved pipe bending and installation; cable and wire pulling; and the setting of motors. (Tr., p. 18) Claimant's work classification with the union was initially that of journeyman wireman and, after 1965, journeyman electrician. (Tr., p. 20) Claimant had worked for defendant employer for "a couple of weeks" when he was injured. (Tr., p. 21) On January 16, 1979 claimant was installing conduit when he slipped on sheetmetal and fell. (Tr., pp. 21-22) Claimant was taken to St. Joseph Mercy Hospital in Mason City for an injury to his left shoulder. (Claimant's Exhibit 1) X-rays were taken and showed no evidence of fracture or dislocation of claimant's shoulder, clavicle, or ribs. (Cl. Ex. 40, p. 4) Claimant was diagnosed as having had contusion of the shoulder and possible injury to the muscles and ligaments. (Cl. Ex. 40, p. 4) Claimant's arm was placed in a sling, and he was referred for followup to Darrell E. Fisher, M.D., an orthopedic surgeon. (Cl. Ex. 40, pp. 2-5) Dr. Fisher reported that he examined claimant on January 22, 1979 and found:

> He had some swelling in the area of his left shoulder. He had some obvious contusion and some ecchymosis, E C C H Y M O S I S, which is -- that is he'd had some bleeding under the tissues which had come to the surface, down along the course of his biceps tendon area, and was further examined. He was having pain on any attempted range of motion. ...[I]t was my opinion at that time that his soft tissue injury to his shoulder as a result of the contusion in the fall, perhaps additional twisting or wrenching, certainly a sprain of the muscle and ligament capsule complex, he should avoid any range of motion. He should wear his sling, use some heat to the shoulder, and obviously would be unable to work, including any lifting or shoveling in his home. He was continued on some of the same pain medication, and in addition I started him on an anti-inflammatory medication called Butazolidin to be taken three times a day after meals. (Cl. Ex. 40, pp. 5-6)

Dr. Fisher advised a home therapy plan of heat applications, massage and exercise of the shoulder, utilizing the lifting of 3-5 pound weights with a rope and pulley device. In February of 1979 claimant began additional physical therapy at Mercy Hospital. (Cl. Ex. 40, pp. 6-7) Claimant continued to have pain as he followed this therapy program. An arthrogram was performed, revealing a tear in the capsule of claimant's left shoulder. (Cl. Ex. 40, p. 8) On May 4, 1979, claimant underwent surgery for an open repair of the rotator cuff of the left shoulder. (Cl. Ex. 40, pp. 8-9) Following surgery, a program of home and outpatient physical therapy was again instituted. On March 6, 1980, Dr. Fisher evaluated claimant for disability purposes and determined a 25 percent impairment of the body as a whole. (Cl. Ex. 15) Dr. Fisher released claimant for work involving "light duties" and noted restrictions of "no work reaching to side; no work higher than head; no lifting with injured arm above 25-30 lbs." (Cl. Ex. 14) On May 4, 1981 claimant consulted Dr. Fisher with a complaint of persistent pain in the shoulder. Dr. Fisher determined claimant had full range of motion in the left shoulder but "half the strength on the left side that he had on the right side. Sixty pounds compared to a hundred and twenty." (Cl. Ex. 40, pp. 12-13) Dr. Fisher determined that claimant had a permanent partial physical impairment of 25 percent of his left shoulder or 10 percent of his body as a whole. (Cl. Ex. 40, p. 14) In November of 1981, Dr. Fisher rechecked claimant and again recommended a lifting restriction of 25 pounds. Dr. Fisher recommended that claimant attempt only light work as "he was not capable of carrying out heavy work in electrician or any other capaci (Cl. Ex. 40, p. 15) On March 22, 1982 claimant saw Dr. Fisher in a followup visit and complained of pain in his right shoulder. (Cl. Ex. 40, p. 15) Dr. Fisher found evidence of tenderness in the biceps tendon and crepitation or grinding in the joint between the collar bone and right shoulder. Dr. Fisher recommended hospitalization and further evaluation. (Cl. Ex. 40, p. 16) Surgery was performed on claimant's right shoulder on March 30, 1982 to repair a degenerative tear in the rotator cuff and relocate the eroding biceps tendon. (Cl. Ex. 40, p. 17) Dr. Fisher's opinion was that the right shoulder had not been involved in claimant's January 16, 1979 injury. (Cl. Ex. 40, pp. 19-20) Dr. Fisher attributed the degenerative changes in claimant's right shoulder to the greater stress placed on the right shoulder in claimant's work and other activities following the injury to the left shoulder. (Cl. Ex. 40, p. 20) On September 16, 1982, Dr. Fisher determined impairment as 25 percent of claimant's left shoulder or 15 percent of his whole body and a 50 percent impairment of his right shoulder, which was still in the healing process. (Cl. Ex. 40, pp. 27-28) Dr. Fisher based his findings on factors of range of motion, the ability to rotate and abduct, and the pain caused by attempted movement. (Cl. Ex. 40, p. 30) In terms of claimant's restrictions on activity, Dr. Fisher stated:

> I would suggest that Mr. Signs assume no working position where his hands have to work any higher than his face, and that he not lift weights away from his body with his elbows extended of more than twenty-five pounds at any time. Because with his elbow extended, the forces applied to his shoulder, even when his arm is forward, are miltiplied approximately six times. If he keeps his elbow bent, his hand no higher than his face, he obviously eliminates virtually all overhead work. He will not only remain virtually symptom free, but he will probably not further injure his shoulder or cause -- cause reinjury to either one of the capsular tears that have been repaired. I would also suggest that he avoid any job or function, even -- even dressing himself where he has to reach back and behind to get into any kind of so-called throwing or Statue of Liberty position, including putting his arm in the sleeve of clothing and so forth. This has to be done carefully, because this is the most stressful position of the shoulder capsule, which without saying obviously he has learned to do in a protective manner within the limit of his discomfort. But as far as stress-related activities, be they work, occupational or nonoccupational, I think he would be very safe in carrying out from the other standpoint nearly any form of upper extremity activity within those limits I've given.
>
> ....
>
> I would preclude him from climbing ladders, because of the obvious stresses which would far exceed this ability. And I'm sure it would include his getting into many crawl spaces, trenches, et cetera, that might be required of an electrician or a construction man. But this would be my recommendation orthopedically.
>
> Q. All right. Now, if we exclude the right shoulder problems, and assume for the purpose of this question that he has no right shoulder problems and assume he just has the problems with the left shoulder, would your restrictions be the same?
>
> A. My restrictions would be the same as they were when he went back to work. Basically no lifting over twenty-five pounds with his left shoulder.
>
> Q. No climbing, would that be the same?
>
> A. I think the climbing limitation would be included, since it requires both upper extremities.
>
> Q. And no raising of the left arm?

A. No raising of the left arm with the hand above the level of his head. (Cl. Ex. 40, pp. 33-34, 58)

Claimant reported that he had no injuries involving his houlder prior to the January 16, 1979 fall. (Signs Deposition, . 66) Claimant's prior injuries have included a back injury in 966, a left hand injury in 1967, and a fainting incident in 976. (Signs Dep., pp. 48-50) Claimant has been and is being reated for a cardiovascular condition, visual and hearing roblems and a hernia condition. (Signs Interrogatories #11)

Claimant reported that following the surgery to his left houlder on May 4, 1979, the pain lessened and he had greater ovement capacity. He recuperated and looked for light duty mployment until August of 1980. (Tr., pp. 86-87) At that time e began working for an electrical firm in Minnesota. (Signs ep., pp. 13-14,17) His duties involved lighter work than he ad previously done for defendant employer. (Signs Dep. pp. 5-16) Over the next 15 months, claimant worked for a variety f contractors, doing progressively heavier electrical work. Signs Dep., p. 26) His right shoulder had begun to cause him evere pain. Claimant explained that he couldn't lift with his eft arm so all the heavy lifting was with his right arm. Signs Dep., p. 20) He began to rely on the help of coworkers o do the heavy lifting and pulling duties. (Signs Dep., pp. 9-30) In November of 1981 claimant worked for Sargeant Electric or two days and terminated his employment due to pain in his houlders and ribs. (Signs Dep., pp. 30-31) The surgery to his ight shoulder followed in March of 1982.

Claimant has not returned to work since November 11, 1981. Signs Dep., p. 33) Claimant testified he has not sought urther work because he has constant pain and no strength in his ight shoulder. (Signs Dep., pp. 33-35) Claimant has not been eleased by Dr. Fisher to return to work since the second urgery. (Signs Dep., p. 33) Claimant states he is now able to lo limited activities around his house involving sweeping and eed pulling, but he is not able to vacuum or mow. (Signs Dep., p. 57-58) Claimant has been paid healing period benefits from anuary 16, 1979 through March 30, 1980 based on a 17.5 percent mpairment. (Tr., pp. 5, 185)

Glenese Signs, wife of the claimant, testified that claimant ad sustained no shoulder injuries prior to the January 16, 1979 njury to his left shoulder. (Tr., pp. 91-92) Mrs. Signs estified that claimant can no longer do jobs around the house hat involve reaching out or lifting up. (Tr., p. 101) Mrs. Signs tated that an unpaid bill from Natural Foods in the amount of 157.88 was for Stress Tabs which were prescribed by Dr. Fisher fter claimant's left shoulder injury. She stated claimant ontinued to take the vitamins for both shoulders in March 1982. Tr., p. 103) Unpaid bills in the amount of $1500, $799 and 253 were for hospital and physician charges incurred by the ight shoulder surgery. Additional charges of $10.40 and $222 ere also the result of the right shoulder injury. (Tr., pp. 04-105) Mrs. Signs stated that when claimant consulted Dr. isher after March 22, 1982, the doctor examined the left as ell as the right shoulder. (Tr., p. 108)

John Kanealy, appearing under subpoena, testified that he orked with claimant as a tool partner in June, July and August f 1981. (Tr., pp. 115-116) Mr. Kanealy stated that claimant id his share of the work and made occasional complaints about is right shoulder. (Tr., pp. 116-118) Mr. Kanealy testified hat after he became foreman, he was not aware that claimant was aving trouble doing his work duties and considered claimant a good worker. (Tr., pp. 120-121) Mr. Kanealy stated that union cale for electricians in Des Moines in 1981 was around $14.96. he work he performed with claimant primarily involved light to ormal duties with some heavy work. (Tr., pp. 122-128) The uties involved reaching to the side, overhead and lifting in xcess of 25-50 pounds. (Tr., p. 142) Mr. Kanealy stated he ould help claimant with heavier tasks. (Tr., p. 129) After he ecame a foreman in August, Mr. Kanealy no longer worked with laimant and didn't know whether claimant required work assistance. Tr., p. 133) Mr. Kanealy stated that in the present job market omplaints from workers to their foreman could be bad for their job. (Tr., p. 136) Mr. Kanealy testified that claimant was a killed and knowledgeable electrician. (Tr., pp. 139-140)

Roger Marquardt, administrator for North Central Rehabilitation Service, testified that the skills of an industrial electrician re transferable to light work areas such as electronics assembly and inspection. Both job areas would require demonstration training but no further vocational rehabilitation. (Tr., pp. 146, 155-158) Mr. Marquardt stated that age is not a deterrant if the worker stays within his general vocational field. (Tr., p. 158) Mr. Marquardt testified that lighter types of work in the electrical field paid a statewide average of $9.71 an hour in 1981. (Tr., pp. 161-162) Light work in unskilled areas at minimum wage would also be a possibility for claimant. (Tr., pp. 159-160) Mr. Marquardt stated that retraining for a new field would not be a realistic solution for claimant because of claimant's age and educational background. (Tr., p. 163) Mr. Marquardt stated that none of the vocational projections for claimant included factors of claimant's progressive visual impairment or other medical conditions. (Tr., pp. 171-173) Mr. Marquardt stated he did not know what the present need of employers was for light electrical work. (Tr., p. 178)

Thomas Carlstrom, M.D., a neurosurgeon, evaluated claimant on July 20, 1982. (Claimant's Ex. 27) Dr. Carlstrom determined an eight percent impairment of the left shoulder, a four to six percent impairment of the right shoulder and a nine percent total disability of the body as a whole. (Defendants' Ex. D, pp. 7-8) Dr. Carlstrom stated his opinion that the injury to the right shoulder was caused by overuse and not by the fall of January 1979. (Def. Ex. D, pp. 11-12)

Harold Baysinger, a counselor for Rehabilitation Education Services of the Iowa Department of Public Instruction testified that claimant had been referred to his office by social security on May 12, 1980. (Cl. Ex. 41, pp. 3-4) Claimant's intake interview established his eligibility for services but claimant returned to work before services were provided. (Cl. Ex. 41, pp. 4-5) In December 1982, claimant sought rehabilitation services and consulted Mr. Baysinger. (Cl. Ex. 41, pp. 3, 6) Mr. Baysinger stated that claimant's employment prospects were dim because of claimant's vision and other physical problems. (Cl. Ex. 41, pp. 10-11) Mr. Baysinger testified that if only shoulder problems were considered, claimant could work in assembly, house wiring and electrical supervision. (Cl. Ex. 41, p. 11) Electrical maintenance and repair were areas claimant could retrain. (Cl. Ex. 41, p. 13) Mr. Baysinger stated that job placement was presently slow. (Cl. Ex. 41, p. 14) Given claimant's motion and lifting restrictions, Mr. Baysinger testified there was no employment in North Central Iowa available for claimant at his present skills. (Cl. Ex. 41, p. 24)

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on January 16, 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).

An employee is entitled to compensation for any and all personal injuries which arise out of and in the course of the employment. Section 85.3(1).

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 16, 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).

A disability to the shoulder is viewed as a disability to the body as a whole. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949).

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, 902 (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, 257 (1963).

Where passage of time and subsequent return to work reveal the disability to be greater than originally determined, the industrial commissioner has the authority to change the extent of permanent partial disability. Meyers v. Holiday Inn of Cedar Falls, Iowa, Iowa App., 272 N.W.2d 24 (1978).

ANALYSIS

Claimant sustained a work-related injury to his left shoulder on January 16, 1979. At issue is the extent of claimant's subsequent disability, and whether there is a causal relationship between the left shoulder injury and the injury which followed to the right shoulder.

Claimant's treating physician, Dr. Fisher, determined on March 6, 1980 that on the basis of the left shoulder injury, claimant had a 25 percent impairment of the body as a whole. This figure was revised by Dr. Fisher on May 4, 1981, when he determined that claimant had a permanent partial physical impairment of 10 percent of the body as a whole. On the basis of the two functional impairment ratings, defendant insurer averaged the difference and paid claimant on the basis of a 17 1/2 percent functional impairment.

As has been stated on numerous 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. See Birmingham v. Firestone Tire & Rubber Company, II Iowa Industrial Commissioner Report 39 (1981); Enstrom v. Iowa Public Services Company, II Iowa Industrial Commissioner Report 142 (1981); Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981).

Claimant is a 58 year old man with a tenth grade education. He has worked for most of his adult life as a sign hanger and later, as an industrial electrician. At the time of his industrial injury of January 16, 1979, he was employed full time as a skilled journeyman electrician. There is no indication in the record that he was in any way restricted in his ability to perform the heavy lifting and pulling duties necessary to do his job. Following the January 1979 injury and subsequent surgical repair, claimant was released for light duty work only with restrictions on lifting and overhead work. Claimant failed to secure employment within these restrictions and returned to electrical construction work. Claimant's left shoulder continued to trouble him and on September 16, 1982 Dr. Fisher redetermined an impairment of 25 percent of the left shoulder or 15 percent of the body as a whole. Claimant was restricted from lifting more than 25 pounds, from climbing, from overhead work, and from personal activities that would put stress on the shoulder capsule.

Claimant's attempts to favor his left side while working were undoubtedly a factor in his later problems with his right shoulder. But focusing on the effects of his industrial injury to the left shoulder, and absent consideration of claimant's other medical problems, claimant is clearly unable to continue employment in the electrical construction work in which he is skilled. Jobs involving lighter duties using claimant's electrical knowledge for assembly or inspection, if available, involve some retraining, and unskilled sedentary work represents significantly diminished earnings potential.

Accepting the treating physician's final assessment of claimant's whole body impairment as 15 percent, and considering claimant's age, education, work history and inability to engage in employment for which he is trained, an industrial disability of 25 percent is determined.

With regard to claimant's second issue, there is no evidence in the record that claimant injured his right shoulder while in the employ of defendant employer. The stress on and ensuing injury of the right shoulder occurred in the post-August, 1980 work periods when claimant was employed elsewhere. Claimant is, therefore, not entitled to right shoulder disability benefits from defendant employer.

Accordingly, defendants are not liable for medical costs and mileage incurred in the treatment of the right shoulder. Absent evidence to the contrary, the radiology, medication and surgical expenses submitted for the period of November 1981 through July 1982 must be attributed to the right shoulder condition and are not chargeable to defendants.

Pursuant to section 85.39 claimant may recover transportation costs incurred in treatment of the industrial injury to claimant's left shoulder.

FINDINGS OF FACT

1. Claimant is 58 years old and has a tenth grade education.

2. Claimant's work history includes 20 years as a sign hanger and 18 years as an industrial electrician.

3. Claimant obtained work with contractors through his union hall.

4. Claimant's work duties involved pipe bending and installation; cable and wire pulling; and the setting of motors.

5. Claimant was working for defendant employer when he injured his left shoulder on January 16, 1979.

6. Surgery was performed to repair a tear in the capsule of claimant's left shoulder.

7. Claimant underwent a program of home and outpatient physical therapy following the surgery.

8. Claimant was released to work at light duties by his treating physician on March 6, 1980.

9. Claimant's work restrictions included no reaching to the side and overhead and no lifting with the injured arm above 25-30 pounds.

10. Claimant was paid disability benefits based on a 17.5 percent functional disability.

11. Claimant was unable to find employment within these restrictions and returned to electrical construction work.

12. Claimant was unable to perform his work duties without pain to his left shoulder and undue stress on his right shoulder.

13. The stress resulted in injury to the right shoulder.

14. Such injury occurred while claimant was employed by others.

15. Claimant is unable to continue working in the electrical construction in which he is skilled and has work experience.

16. There is no employment available to claimant that will utilize his training and allow for his motion and lifting restrictions.

17. Claimant would have to have vocational retraining or work at minimum wage, unskilled employment.

18. Claimant's age and educational background are not conducive to successful retraining.

19. Claimant's earning potential has been significantly diminished.

20. Claimant has a 15 percent permanent partial impairment of the body as a whole.

21. Claimant has an industrial disability of 25 percent as a result of his left shoulder injury.

22. Claimant is entitled to additional permanent partial disability benefits for the industrial injury to his left shoulder.

23. Claimant is entitled to reimbursement of transportation costs incurred in treatment of the left shoulder injury.

24. Claimant's rate of compensation benefits is $244 per week.

CONCLUSIONS OF LAW

Claimant is entitled to additional permanent partial disability benefits based upon a finding of an industrial disability of 25 percent as a result of a work-related injury sustained to his left shoulder on January 16, 1979.

Claimant has failed to sustain his burden of proof that his right shoulder injury arose out of and in the course of his employment with defendant employer.

WHEREFORE, the proposed decision of the deputy is reversed in part and affirmed in part.

THEREFORE, it is ordered:

That defendants pay unto claimant an additional thirty-seven and one-half (37 1/2) weeks of permanent partial disability at a rate of two hundred forty-four dollars ($244) per week. The record notes an overpayment of $610 dollars to claimant by defendant. This amount will be credited to the additional compensation due.

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendant reimburse claimant for transportation expenses incurred with medical treatment up to and including March 22, 1980:

433 miles (323 + 110)	at $.15 a mile	($64.95)
70 miles	at .18 a mile	(12.60)
300 miles	at .20 a mile	(60.00)
803 miles	Total	$137.55 due

That defendants pay costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

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

Signed and filed this 30th day of April, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STEVE SMID,	:	
Claimant,	:	
vs.	:	
	:	File No. 680009
YELLOW CAB CO. and FRANK LESTER,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
CARRIERS INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Defendant Yellow Cab Company and its insurer appeal from a proposed arbitration decision wherein claimant was awarded healing period and permanent disability benefits. Medical costs were also awarded. The record on appeal consists of the transcript of the proceeding which contains the testimony of claimant, Frank Lester, Don Anderson, Barbara Joanne Byers, and Mark Grove; claimant's exhibits 1 through 8; defendants' exhibits A through C; and the briefs and filings of all parties on appeal.

ISSUES

Defendant Yellow Cab Company states the issues as:

1. At the time of his injury, was the Claimant an "employee" of Yellow Cab Co. or of Frank Lester? If so, by which respondent was he "employed"?

2. If Claimant was an "employee", what was the rate of compensation applicable to his injury?

REVIEW OF THE EVIDENCE

Claimant is a 1970 high school graduate whose previous work experience has included managing a shoe store, general labor and concert promotion. At the time of the hearing he was single and paid $65 a month support for a daughter. He does not claim her as a dependant. (Transcript, pages 7-8) For a period of time in 1977 - 1978, claimant owned his own cab and drove for Capitol Cab Co. When he lost his cab, claimant worked for an insurance company and then bought another cab and returned to driving for Capitol Cab Co. He had a written contract both times which called for payment of a weekly fee to the cab company for a bond and the use of their dispatch service. (Claimant's Exhibit 7, pp. 9-13) He maintained the cab at his expense and set his own hours of work. (Cl. Ex. 7, pp. 11-14) Claimant's second cab was repossessed in June of 1980, and he obtained work as a relief driver for another cab owner by placing a notice on the bulletin board of Capitol Cab's office. He was called by the owner, Maxine Baird, and began working under an oral agreement. (Tr., pp. 11, 14; Cl. Ex. 7, p. 21) Claimant stated he did not have to go through a screening process with Capitol as he was known to them. He called in on the cab radio giving his name and cab number and began driving. (Cl. Ex. 7; pp. 21-22) Claimant would work his shift, drive the cab back to the owner's house, and turn the bookings over to the owner. He would either receive his pay at that time or by check at the end of the week. (Tr., pp. 11-12) His pay was half the earnings from his 12-hour shift less a nickel a mile for gasoline. (Tr., pp. 12-14) Claimant stated he was terminated when the owner's son went back to driving. He again placed a notice of his availability to drive, along with his name and telephone number, in the offices of Capitol Cab and of Yellow Cab. (Tr., pp. 13-14) Claimant testified he was called by Frank Lester who said he had one shift open, and arrangements were made for claimant to go to work on Wednesday night. (Cl. Ex. 7, p. 32; Tr., p. 15) Claimant was told to see "Mark" at the Yellow Cab office to be approved. Claimant explained this meant he had to show his driver's license, city cab badge and a copy of his driving record. (Tr., p. 15-16) Claimant testified he went to the office on East Grand and told the woman in the office why he was there. Claimant was told Mark was on the phone. Claimant stated he waited approximately 25 minutes and asked the woman to check again. Claimant testified she left the office and returned to tell him to go to work that night and call in his name to the dispatcher. (Tr., pp. 17) That evening Lester's day driver picked claimant up at his home and turned the cab over to him. Claimant then called the Yellow Cab dispatcher and reported his name, cab number, and zone location, and was dispatched on a trip. (Tr., pp.20-22, 197) Claimant stated that the cab he was driving had a Yellow Cab dome and side markings, a meter and 2-way radio. (Tr., pp. 20-21) A map in the cab divided the city into working zones which were used to regulate territory priorities for drivers. (Tr., pp. 23-24) Claimant explained the dispatch service was the only way to get business other than waiting in line at the airport or bus station. (Tr., pp. 24-25) Claimant stated that at Capitol Cab if a driver swore at a dispatcher or turned down a dispatched trip, he received no more trips for that day. (Tr., pp. 25-26)

On the evening of August 5, 1981 claimant took approximately eight fares by dispatch. (Tr., p. 26) He had been told by the day driver to fill up the gas tank when his shift ended and split the cost with Lester. During the evening, claimant found the oil to be low and called Lester. Claimant testified Lester told him to put oil in and asked claimant how the work was going. (Tr., pp. 26-28) Claimant recalled that his second to last trip that night was a group of nursing students from Broadlawns Hospital who had a charge account with Yellow Cab. Claimant stated the practice was to call the charge into the dispatcher and the amount would be credited to Lester's cab number. (Tr., pp. 29-30)

On claimant's next dispatched trip he was sent to an Oakridge address, and a man identifying himself as the fare got into the cab and gave an address. While claimant was driving, the passenger produced a knife. He demanded and received claimant's money and then stabbed claimant in the arm and chest. (Tr., pp. 35-38) The assailant got into a waiting car and left. Claimant called the dispatcher and was taken by ambulance to Mercy Hospital. (Tr., pp. 38-39) Claimant underwent surgical repair of the stab wounds and remained in the hospital until August 8, 1981. He was treated at the hospital by J. A. Olivencia, M.D., and David Friedgood, D.O., a neurologist. (Cl. Ex. 2; Smid Deposition Ex. 2) Claimant was released to return to work on September 2, 1981. (Cl. Ex. 2) He later consulted Thomas Carlstrom, M.D., a neurologist, who reported a permanent sensory loss of the upper right arm:

> I saw Steven Smid on the 12th of August, 1982, and again on the 26th of August. As you will recall he was stabbed in the right arm and chest early in August of 1981 with immediate loss of sensation in his right arm distal to the stab wound. The sensation has not returned. He has not had symptoms of motor dysfunction, and the chest wound healed without incident.
>
> ....
>
> I do believe he has suffered loss of the medial antebrachial cutaneous nerve on the right. Most likely he will experience abnormal sensory symptoms in that right upper extremity for the rest of his life. These symptoms should be mild and well tolerated. I do not recommend any further diagnostic procedures nor any therapeutic measures. The AMA guide to physical disability awards a 5% disability of the upper extremity when there is a loss of the medial antebrachial cutaneous nerve. There should be, however, no significant disability regarding motor function, as the nerve does not innervate any muscles and the sensory supply is of a rather unimportant portion of the upper extremity. (Cl. Ex. 1)

Claimant testified that his arm gets sore and is not as strong as it once was, but it is functional. He received no payment for the August 5, 1981 driving and did not work again until November 1981 at which time he assisted his father in a cleaning business. (Tr., pp. 42-44) He has been employed as a salesman and commodity broker since February of 1982. (Tr., pp. 44-45) Claimant estimates he took in $44-45 in cash fares and the $4 charge fare plus $1.50 in tips between 6:00 and 9:30 the evening of August 5, 1981. (Tr., pp. 80-81) Claimant's understanding was the shift earnings would be split evenly with Frank Lester, and claimant would keep all tips. (Tr., p. 90) Claimant stated he believed he was working for Yellow Cab as they had to approve him as a driver and could have kept him from working for them. (Tr., p. 92) Claimant shows himself as self-employed on his tax statements. (Tr., p. 93)

Frank Lester testified that he was the owner of the cab and had a man who drove it during the day. He does not drive it himself because of his accident record. (Tr., p. 96) He confirmed that his cab said "Yellow Cab" on the side. The dome light, meter and 2-way radio are owned by Yellow Cab Co. (Tr., pp. 97-98) He does not carry workers' compensation insurance. Mr. Lester testified that claimant called him to lease the cab for the one night. (Tr., pp. 100, 107-108) Mr. Lester told him he would have to take his chauffeur's license, driving record and badge to Mark Grove at Yellow Cab. (Tr., p. 106) Mr. Lester stated that he paid Yellow Cab a lease fee of $153 weekly for liability insurance and dispatch service. (Tr., p. 102) Yellow Cab also receives three percent on charge fares. (Tr., p. 112) Mr. Lester confirmed that the financial arrangement with claimant would be to pay the gas from the earnings and then split the remainder. (Tr., p. 111)

Don Anderson testified that he drove for Frank Lester in the summer of 1981. He estimated that he made approximately $50 on the night shift in gross fares and netted about $20 for a 12-hour shift. (Tr., pp. 121-123) Mr. Anderson stated that as an owner-operator he works under the authority of Yellow Cab (Tr., p. 120)

Barbara Byers testified that she worked in the office of Yellow Cab Co. as a cashier in August of 1981. (Tr., p. 127-129) She remembered talking to claimant on August 5, 1981, but denied telling him he could go ahead and drive. (Tr., p. 131)

Mark Grove, operations manager of Yellow Cab Co., testified that in August of 1981 all Yellow Cabs were owned by owner-operators. (Tr., 165-167) Yellow Cab operates under a Certificate of Public Convenience issued by the City of Des Moines. The dispatch service is licensed as station KAA505 by the Federal Communications Commission. (Tr., pp. 167-168) The cab company provides liability insurance to independent operators under a requirement of the City Code. Mr. Grove testified that operators are not required to make use of the dispatch service. (Tr., pp. 170-176) Rates on the meters are approved by the City Council. (Tr., p. 176-177) Mr. Grove stated drivers needed approval from Yellow Cab because of insurance standards and a city ordinance that requires the cab company to report the names and addresses of all drivers. (Tr., pp 179-180) Mr. Grove denied giving Ms. Byers authority to approve claimant as a driver. (Tr., p. 183) He stated that Yellow Cab does not carry workers' compensation insurance covering owner-operators because they are independent contractors, not employees. (Tr., p. 184)

APPLICABLE LAW

The workers' Compensation Act defines a "worker" or "employee" as a "...person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer, every executive officer elected or appointed and empowered under and in accordance with the charter and bylaws of a corporation, including a person holding an official position, or standing in a representative capacity of the employer...." Code of Iowa, section 85.61(2).

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

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

Section 85.18, Code of Iowa, states: "No contract, rule, or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this chapter except as herein provided." The Iowa Supreme Court has further stated that "the law looks to the substance and not the form of the contract to determine the relationship" of the parties. Sanford v. Goodridge, 234 Iowa 1036, 1042, 13 N.W.2d 40, 43 (1944)

The factors by which to determine whether an employer-employee relationship exists are (1) the right of selection, or to employ at will; (2) responsibility for the payment of wages by the employer; (3) the right to discharge or terminate the relationship; (4) the right to control the work; and (5) is the party sought to be held as the employer the responsible authority in charge of the work or for whose benefit the work is performed. In addition to the five above-named elements is the overriding element of the intention of the parties as to the relationship they are creating. Henderson v. Jennie Edmundson Hospital, 178 N.W.2d 429, 431 (1970). Standing alone, this intention of the parties as to the relationship created may be somewhat misleading. However, community custom in thinking that a kind of service is rendered by employees is of importance. Nelson v. Cities Service Oil Co., 259 Iowa 1209, 1216, 146 N.W.2d 261, 265 (1967).

An independent contractor allegation is an affirmative defense which must be established by the employer by a preponderance of the evidence. Daggett v. Nebraska-Eastern Exp., Inc., 252 Iowa 341, 107 N.W.2d 102 (1961).

In case of doubt, the Workers' Compensation Act is liberally construed to extend its beneficent purpose to every employee who can fairly be brought within it. Usgaard v. Silvercrest Golf Club, 256 Iowa 453, 459, 127 N.W. 2d 636, 639 (1964). In Cowles v. J. C. Mardis Co., 192 Iowa 890, 919, 181 N.W. 872, 884 (1921), the court acknowledged the potential dual character or relation which may arise from varying degrees of control in different portions or phases of the work; that is, "that, as to some parts of the work, a party may be contractor, and yet be a mere agent or employee, as to other work."

To put the employee outside the Workers' Compensation Act, it must appear that the employment was both purely casual and not for the purpose of the employer's trade or business. Gardner v. Trustees of M. E. Church, 217 Iowa 1390, 244 N.W. 667, 250 N.W. 740 (1933).

The word "causal" has been construed to mean occasional, irregular or incidental, as opposed to stated or regular. An employment is not rendered causal because it is not for any specified length of time, or because the injury occurs shortly after the employee begins work. Gardner, 217 Iowa 1390, 244 N.W. 667.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on August 5, 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 August 5, 1981 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).

Section 85.34(1), Code of Iowa, provides for the payment of a statutory healing period beginning on the date of injury until claimant has returned to work or competent medical evidence indicates that recuperation has been accomplished.

Section 85.34(2)(m), Code of Iowa, provides for 250 weeks of permanent partial disability compensation for the loss of an arm.

Section 85.36(8), Code of Iowa, allows the commissioner to ascertain the usual earnings for similar services in obtaining gross weekly wage.

Section 85.37, Code of Iowa, provides for the payment of medical expenses.

ANALYSIS

Defendants contend claimant was not an employee of Yellow Cab because there was no intention by the parties to form an employer-employee relationship. They cite and support the language of the owner/driver agreement between Frank Lester and Yellow Cab in which the owner-operator is termed an independent contractor.

The application of a legal name and form does not, of itself, establish a legal relationship, any more than can claimant's intentions be presumed from the wording of an agreement to which he was not a party. In examining the question of whether an employment relationship existed, it is necessary to look beyond the terms applied to the facts of the relationship at the time of the injury.

Claimant was driving a cab which bore the markings of the Yellow Cab Company. The equipment he used was provided by Yellow Cab Co. The hours of his shift and the rates he charged were determined for him by Yellow Cab Co. The company had the authority to approve him as a driver, and in the mind of claimant, would have the authority to sever the driving relationship. Claimant has testified that he considered himself to be working for Yellow Cab and such belief governed the manner in which he performed his work duties. He felt obliged to cooperate with the dispatcher, observe the priority system of the Yellow Cab zones, and respond promptly to the trips he received. Although he received no wages from defendant, his sole earnings at the time of the injury had been dependent upon his bookings through the dispatcher.

Applying the weight of the evidence to the factors outlined by the court in Henderson, 178 N.W.2d 429, establishes that an employer-employee relationship existed between Yellow Cab Company and claimant at the time of injury on August 5, 1981. Defendant Yellow Cab had the right of selection of claimant through the approval process and could terminate the relationship if claimant's work conduct or driving record proved unsatisfactory. Yellow Cab was in charge of the work, exercising control of claimant's movements through the city, and subsequent earnings, through a regulated system of zones and dispatch. Since it is Yellow Cab's telephone number that is advertized for taxi service, and since cabs bearing Yellow Cab markings answer the calls and provide the service, the public may reasonably assume that their drivers are Yellow Cab employees and would look to the company for satisfaction of any problem encountered in the taxi service.

With regard to the injury itself, the record reveals that on the evening of August 5, 1981, claimant was dispatched by Yellow Cab to an Oakridge address. Claimant picked up a man who identified himself as the intended fare, and it was while claimant was transporting the passenger that he was robbed and stabbed. Substantial evidence supports the deputy's finding that claimant was performing duties which arose out of and in the course of his employment at the time of injury.

Having found that claimant was an employee of defendant Yellow Cab on August 5, 1981 and that the injury was work-related, the deputy determined a rate of compensation of $99.25 per week. That determination is hereby accepted as correct. Medical costs incurred in the treatment of claimant's work-related injury are chargeable to defendants.

FINDINGS OF FACT

1. Claimant has previously worked as a relief driver and as an owner-operator of taxi cabs.

2. In August of 1981 claimant agreed to drive a cab for Frank Lester, an owner operator for Yellow Cab Company.

3. Yellow Cab Company had a procedure for approving all new drivers.

4. Claimant began driving on the evening of August 5, 1981.

5. Claimant's taxi had Yellow Cab Company markings and equipment.

6. Claimant reported his name, cab number and location to the Yellow Cab Company dispatcher when he began work.

7. Claimant was dispatched by Yellow Cab Company to a number of addresses during the evening.

8. On claimant's last trip, he was sent to an Oakridge address. There, claimant picked up a man who identified himself as the intended passenger.

9. While transporting the passenger, claimant was robbed and stabbed in the arm and chest.

10. Claimant was hospitalized and underwent surgical repair of his injuries.

11. Claimant was released to return to work on September 2, 1981.

12. Claimant's doctor determined a five percent impairment of the upper right extremity as a result of the August 5, 1981 injury.

13. Claimant's work as a driver placed him under the authority of Yellow Cab Co.

14. Yellow Cab Company controlled claimant's work activities through its dispatch service.

15. Claimant had an employment relationship with Yellow Cab on August 5, 1981.

16. Claimant sustained a work-related injury on August 5, 1981.

17. Claimant incurred medical expenses as a result of the August 5, 1981 injury.

18. Claimant is entitled to permanent partial disability benefits based on a five percent impairment of the right arm.

19. Claimant's rate of compensation is $99.25 per week.

CONCLUSION OF LAW

Claimant has sustained the burden of proving that he was an employee of Yellow Cab Company on August 5, 1981, and that claimant was performing duties which arose out of and in the course of his employment at the time he was injured.

WHEREFORE, the proposed decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant Yellow Cab Company shall pay claimant four (4) weeks of healing period benefits at the rate of ninty-nine and 25/100 dollars ($99.25) per week

That defendant Yellow Cab Company shall pay claimant twelve and one-half (12 1/2) weeks of permanent partial disability benefits at the rate of $99.25 per week.

That defendant Yellow Cab Company shall pay the following medical costs:

Mercy Hospital	$ 483.71
Dr. Olivencia	465.00
Neuro Associates	138.00
Total	$1,086.71

Defendant Yellow Cab Company is to file an employer's first report of injury and a final report upon paymant of this award.

Interest is to accrue pursuant to section 85.30, Code of Iowa, from the date payments become due.

Costs are taxed to defendant Yellow Cab Company.

Signed and filed this 29th day of June, 1984.

Appealed to District Court;
Pending

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RTHUR LOUIS SMITH,
Claimant,
s.
. C. PENNEY,
Employer,
nd
HE TRAVELERS INSURANCE OMPANY,
Insurance Carrier,
Defendants.

FILE NO. 392440
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 Arthur ouis Smith, claimant, against J. C. Penney, employer, and The ravelers Insurance Company, insurance carrier, for the recovery f further benefits as the result of an injury on October 15, 972. The case was considered fully submitted upon receipt of a tipulation of facts in lieu of hearing on August 12, 1983.

The record consists of the stipulation of facts.

ISSUES

The issue presented by the parties at the time of the re-hearing and the hearing is whether claimant is entitled to ny further 85.27 benefits.

FACTS PRESENTED

Although claimant originally brought this action for permanent isability and section 85.27 benefits it has been previously uled that claimant is not entitled to any further weekly enefits because of a statute of limitations. Claimant and efendants filed a stipulation which contains the following:

6. Pursuant to the November 16, 1982 order of Deputy Commissioner Lee M. Jackwig, counsel for the Claimant served on the Defendants bills incurred by the Claimant as a result of the alleged subject injury. The said bills, copies of which are attached hereto, are as follows:

Exhibit A - Waterloo Surgical and Medical Group (10-17-72 to 3-15-73) . . $ 736.50

Exhibit B - Waterloo Surgical and Medical Group (6-2-73 to 6-18-73 plus carryover balance of $13.00 for treatment 5-31-73 and 6-1-73) . . . 97.00

7. That the bills identified in paragraph 6 herein have been paid by the Defendant Travelers Insurance Company as is shown on the face of each bill and also as evidenced by phytocopies [sic] of the following drafts issued by the Travelers which are attached hereto as follows:

Exhibit C - Travelers Draft No. 07284108 dated 3-29-73 in the amount of $736.50 payable to Waterloo Surgical & Medical Group.

Exhibit D - Travelers Draft No. 07285224 dated 8-31-73 in the amount of $97.00 payable to Waterloo Surgical & Medical Group.

8. In view of the fact that the medical bills submitted by the Claimant to the Defendants have been paid there remains no justiciable issue between and among the parties in the pending action.

APPLICABLE LAW

Section 85.27 states:

The employer, with notice or knowledge of injury, shall furnish reasonable surgical, medical, osteopathic, chiropractic, podiatrial, nursing and hospital services and supplies therefor. The employer shall also furnish reasonable and necessary crutches, artificial members and appliances but shall not be required to furnish more than one permanent prosthetic device. The total amount which may be allowed for medical, surgical, and hospital services and supplies, services of special nurses, one set of prosthetic devices, and ambulance charges, shall be unlimited. However, if the aggregate thereof exceeds seventy-five hundred dollars, application for the allowance of such additional amounts shall be made to the commissioner by the claimant, and the commissioner may, upon reasonable proof being furnished of real necessity therefor, allow and order payment for additional surgical, medical, osteopathic, chiropractic, podiatrial, nursing and hospital services and supplies, and no statutory period of limitation shall be applicable thereto.

Charges believed to be excessive or unnecessary may be referred to the industrial commissioner for determination, and the commissioner may, in connection therewith, utilize the procedures provided in sections 86.38 and 86.39.

ANALYSIS

Not only does it appear from the stipulation that claimant's medical bills have in fact been paid by defendants, the stipulation also indicates that claimant admits there remains no justiciable issue between and among the parties. Claimant should have filed a dismissal under such a set of circumstances. When the parties agree that nothing remains to be decided and claimant is not due anything, the undersigned can only enter an order in defendants' favor and dismiss the action.

FINDING OF FACTS AND CONCLUSIONS OF LAW

WHEREFORE, based on the principals of law previously stated and the stipulation entered into by the parties the following finding of facts and conclusions of law are made.

Finding 1. All of claimant's medical bills have been paid by defendant.

Finding 2. Claimant has no unpaid medical bills.

Conclusion A. Claimant has failed to prove he is entitled to any further medical benefits.

THEREFORE, claimant is to take nothing as a result of this action.

Claimant is to pay any costs which may have arisen because of this motion.

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

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BARBARA JEAN SMITH,
Claimant,
vs.
OWENS BRUSH COMPANY,
Employer,
and
EMPLOYERS INSURANCE OF WAUSAU,
Insurance Carrier,
Defendants.

File No. 532867
A P P E A L
D E C I S I O N

By order of the industrial commissioner filed August 24, 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 testimony of the hearing; the deposition of Irwin K. Carson, M.D.; claimant's exhibits 1 through 8, inclusive; and defendants' exhibits A, B, C, D, F, G, H, I, J, K, L, M, N and O, all of which evidence was considered in reaching this final agency decision. The deposition of John S. Koch, M.D., was marked as exhibit D.

The result of this final agency will be the same as that reached by the hearing deputy.

EVIDENCE

The record shows claimant had some four incidents of lower back problems in May 1977, August 1977, January 31, 1978 and July 1978. However the hospital records indicate that she had fully recovered from the July 1978 problem and, presumably, had recovered from the problems prior to that time.

On December 22, 1978 she sustained an injury at work while lifting some trays or cartons of toothbrushes. On December 27, 1978 she visit W. J. Tegler, M.D., who detected "disc symptoms." (Claimant's exhibit 1-1) Her problems continued, and Dr. Tegler recommended claimant see an orthopedic surgeon. Meanwhile, in the middle of February 1979, claimant hurt her knee while doing some flexion exercises and saw an orthopedist at the University Hospitals in Iowa City, Dr. Sprague. He diagnosed a lower lumbar sprain due to the leg raising exercises. (Claimant's exhibit 1-5) On March 12, 1979, x-ray studies showed an impression of degenerative joint disease of the lumbar spine and minimal anterior wedging at L3 suggestive of an old injury.

While seeing the medical doctors, claimant also saw a doctor of chiropractic, G. O. Siebert who diagnosed severe neuritis and neuralgia in the lower lumbar region.

Claimant went to the Mayo Clinic in April 1979. In two reports, Louis Letendre, M.D., in the Department of Hematology and Internal Medicine and Medical Oncology, stated that there was no objective evidence of disc disease and that Kenneth A. Johnson, M.D., of Mayo's Orthopedic Department opined that the back and buttock pain were out of proportion and likewise did not feel there was degenerative disc disease. However, just prior to that examination at the Mayo Clinic, Dr. Tegler on April 4, 1979 had diagnosed "[r]ather severe degenerative osteoarthritis low back with disc symptom" (claimant's exhibit 1-7) and on July 26, 1979, claimant was at the emergency room at University Hospitals in Iowa City where Dr. Callaghan, a University Hospitals orthopedic surgeon, diagnosed a possible L5-S1 retrolisthesis.

On September 21, 1979 she was examined by Bruce L. Sprague, M.D., an orthopedic surgeon, who diagnosed low back pain of a primarily ligamentous nature with some mild degenerative changes.

In October 1979, claimant was seen by Edward Dykstra, M.D., an orthopedic surgeon, who referred claimant to R. F. Neiman, M.D., a neurologist. Dr. Neiman recommended a myelogram which stated there was "a slight suggestive findings [sic] for a central herniated disc, though conformed [sic] by additional views." (Claimant's exhibit 1-16)

On March 31, 1980, claimant had a bone scan which was basically normal. On May 7, 1980 claimant was back in the hospital with back pain and at this time, Dr. Neiman suggested a possible ruptured disc (claimant's exhibit 1-18) EMG studies by Dr. Neiman of September 11, 1980 stated: "This is an abnormal study compatible with an L5 radiculopathy. This generally suggests either and L4-5 disc 80% of the time or a lateral disc at L5-S1. Clinical correlation is advised." (Claimant's exhibit 1-23)

Dr. Lehmann apparently contemplated surgery but received the following telegram from the insurance carrier which stated, in part:

> We understand you are to see Mrs. Smith on 1 16 81 at 1:15 P.M. and she informs us you plan to do disc surgery. Doctor E. A. Dykstra has dismissed and rated this individual and we are not in a position to authorize surgery until such time as we have an opportunity to review your findings and recommendations for treatment. She has seen numerous physicians since her original injury in December 2, 1978 [sic] and has been receiving weekly compensation. (Claimant's exhibit 4)

Dr. Lehmann did not operate. His examination revealed that claimant had a possible herniated disc or a possible L5-S1 facet joint arthropathy. (Claimant's exhibit 1-25) In fact, Dr. Lehmann stated that he did not recommend surgery and said: "We do feel that inasmuch as the patient was well prior to the alleged injury in December of 1978, that she has suffered a permanent impairment as a result of that injury" estimated at 10 percent of the body as a whole. (Claimant's exhibit 1-25)

Claimant was hospitalized in August 1981 for chest pain, and John S. Koch, M.D., a qualified orthopedic surgeon was called in on account of her back symptoms. In his deposition testimony, Dr. Koch opined that it was his impression that claimant's problem "was a developmental, long-standing situation in this woman." (Dep., p. 22) He also found no evidence of a herniated disc but did diagnose a chronic postural backache with some degenerative fibromyositis and tendinitis. (pp. 25 and 27)

Claimant was in the hospital for three days in November 1981 for "severe and unrelenting pain in her back." (Defendants' exhibit O) She was again treated conservatively. At that time she was treated by Dr. Neiman who stated that Dr. Dykstra believed there was an element of functional overlay on top of the strain and who did not feel surgical intervention was a good idea. Dr. Neiman agreed.

In the spring of 1982, claimant moved to the Chicago area upon the suggestion of her son. In March and May of that year she was hospitalized for chest pain. On May 25, 1982, Dr. Neiman wrote a letter to claimant's attorney which again stated claimant had a permanent impairment of 10 percent of the body as a whole.

In June 1982, claimant was evaluated by a psychologist in Cedar Rapids who stated that claimant "is suffering from chronic pain, very possibly a serious depression, anxiety, stress induced." (Claimant's exhibit 1-37)

Claimant was hospitalized in July 1982 in Chicago with severe back pain and on August 11, 1982 had surgery in the nature of a laminectomy. The surgery was performed by Irwin Krengel Carson, M.D., a qualified orthopedic surgeon who testified that a CT scan suggested an extruded disc fragment at L5-S1. That doctor therefore performed the laminectomy and found some hard, brittle disc material. In reply to a question as to how long these disc fragments may have been present, Dr. Carson stated in part: "But I think the hardness and the multiple amount of pieces, in my experience, is indicative of something that's been going on for a couple of years or more." (Dep., p. 18-19) Dr. Carson did not take a detailed history as to the original injury but testified to a hypothetical question which included the basic facts of the injury that claimant's activity could have caused the disc injury.

Finally, Dr. Neiman again examined claimant on February 22, 1983 and in a report of that date stated in part:

> There is no question that the pain pattern that was present in 1978 following the accident on December 22, 1978 has been a persistent complaint all the way through the various examinations. The pain pattern certainly was consistent with a disc herniation. I, in fact, stated in the past despite two other orthopedic opinions that she did indeed have a disc disease. Apparently the orthopedic surgeon in Chicago has confirmed my suspicion of disc herniation with the abnormal EMG and CT scan and improvement after the operation. I do think the back operation was required as a direct result of the injury occurring on December 22, 1978.

ISSUES

Defendants' brief states the issues:

> I. Claimant failed to satisfy her burden of proof to establish that her herniated lower lumbar disc was causally related to her employment accident of December 22, 1978.
>
> II. The deputy erred in ruling that claimant's case constituted emergency medical care within the scope of section 85.27 of the Iowa Code.
>
> III. Certain medical expenses awarded by the deputy were improper and not related to care for claimant's lumbar disc condition.

APPLICABLE LAW

Claimant must show that the health impairment was probably caused by her 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 Produce Company, 240 Iowa 1219, 38 N.W.2d 158 (1949); Almquist v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 (1934). 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). "The incident or activity need not be the sole proximate cause, if the injury is directly traceable to it." Holmes v. Bruce Motor Freight, 215 N.W.2d 296, 297 (Iowa 1974); Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971). "A cause is proximate if it is a substantial factor in bringing about the result." Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980)

Section 85.27 states in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, he should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care 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

With respect to the argument that claimant's prior back problems would have been causally related to her present condition, one must first consider Dr. Tegler's Mercy Hospital report of December 30, 1978 wherein he stated that claimant had fully recovered from the prior condition of July 1978. As stated above, it is presumed that she likewise recovered from problems prior to July 1978 also.

Also concerning the issue of causal relationship, defendants questioned the weight of Dr. Carson's testimony. It is true that Dr. Carson did not take a complete history from claimant with respect to the original injury and that claimant attempted to cure this problem by asking a hypothetical question. First, one should recognize other portions of Dr. Carson's testimony, namely that the disc material found had been defective for some two years or more prior to the surgery. Thus the time sequence suggests that the origin of the defective disc goes back far enough to include December of 1978. Second, both Dr. Lehmann and Dr. Neiman connect the work to the disability in reports of May 25, 1982 and February 22, 1983. It is noted that both of these experts' opinion are more up to date than that of Dr. Koch who did not find a causal relationship.

Considering the time sequence and the most recent medical information, which is taken over the older medical information, a causal relationship has been established by claimant.

In considering the issue of choice of care of treatment, one presumes that claimant had a herniated intervertebral disc which could not definitely be diagnosed until surgery. As a result, although surgery had been suggested, nothing was done until the Illinois surgeon, Dr. Carson, took the initiative. It is clear that claimant knew the employer had the choice of care, because it was explained to her when she had been to a chiropractor without prior authorization. Further, she had had telephone conversations with a representative of the insurance carrier with respect to choice of care.

Even so, it appears the surgery may lower defendants ultimate liability and therefore benefits defendants. In a similar case, where surgery was of benefit to defendants, the industrial commissioner held that defendants should pay for the care. Rittgers v. United Parcel Service and Liberty Mutual Insurance Company, filed October 19, 1982. Less on direct point but generally applicable is the concept that the workers' compensation law should be liberally construed in aid of accomplishing the object and purpose of its legislation. Jacques v, Farmers Lumber & Supply Co., 242 Iowa 548, 47 N.W.2d 236 (1951). Also less on point but necessary to consider is the extent to which the humanitarian purposes of the workers' compensation law are to be considered. See Arnold v. State, 233 Iowa 1, 6 N.W.2d 113 (1942)

Claimant herself testified:

Q. Did this problem continue throughout the year 1979 and 1980?

A. Yes.

Q. How about into 1981?

A. Yes. I got to where my right leg was weak and the pain was going down to my -- the right side of my foot, and I stayed most of the time on the heating pad and took medication, and Dr. Neiman had given me a machine that would keep the pain dull and I was using that, and I didn't do anything. I was constantly aware of the pain, and that's why I --

Q. Subsequently did you move to your son's home in the Chicago area?

A. Yes. I knew I was -- would not get medical help in Iowa City, and I moved to Schaumburg, Illinois, and my son got the doctors and took me to them. (Page 22, 11. 3-18)

Here is a claimant, then, who was distracted by pain, given pain killers and tranquilizers, and told, apparently, that she needed psychiatric treatment. Although one does not want to state the case in too dramatic a fashion, it must have seemed to claimant that she had reached a dead end. Under the circumstances, and considering that defendants, hopefully, benefit from the surgery, the employer and insurance carrier should pay for all the services rendered in connection with the work injury.

None of this is to be critical of defendants in any way whatsoever. Defendants guided claimant to the best treatment available in eastern Iowa.

Defendants also object to care by Dr. Siebert, care by Satish K. Dhonda, care for the hospitalization during 1982, care by Dr. Warrier and care by Dr. Margolis. Claimant concedes the care by Dr. Siebert, by Satish K. Dhonda, and by Dr. Margolis is not related to back injury. Therefore those items will be stricken from the order to make payment. It does appear that the treatment in the hospitalization of July 1982 and by Dr. Warrier were connected to the back condition, so those items will remain in the order.

Finally, one would agree with the hearing deputy that claimant should receive temporary total disability or healing period disability until she is healed, at which time the question of permanent partial disability may be addressed.

FINDINGS OF FACT

1. Claimant hurt her low back at work on December 22, 1978.

2. Claimant has been unable to work since the injury.

3. Claimant's work injury caused the necessity for her surgery in August 1983.

4. The employer did not authorize and claimant did not request permission to be treated by certain doctors and hospitals.

5. As a result of the injury, claimant's low back made her desperate to seek care.

6. Claimant has improved since the surgery, and there is a reasonable possibility that her condition after the surgery will be better than before the surgery.

CONCLUSIONS OF LAW

Claimant sustained an injury which arose out of and in the course of the employment on December 22, 1978 and which caused temporary total disability until the tests for cessation of temporary total disability or healing period disability has been met.

Claimant is entitled the benefits under §85.27, The Code, as ordered below.

ORDER

THEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant from December 22, 1978 until the healing period terminates according to §85.34(1), Code of Iowa, any accrued payments to be made in a lump sum together with interest at the rate of ten (10) percent per year from June 30, 1983.

Claimant is further entitled to have the following medical expenses paid by defendants:

APPLIANCES AND PROSTHETICS

11-20-80	Hawkeye Medical, Traction Set	$ 30.00
5-29-79	Anderson's, Heat Lamp	9.00

PHYSICIANS, CLINICS AND OTHER MEDICAL PRACTITIONERS

5-29-79	Mayo Clinic	786.95
4-24-81	Dr. Tegler	30.00
6-23-81	Stan Christensen	40.00
7-2-81	Stan Christensen	25.00
7-8-81	Stan Christensen	25.00
7-17-81	Stan Christensen	25.00
7-21-81	Stan Christensen	20.00
6-80	Dr. Dykstra	137.00
8-7-82 to 8-21-82	Dr. Irwin Carson	4,038.00
8-11-82	B. R. Pydsiette	480.00
8-82	Countryside Diagnostics	98.00
5-30-82 to 8-9-82	Dr. Warrier	383.12
7-27-82	Kenneth A. Vatz	280.00
10-4-82	Dr. Richard Neiman	60.00
1-29-81	Mercy Hospital, Iowa City, Iowa	10.65
12-28-80	Mercy Hospital, Iowa City, Iowa	3.40
8-7-82 to 8-21-82	Northwest Community Hospital, Arlington Heights, Illinois	322.25 5,075.55
July Admission	Northwest Community Hospital, Arlington Heights, Illinois	260.00 3,871.70
6-4-81	University of Iowa Hospitals, Iowa City, Iowa	10.00
2-26-81	University of Iowa Hospitals, Iowa City, Iowa	28.42
	Iowa Medical Services	45.00
2-26-81 to 7-18-81	University of Iowa Hospitals, Iowa	437.40
6-82 to Present	Prescriptions	134.86
	Transportation expenses (See exhibit "A" (attached) through present	369.80
	Hotel expenses (while receiving medical care)	
	4-14-79	53.37
	5-30-79	106.73
	4-11-79	20.58
		$17,986.78

The penalty sought by claimant should be denied.

Costs of this proceeding are taxed to defendants.

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

Signed and filed at Des Moines, Iowa this 30th day of November, 1983.

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

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

Mr. Larry L. Shepler
Attorney at Law
600 Union Arcade Building
Davenport, Iowa 52801

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEITH ALLEN SMITH, Claimant, vs. McKEEVER CUSTOM CABINETS, Employer, and LUMBERMEN'S MUTUAL CASUALTY COMPANY and THE HARTFORD INSURANCE GROUP, Insurance Carrier, Defendants.	:	File No. 669699 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

McKeever Custom Cabinets, employer, and Lumbermen's Mutual Casualty Company, insurance carrier, appeal from an arbitration decision wherein claimant was awarded healing period benefits, permanent partial disability, and medical expenses.

The record on appeal consists of the hearing transcript together with exhibits 1 through 18, 19A through 19E, and 20 through 22.

ISSUES

1. Whether the deputy erred in finding that claimant's injury was cumulative rather than related to tramuatic events of November 1978 and April 1979.

2. Whether the deputy erred in failing to find that claimant's claim is barred by Iowa Code sections 85.26 and 85.23.

3. Whether the deputy erred in failing to determine claimant's rate according to his wage in November 1978 or April 1979.

4. Whether the deputy erred in failing to find that the Hartford Insurance Group was the insurance carrier at the time of the injury herein.

5. Whether the deputy erred in awarding healing period benefits from May 1, 1981 through January 26, 1982.

REVIEW OF THE EVIDENCE

Claimant, who was 25 years old at the time of the hearing, began working for McKeever Custom Cabinets in April of 1978. He left his job with McKeever in August of 1980, and worked on an uncle's farm in Minnesota and in a cabinet shop in Oklahoma "just for a change." Claimant returned to his position with McKeever in March of 1981 until May of 1981. (Transcript, pp. 11-12, 16, 19-20) Records from McKeever indicate that claimant was paid $4.25 per hour to start and $6.50 per hour when he quit working in May of 1981. (Exhibit 21) Claimant testified that his job consisted primarily of construction and installation of custom cabinets. He indicated that after returning to the job in March of 1981 he did more shopwork than installation work. Claimant stated that he used power tools including a vibrating sander, drill, table saw, and pneumatic nail gun regularly in the course of his employment with McKeever. (Tr., pp. 12, 20-21)

Claimant recalled that in November of 1978 his right wrist was struck by a half sheet of building material as it fell from a storage bin. He testified that his wrist hurt when it was hit, but that he did not believe he had suffered an injury to the wrist. The pain was not long lasting and claimant missed no work as a result of the incident. Claimant recalled that he had his wrist examined by John Mathiasen, M.D., several days later for assurance that a hairline fracture had not occurred and for his own "peace of mind." (Tr., pp. 13-15) An x-ray report from Mercy Hospital in Council Bluffs dated November 14, 1978 identified no bony or joint abnormalities and found no fracture of claimant's right wrist. (Ex. 1) Claimant testified that he continued working and did not visit Dr. Mathiasen thereafter. (Tr., pp. 15-16)

In April of 1979 claimant fell into a hole as he and another employee were carrying a cabinet into a building. (While claimant testified that this incident occurred in July of 1979 the record as a whole indicates that April of 1979 was the month in which it actually occurred.) Claimant testified that he took the remainder of the day off work, but returned to work on the following day and did not seek medical attention. (Tr., pp. 18-19)

Claimant testified that he visited Thomas C. Bush, M.D., in April of 1981 due to gradually progressing pain in his right wrist. He recalled that he eventually underwent a bone fusion of the right wrist in March of 1982. (Tr., pp. 25-27)

Thomas C. Bush, M.D., testified that he first saw claimant on April 14, 1981 at which time he recorded a history of long term right wrist pain dating back to November of 1978. The doctor stated that claimant's pain had occurred as he hammered and used a saw at work, and that it had become progressively worse over the preceeding year and a half or two and a half years. Dr. Bush testified that x-rays taken during his initial examination of claimant showed aseptic necrosis of the lunate bone in the wrist joint area. (Bush Dep. pp. 3-5) At one point Dr. Bush discussed how aseptic necrosis might develop: "[L]unate necrosis can come from a single event and we frequently do see it come from a single event. But again it is most common in people that use their wrists for hammering and pounding, carpenters, shinglers, people who shingle roofs, this sort of conditions." (Ex. 9, pp. 13-14)

The doctor indicated that activities such as hammering and operating pneumatic air tools could have caused claimant's necrosis. When pressed as to whether claimant's wrist problems might have been caused by his November 1978 incident, Dr. Bush replied:

> A. I think what we've got to establish here is the fact, this condition obviously can come about from a single traumatic incident, such as falling or a hard blow to the wrist where it creates swelling within the joint, certainly this can happen also. And the other condition it can come from is repetitive hammering and use of the wrist and hand to do manual labor. Now, his history, of course, is that he, in November of '78 did have some traumatic incidents to his wrist and, of course, he continued to work, while hammering. And it could come from either one, most likely, or historically speaking, it was set off by the fact that he did have acute trauma to the wrist. In his history. (Ex. 9, p. 16)

Dr. Bush recalled telling claimant that since the lunate bone had already degenerated he could go ahead and use it as long as he could put up with the discomfort. By the time a second set of x-rays were taken on January 26, 1982 the wrist had worsened considerably. Dr. Bush noted that a wrist fusion was performed on March 3, 1982. (Ex. 9, pp 20-21 The doctor was questioned as to the symptoms which could be expected to exist following a traumatic event responsible for causing aseptic necrosis:

> Q. Typically with this type of injury, how intense is the pain that is suffered in the months following the traumatic event, here in November of '78?
>
> A. Well, they got a constant throbbing pain in the wrist area, that is even painful at rest, or upon any motion or use, it hurts. (Ex. 9, p. 18)

Dr. Bush further discussed symptoms on cross-examination:

> Q. I further understand, based on your testimony, that such a condition is -- does not reveal itself by x-ray on the date of the occurrence but will show up a month later?
>
> A. That is frequently the case, yes.
>
> Q. But as far as the symptoms, the pain, the swelling, the discomfort, those are present at all times?
>
> A. Then when you say "at all times", early in the condition it can be more described, I think, best as being rather constant, with perhaps an hour or two here or there where they do not have discomfort, early. But yet once this starts, yes, they have a lot of discomfort or a fair amount of discomfort or a lot of discomfort, depending on how bad it is originally. Most of the time. I'm not saying that he would have a throbbing wrist twenty-four hours a day but I'm saying that he would have a fair amount of discomfort in his wrist a good number of hours out of a day, originally, and it progressively gets to a point where there is no relief even for any period of an hour or so.
>
> Q. I guess that's what I'm searching for and that is, that once this condition started, that the patient, Mr. Smith, knew he was hurt?
>
> A. Yes. Typically what they will tell you is that early on, after the trauma has occurred, that the wrist will hurt them during their waking, active hours and at night will throb somewhat until they can finally go to sleep and then they can rest. When they wake up in the morning, it's sore again the minute they start moving around, it becomes sore again. This is early on, and then of course as it progressively gets worse, actually it's a twenty-four-hour-day ache. (Ex. 9, pp. 27-28)

Dr. Bush was finally questioned as to whether claimant's accident of November 14, 1978 was the cause of his aseptic necrosis of the lunate bone:

> Q. On the basis of those documents, would you draw a conclusion that on or about November 14, 1978, there was an acute traumatic event to the right wrist involving being struck by a board?
>
> A. Yes, sir.
>
> Q. And that then, Doctor, would fit very nicely with the condition that you found on April 14, 1981?
>
> A. Yes, it could.
>
> Q. And that would be the probable cause of the condition that you found and treated and the symptoms of which he complained to you when he saw you on April 14, 1981?
>
> A. Yes, it could be. (Ex. 9, p. 33)

Dr. Bush assigned claimant a rating of 20 percent permanent partial disability of the upper extremity or 22 percent of the hand. (Ex. 9, pp. 24-25)

Claimant's deposition was taken on two occasions prior to the hearing. During the first deposition taken February 2, 1982 claimant characterized the incident of November 1978 as "common place." He attributed occasional wrist pain between November 1978 and July 1979 to a variety of strains and the nature of carpentry work in general. Claimant indicated that when he would become fatigued after several hours of using air and power tools he was able to compensate by using his left hand also. (Ex. 20, p. 19) Claimant was also questioned as to the after effects of the April 1979 incident. He stated:

> A. The only other time that I experienced a lot of pain was when I would be handling a drill. And this just happened on a couple of occasions with a spade bit and the drill would catch, that's how we would attach our cabinets and drill our holes. The holes with the plumbing is with the spade bit and on occasion if you get them in there they will catch and wrench your hand if you don't have it with both hands and you're leaning in a weird position. But that would be the only times that it would hurt and the hurt would subside and then I would just continue with what I was doing. (Ex. 20, p. 16)

Claimant's second deposition was taken on September 15, 1982 at which time he recalled that his pain had begun in about July of 1979 following the fall on his right arm. Claimant was asked to describe the manner in which the pain in his right wrist progressed from July 1979 until he saw Dr. Bush in April 1981:

> A. It would just -- at first it was just, like I say, it would only occur if I used a hand tool for a long period of time.
>
> Q. What is a long period of time?
>
> A. Two hours. A lot of time we'd be working on one certain project which would -- I'd have to sand or something for that period of time. Then it would just start to -- I don't know what arthritis is like, but I just kind of compare it to that. Because it was just a discomfort and it was easy for me to take up with my left hand or just do another project until it wasn't bothering me. But

as it progressed along, I would just notice it more often. It wasn't like if -- in a certain period of time, cause it took a long time.

Q. And then as -- starting from this point where you had the pain, discomfort, following use of a hand tool, for like two hours --

A. Uh-huh.

Q. -- did it -- the condition become more sensitive? Did it take less and less to cause this discomfort?

A. Yes. Over the next year period.

Q. And by the time you went to Dr. Bush in April of 1981, what was the condition of the wrist?

A. It would just -- I was conscious of it every day and so that it became continually harder to work with my right hand and so I was always constantly using my left and making up for it. (Ex. 10, pp. 13-14)

On cross-examination claimant was questioned as to whether his wrist pain could have started as early as November 1978:

Q. So when Dr. Bush indicated that the problem began in November of 1978, was he accurate or not?

A. Well, not to the point of bothering me at work. I mean, I had known of that injury, I mean, I didn't realize that it was an injury in November but I had had it checked then. And when we'd work around the shop, just handling hand tools, you're using your hands all day long so I never paid attention to it.

....

Q. What is your testimony to us here today as to whether or not you began experiencing discomfort in that right wrist as of November, 1978?

A. No, not at -- it didn't hinder me at all at work and I didn't --

Q. So you are telling us that between November of 1978 and July of 1979, you did not experience any discomfort with your wrist?

A. No.
(Ex. 10, pp. 24-26)

Claimant was also questioned as to the nature of his pain:

Q. Before you went to the doctor, what was the nature of the problem?

A. Okay. Just pain in my wrist area and if I used certain tools too much, it would just cause sharp pain in the area.

Q. Something in the nature of a throbbing type discomfort?

A. Near the end it became more sharp.

At the hearing claimant testified that he was unable to state for sure when he first began to notice any problems with his wrist. He indicated that the wrist problems worsened gradually and that he was mostly able to compensate by greater use of his left hand. (Tr., pp. 23-24) Claimant was questioned as to his concern at the onset of his wrist problems:

Q. When you first started to notice the problem, were you worried or concerned about it all?

A. No.

Q. Why not?

A. Just because of the nature of the work and using it seemed -- in a lot of instances, it just seemed like if anybody else was doing the same thing for an hour or two, with the same tool, it would be uncomfortable.

Q. Are you telling us that it is not unusual for a carpenter using pneumatic tools and the type of tools that you were using, to experience an occasional pain?

A. No, not at all, just because of the nature of -- your hands are what you work with. It's labor.
(Tr., pp. 24-25)

Claimant testified that when he returned to work for McKeever in March 1981 his wrist was "the same." When pressed for clarification claimant stated that it did not bother him all of the time, but would get stiff after using a sander for a long period of time. Claimant indicated that he began to wonder in March 1981 whether there might be a problem with his wrist, and decided in April 1981 that he should have it examined. (Tr., p. 22) With regard to the wrist pain as it existed in April 1981 claimant testified:

Q. And what about in April of 1981, prior to the time that you saw Dr. Bush? What type of discomfort, if any, were you feeling then? And how frequently did it occur?

A. It probably got so every day I was aware of it but I would just -- I still -- I don't know -- I'd just have to be careful how I handled the tools at the very end.

Q. How long would you work before you would start to experience discomfort, in April of 1981?

A. Oh, I still put in eight-hour days. It was just -- if I would -- I'd work an hour or day -- that's what sticks out in my mind the most, is handling the vibrating sander.

Q. And what kind of pain would you then feel in April of 1981, from handling the vibrating sander?

A. It was painful.

Q. Was it a greater pain when you felt that pain in April of 1981 than the pain that you felt in the months subsequent to April 3rd, 1979?

A. Yes.

Q. Was it greater than any pain, if any, that you felt after the incident in November of 1978?

A. Yes.
(Tr., pp. 57-58)

In a letter dated May 7, 1981 and addressed to claimant's counsel, Dr. Bush wrote:

> I saw Keith Smith for the first time in my office on April 14, 1981 complaining of chronic right wrist pain. The patient had swelling of the right wrist area, limitation of range of motion in all planes and pain to palpation. The diagnosis is aseptic necrosis of the lunate bone of the wrist. This injury is the result of his work as a carpenter. Ultimately fusion of the wrist joint will probably be necessary as these are persistent in nature regarding to pain and also regarding to other symptoms and signs. The patient, of course, has been informed of this and advised to use his wrist as long as he could tolerate the discomfort. When the time came that this had reached a marked degree, surgery, of course, would then be the answer. (Ex. 3)

Claimant testified during his first deposition that he had been told by Dr. Bush that his wrist would eventually require surgery. (Ex. 20, pp. 21, 29) When claimant was questioned during his second deposition as to his understanding of his injury after the initial visit with Dr. Bush, he replied: "That it was irreversible damage to the area and that I did have -- it would eventually have to be operated on, depending, you know, as a matter of when I decided." (Ex. 10, p. 16) At the hearing claimant indicated that the reasons he waited from May 1981 until March 1982 to undergo the surgery were that it was a "big decision" and that the wrist had ceased to bother him after he quit work. (Tr., p. 28)

At the time of the hearing claimant was enrolled as a student at Iowa Western Community College. He stated that he hopes to transfer to Creighton to achieve a B.A. degree in social services. (Tr., pp. 28-29)

APPLICABLE LAW

An award of benefits cannot stand on a showing of a mere possibility of causal connection between the injury and the claimant's employment. An award can be sustained if the causal connection is not only possible, but fairly probable. Nellis v. Quealy, 237 Iowa 507, 21 N.W.2d 584 (1946). 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, 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, 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, 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.

In Ford v. Goode, 240 Iowa 1219, 1222, 38 N.W.2d 158, 159 (1949), the court stated:

> We have held that an injury may be a disease, which is not occupational; that it may be an aggravation of injuries which in their origin were apart from the employment; that in order to prove that the employee received a personal injury in his work it is not necessary that there be proof of some special incident or unusual occurrence.

Black v. Creston Auto, 225 Iowa 671, 281 N.W. 189 (1938), stands for the proposition that a gradual injury may be compensable in Iowa.

Iowa Code section 85.26(1) provides, in part:

> An original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed or, if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits.

In Orr v. Lewis Central School District, 298 N.W.2d 256, 261 (Iowa 1980) the court stated: "The limitation period under section 85.26, ... began to run when the employee discovered or in the exercise of reasonable diligence should have discovered the nature, seriousness and probable compensable character of the 'injury causing ... death or disability for which benefits [were] claimed.'"

Iowa Code section 85.23 provides:

> '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 or a dependent or someone on his behalf or a dependent or someone on his behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed.

In Robinson v. Department of Transportation, 296 N.W.2d 809 (Iowa 1980) the court applied the discovery rule to the notice provision of the Code.

Iowa Code section 85.34(1) provides:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

ANALYSIS

The first issue on appeal is whether the deputy erred in finding that claimant's injury was cumulative rather than related to traumatic events of November 1978 or April 1979. At the onset it should be noted that workers' compensation benefits in this jurisdiction are awarded for injuries, not accidents, arising out of and in the course of employment. Defendants are correct that the phrase "cumulative injury" is not present in the case law relied upon by the deputy and that the phrase appears to be akin to occupational diseases as covered under Chapter 85A. To deny compensation for this type of injury, however, would be to ignore the clear import of the language in Ford, Almquist and Black. The concept of cumulative or gradual injury will, therefore, be recognized as valid in the context of this decision.

Claimant was awarded benefits as a result of Dr. Bush's diagnosis of aseptic necrosis of the lunate bone. At several points during his deposition testimony, Dr. Bush related that such condition is commonly found among carpenters, and that it may be attributable to either repeated activities such as hammering or to a single traumatic event such as the incident of November 1978 or April 1979. Reviewing the doctor's testimony as a whole, he was unable to unequivocally state whether claimant's condition was related to a single event or was simply the result of the type of work he does. Regarding the pain and discomfort which generally accompany aseptic necrosis of the lunate bone, Dr. Bush described a throbbing pain in the wrist with any motion or even at rest. He indicated that when the necrosis is caused by a specific traumatic incident the wrist will generally hurt during the persons working hours and continue to throb until the patient can sleep. The pain generally resumes as soon as the person begins to move about in the morning. Dr. Bush indicated that the pain would become progressively worse from this stage.

While troublesome inconsistencies do exist in claimant's testimony as to the date that his wrist first began to hurt, the evidence clearly indicates that claimant's symptoms following either incident were dissimilar to those Dr. Bush believed would have occurred had aseptic necrosis of the lunate bone resulted therefrom. Claimant was able to continue working a full two years following the later incident. The wrist pain experienced by claimant over the greater part of the two year span was not constant, rather appears to have occurred occasionally and only after using power and pneumatic air tools for several hours. Claimant did not have any problems with his wrist during the period when he was not working for McKeever from August 1980 until March 1981. In light of Dr. Bush's testimony that aseptic necrosis of the lunate bone often developes from the repetitive activities involved in the carpentry trade and the fact that claimant's wrist pain initially occurred only after using power tools for several hours, the deputy's finding that claimant's condition was a cumulative injury rather than related disability to the incidents of November 1978 or April 1979 shall be affirmed.

The second issue on appeal is whether the deputy erred in failing to find that claimant's claim as barred by either section 85.26 or 85.23. Under the "discovery rule" which has been applied to both sections, the point from which claimant is responsible for providing notice of an injury and from which the statute of limitations runs is when the claimant, in the exercise of reasonable diligence should have discovered the nature, seriousness, and probable compensable nature of his injury. When claimant was hit by a board in November 1978 he sought medical advice, but no fracture or abnormality was found. When claimant fell on his arm in April 1979 no symptoms of serious problems were apparent. Claimant noted that carpenters are subject to a variety of aches and pains due simply to the nature of the trade. Aseptic necrosis is not a visable injury and may develop gradually. Claimant eventually sought medical attention on April 14, 1981 when his pain had obviously became too intense to be a normal facet of carpentry work. Under the facts of this case it cannot be said that claimant failed to exercise reasonable diligence in waiting until April 14, 1981 to seek medical help which led to the discovery of aseptic necrosis. Because claimant quit work within a month from Dr. Bush's diagnosis and his original petition was filed August 27, 1981, claimant is found to have complied with the provisions of section 85.26 and section 85.23 in a timely manner.

The third issue on appeal is whether the deputy erred in failing to determine claimant's rate according to his wage in November 1978 or April 1979. Because it has been determined that claimant's injury was cumulative the deputy's rate calculation using claimant's wage from March 1981 to May 1981 is proper.

The fourth issue on appeal is whether the deputy erred in failing to find that the Hartford Insurance Group was the insurance carrier at the time of the injury herein. The record indicates that Hartford ceased to be the insurance carrier for McKeever on February 5, 1980. Because claimant's injury was determined to have become disabling in May of 1981 the deputy's finding that Lumbermen's Mutual Casualty Company was the applicable insurance carrier is affirmed.

The final issue on appeal is whether the deputy erred in awarding healing period benefits from May 1, 1981 through January 26, 1982. In determining the healing period the deputy apparently took January 26, 1982 as the date when claimant first learned of his need to undergo a wrist fusion. The record, however, indicates that claimant knew as early as April 1981 that the surgery would be required. Claimant testified that the reason for delaying his surgery until March 1982 was because it was a "big decision" and the wrist had stopped bothering him since quitting work and beginning school. While claimant is entitled to healing period benefits from March 2, 1982 when he entered the hospital until June 3, 1982 when he was released from Dr. Bush's care, he is not entitled to similar benefits for any period dating back to May 1, 1981. The delay of surgery from May 1981 until March 1982 appears to have been for the convience of claimant, who has a duty to mitigate the length of the healing period when reasonably possible.

FINDINGS OF FACT

1. Claimant was employed as a carpenter for McKeever Custom Cabinets from April 1978 until August 1980 and from March 1981 until May 1981.

2. Claimant had experienced no wrist problems prior to his employment with McKeever.

3. Claimant's right wrist was struck by a falling piece of building material in November 1978.

4. X-rays of claimant's right wrist taken after the November 1978 incident revealed no boney or joint abnormalities.

5. Claimant missed no work as a result of the November 1978 incident.

6. Claimant fell into a hole in April 1979 landing on his right arm.

7. Claimant missed one-half day of work as a result of the April 1979 incident.

8. Claimant did not seek medical care following the April 1979 incident until April 1981.

9. At some point between November 1978 and June 1979 claimant began experiencing some problems wih his right wrist after operating power and pneumatic tools for several hours.

10. Claimant's wrist problems progressively worsened until he sought treatment from Dr. Bush in April 1981.

11. Claimant was diagnosed in April 1981 as suffering from aseptic necrosis of the lunate bone.

12. Claimant was told in April 1981 of his eventual need to undergo a wrist fusion on his right wrist.

13. Claimant last worked in May 1981.

14. Claimant's aseptic necrosis is not directly traceable to the incidents of either November 1978 or April 1979.

15. Claimant's injury was cumulative and the limitation periods provided in Iowa Code sections 85.23 and 85.26 began to run in May 1981.

16. Claimant's wrist did not bother him once he quit working.

17. Claimant entered college in the fall of 1981 and was enrolled for classes at the time of the hearing.

18. Claimant underwent a right wrist fusion on March 3, 1982 and remained under the care of Dr. Bush until June 3, 1982.

19. Claimant delayed the surgery until March 1982 for his own convience.

20. Lumbermen's Mutual Casualty Company was the insurance carrier at the time of claimant's injury.

CONCLUSIONS OF LAW

Claimant has sustained the burden of proving a 20 percent functional impairment to the upper extremity.

WHEREFORE, the deputy's decision filed April 29, 1983 is affirmed in part and modified in part.

THEREFORE, it is ordered:

That defendants, McKeever Custom Cabinets and Lumbermen's Mutual Casualty Company, pay healing period benefits at a rate of one hundred eighteen and 65/100 dollars ($118.65) from March 2, 1982 to June 3, 1982.

That defendants, McKeever Custom Cabinets and Lumbermen's Mutual Casualty Company, pay permanent partial disability benefits for fifty (50) weeks at the rate of one hundred eighteen and 65/100 dollars ($118.65).

That defendants, McKeever Custom Cabinets and Lumbermen's Mutual Casualty Company, pay all amounts accrued in a lump sum.

That defendants, McKeever Custom Cabinets and Lumbermen's Mutual Casualty Company, pay interest pursuant to Iowa Code section 85.30.

That defendants, McKeever Custom Cabinets and Lumbermen's Mutual Casualty Company, pay the following medical expenses:

West Omaha Orthopaedic Surgeons, P.C.	$ 604.00
Orthopaedic X-ray Service	105.00
Methodist Hospital	2,043.94
Methodist Hospital	116.00
The Pathology Center	48.90

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

Signed and filed this 30th day of November, 1983.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

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

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

R. V. SMITH,
Claimant,
vs.
GRALNEK & DUNITZ,
Employer,
and
CNA INSURANCE COMPANY,
Insurance Carrier,
Defendants.

FILE NO. 665212
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 R. V. Smith, claimant, against Gralnek & Dunitz, employer, and CNA Insurance Company, insurance carrier, defendants, to recover additional benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of his employment on December 29, 1980. It came on for hearing on July 13, 1983 at the office of the Iowa Industrial Commissioner in Des Moines, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file shows a first report of injury received April 22, 1981. A memorandum of agreement was received August 23, 1982. A Form 2 shows the payment of 63 weeks of healing period benefits and 80 weeks of permanent partial disability.

At the time of hearing the parties stipulated to a rate of compensation in the event of an award of $169.73 and to a conversion date from healing period to permanent partial disability of March 15, 1982.

The record in this matter consists of the testimony of claimant, George Pat Weigel, Freda Mae Smith, and Kathleen A. Benson; claimant's exhibit 1, a transfer of skills report from the Medical Occupational Evaluation Center done June 29, 1983; claimant's exhibit 2, notes from Ronald K. Bunten, M.D.; claimant's exhibit 3, a letter from Erwin Wittenberg, M.D., dated July 1, 1983; claimant's exhibit 4, a letter from Dr. Wittenberg dated March 16, 1982; defendants' exhibit A, a series of medical reports; defendants' exhibit B, a series of medical reports filed under the notice of intent to offer medical reports of July 12, 1983; defendants' exhibit C, a series of reports from Kathleen Benson, M.A., and defendants' exhibit D, an estimated functional capacity form completed by Dr. Bunten on September 23, 1981.

The parties filed briefs.

ISSUE

The sole issue in this case is claimant's entitlement to permanent partial disability benefits.

STATEMENT OF THE CASE

Fifty-two year old married claimant who completed eleventh grade and who has no additional specialized training, testified to beginning work at age 13 after school and on Saturdays in a sawmill. At age 20 he married and moved to Wichita where he worked for two aircraft companies doing sheet metal work. He left those jobs apparently because he was ready to switch to something else and move to Newton, Iowa. His first labor there was with sheet metal and as a press operator. He then took a second part-time job with defendant employer. When he was laid off on the full time job, his work for defendant employer became full time.

Initially, claimant did work with a torch. Later he moved to dismantling parts. He supervised the yard if others were working. His labor entailed occasionally lifting over 100 pounds, stooping, bending and twisting at the waist, sometimes carrying ladders as often as two to three times a day and walking over uneven surfaces. Most of his work day is spent either standing or walking.

Regarding his injury on April 25, 1977, claimant said: Transmissions were stacked one on top of another. Because of snow there was trouble getting a transmission off the top of a pile. He and another employee tried to move the transmission. Claimant felt as if his back "blowed up". He stayed home from work and saw Dr. Wittenberg who prescribed pain pills and rest. Eventually he was hospitalized. He estimated his time off at from six weeks to two months. His pain subsided but he did have pain when he returned to work at his same job. He was restricted from bending from the waist down and he had a weight limitation as well. He tried to watch the weight he was lifting, but he had a job to do. He missed two or three days of work because of his back in early 1980.

In April of 1980 he was trying to get a radio out of the car. He then had difficulty getting out himself. He sought medical attention the next day. He went back to the same activity.

He remembered the events surrounding the injury of December 29, 1980 thusly: He was working alone pulling motors using a lift tractor. The last was pulled at 2:00 or 3:00 o'clock. He attempted to turn the motor over to remove the bolts. He got down and could not straighten up. He has not returned to work.

The claimant compared his situation after April 19, 1977 with after December of 1980. He asserted that after 1977 he felt pretty good some of the time. Now he hurts most of the time and his discomfort is at times severe. After 1977 he did "most everything"; since 1980 he does "hardly anything".

Claimant reported hernias in 1957, 1965 and 1966 and 1977. He stated that he had his right leg feel numb or weak and warmer than the other leg. He has had eight years of high blood pressure difficulty for which he takes Diazide. He claimed ulcers which bother him from time to time and led to a hospitalization in 1976. His last problem was in the winter of 1981 or early 1982.

Claimant presently complains of aching in his low back and swelling which feels like a baseball. A brace was recommended which he wears when he needs support. He can ride in a car for thirty to ninety minutes depending on his condition. He sometimes has trouble getting out of cars and pulls himself out by the door or top.

Although claimant said he loved automotive work, welding and aircraft jobs when he did them, he did not think he could go back to his old job with defendant employer. He and his spouse have discussed opening a shop with the 700 to 1,000 dolls in his spouse's doll collection. He believed he could help her as there would not be much lifting and as he could help in the shop or lie down or sit as he chose.

On direct examination he denied any contact with defendant employer regarding his condition or return to part-time duty. On cross-examination, he said that he did not think part-time work with defendant employer would be suitable for him and that Benson had not suggested any other jobs. It was claimant's feeling that although the work offered by defendant employer would fit the words Dr. Grant wrote, the work would be different.

Claimant acknowledged that he had made no application for jobs and has not been to job service. He justified his failure to make application for work on the basis of his having no release from the doctor, his inability to work eight hours a day and the lack of suitable work in Newton.

Claimant testified to unreimbursed mileage for which he had made no claim which included ten trips to Dr. Bunten's office - 70 to 75 miles a round trip and 18 to 20 trips to Dr. Wittenberg's office at 2 miles each.

Freda Smith, claimant's spouse of thirty-two years, recalled claimant's 1977 injury. Although she was unable to say precisely, she thought claimant was off for six weeks and then returned to work full time as well as to shoveling, buying and carrying groceries, taking out the garbage, working on cars and going on drives and trips. She acknowledged some occasional low back complaints. On comparison after his December 1980 injury he did not return to work. His activities around the house changed. He could no longer take care of the car, shovel snow or mow. He is bothered by driving and riding and he has trouble getting out of bed if he has too much activity.

Robert W. Jones and G. Patrick Weigel conducted an evaluation of claimant on June 29, 1983. Weigel testified at the hearing to having a master's degree and experience as a rehabilitation

counselor for the state of Iowa. He began work in the Mercy Evaluation Center in February of 1981. He defined vocational rehabilitation as the process of helping disabled job seekers return to work giving consideration to job skills and vocational background.

Claimant gave a history of injury to his back in April of 1977 and a second work incident on December 29, 1980. He complained of constant low back pain which occasionally radiated into his right leg accompanied by a sensation of his leg giving way and of varicose veins. Claimant reported lifting restrictions of 10 to 15 pounds by one doctor and 5 to 10 pounds by another.

Claimant indicated he would be happy to go to work for defendant employer if his back would allow it and told the evaluators he had missed no work between the 1977 injury and the 1980 injury. Claimant spoke of a possible vocational interest in opening a doll shop with his spouse.

The evaluators used restrictions by John A. Grant, M.D., assigned on September 13, 1982 which were: ability to change position at will, maximum lifting of 10 to 20 pounds, minimal bending and overhead reaching, no repetitive twisting or lateral bending from the waist, and avoidance of slippery and uneven surfaces and climbing on ladders or scaffolds. Those restrictions were translated into light work with maximum lifting of 20 pounds, frequent lifting of 10 pounds and no climbing, balancing, stooping, kneeling, crouching or crawling. Medical information was available from Drs. Grant, Bunten and Wittenberg.

Claimant was given the General Aptitude Test Battery (GATB), the Career Assessment Inventory (CAI) and Valpar Component Work Samples (VCWS) 4 and 11. Validity and reliability indicators on all tests were acceptable. As none of claimant's scores on the GATB which measures aptitude in nine areas exceeded the thirty-third percentile, on-the-job training was viewed as preferable to formalized academic training. Claimant showed good work habits, attitude and concentration on the VCWS with good follow through on verbal instructions and high motivation and cooperation. During the VCWS testing claimant appeared to have constant pain and discomfort and to need to shift positions frequently. Manual dexterities, gross and fine movements and hand/eye/foot coordination were average compared to other male patients. Claimant's scores on the CAI were described as "generally quite strongly suppressed" and compatible with those persons in mechanical/fixing occupations. The witness attributed claimant's performance to his limited exposure to the world of work, to trouble with reading and writing and to his not seeing himself in a good light.

Overall, the evaluators found claimant's aptitudes not strong, his exposure to work limited and his transferable job skills deficient. Other factors given consideration were claimant's age and his poor education. Part-time employment was suggested as a possibility, although the witness acknowledged that finding part-time employment would be difficult in these economic times. He said that a part-time job three mornings a week handling small parts, change and answering the phone would be worth a try. He agreed that motivation was important and he thought claimant highly motivated.

Weigel admitted that he was unable to separate out what portion of claimant's injury was related to his difficulty prior to 1980, that he assumed what claimant told him was true, and that he found no documentation of restriction from lifting in 1977. For example, he had taken claimant's word that five doctors had told him not to have surgery. The witness did not feel claimant's ulcer was significant and he had not included it as a reason to avoid heavy lifting. He looked at claimant as of the date of the evaluation.

Weigel assented to not having interviewed any doctor or the employer and to having no view of the work place.

Kathleen Benson, M.A., C.R.C., was contacted by the insurance carrier in May of 1982 to vocationally evaluate claimant. On May 7, 1982 she met with claimant, his spouse and his attorney.

Claimant's physical complaints at that time were of a constant dull ache elevating into a throbbing pain in his lower back, pain and decreased strength in the right leg and sleep disturbance. Claimant listed limitations as inconsistent reaching ability, standing tolerance of twenty to thirty minutes, walking limited to one to twelve blocks, pain with bending and incapacity for lifting a gallon of milk. Claimant's stair climbing and driving also were restricted. He did not mention his 1977 injury.

Claimant expressed a preference for work at ground level alternately inside and out as he did note adverse effects from heat and cold. Claimant reported a hobby of buying and renovating wrecked cars.

Benson took a vocational history and classified claimant's work according to the Dictionary of Occupational Titles. She characterized work for the defendant employer as heavy and semi-skilled, for the washing machine manufacturer as medium and semi-skilled, and for the aircraft companies as medium and semi-skilled. She noted that claimant has worked indoors and outdoors, near hazards and high noise using some technical skills and average aptitudes to work within routine organized tasks of a nonsocial nature to produce a tangible result. She further found claimant completing short cycle repetitive duties and making objective on-the-job evaluations to meet precise standards.

Following these assessments she assigned career alternatives as a supervisor of body repair, auto design detailer and buffing machine operator-- positions light in nature located indoors and requiring average aptitude.

After this initial meeting Benson suggested a second medical opinion be obtained and the Career Assessment Inventory (CAI) be administered to claimant. Her impression was that claimant was convinced he is incapable of competitive employment, resistive, and bitter toward defendant employer.

She visited Dr. Bunten who did not think claimant needed a myelogram. In a letter dated July 28, 1982 and in her testimony Benson reported meeting with Dunitz at the salvage yard. Dunitz explained that the yard is divided into auto repair and auto scrap. Dunitz understood that claimant could manage the business, but could not do heavy lifting. Dunitz said a part-time position three mornings a week with payment of $5.00 an hour and no benefits except for a single member health policy and duties including answering the phone, talking with customers, retrieving small parts, making change and helping with inter-business communications would be feasible. Part-time hours could be increased if the business were to increase. Dunitz also was willing to provide claimant with a good reference. Claimant reportedly was unwilling to accept the part-time position.

The CAI showed him to have interest in the areas of auto mechanics, farming, radio/TV repair, telephone repair or card or gift shop manager.

Benson subsequently performed a job analysis of the part-time position offered by Dunitz and concluded that the work would entail walking both on cement floors and on loose gravel, retrieving small parts as well as tires and alternators, standing 50 percent of the time, walking 25 percent and sitting 25 percent, occasionally stooping and crouching, some bending at the waist and some reaching above shoulder and head level.

Benson sent a follow-up letter after claimant saw Dr. Grant.

At the hearing she testified that her CAI concurs with what Weigel found. She agreed that the GATB and VCWS are common tests. She acknowledged that the part-time work for claimant would entail miminal reaching overhead. She said that she wanted to find claimant a tailor-made job. It was her opinion that $5.00 an hour would not be that helpful financially to claimant, that he wanted his old job back and that doing a modified position would hurt his pride. Benson ackowledged that claimant's access to the job market is limited. She also admitted that leaving the heavy work area can lead to jobs with greater intellectual demands.

She described the use of VDARE for matching the employee's description with the DOT code. Following that she looks at the employee's physical condition, education, work activity and transferable skills which in claimant's case are limited.

Ronald K. Bunten, M.D., saw claimant on April 7, 1980 at which time he was complaining of discomfort in his low back "most all the time" with radiation into the left groin and inter and posterior left thigh with an onset related to a work incident in April 1977 which resulted in a hospitalization for six to eight weeks and claimant's subsequent return to usual work activities. On examination the doctor found some guarding with no list. There was moderate restriction in forward flexion and hyperextension. Neurological signs were negative as was straight leg raising to 70 degrees. Tenderness was present in the lower lumbar spinous processes. X-rays showed mild degenerative changes around the L3-4 lumbar interspaces and perhaps extra osseous density between L4 and 5. Dr. Bunten's impression was degenerative changes in the low back. He proposed that claimant's symptoms would be less troublesome if he used a brace. The treatment proposed was for claimant to wear a support and to continue with rest, heat and salicylates.

Claimant returned to Dr. Bunten on March 6, 1981 and reported increased back pain when he was lifting a transmission. Examination showed moderate restriction of low back motion based on pain. There was tenderness over the low lumbar spinous processes on deep palpation. There was no interval change on x-rays. The orthopedist wrote:

> I don't think he sustained any additional significant injury or impairment. He may have had some abnormal motion as a result of an accident three months ago. This should return to this pre-injury state in the months ahead. I thiink [sic] he could consider returning to work in the near future when he feels his symptoms would permit.

Claimant was back on September 23, 1981 at which time he reported that he had not returned to work. He told of persistent low back pain radiating into his right buttock and thigh and of taking mild analgesics intermittently. He was wearing an elastic stocking for varicose veins on the right. Claimant was observed to guard his lower back with transfers. Discomfort was reported in the low back and right buttock and thigh with forward flexion and hyperextension. Straight leg raising produced pain at 70 degrees on the right. X-rays remained unchanged with very little degenerative change, but some arthritic changes in the posterior facets of the lumbar sacral level. Dr. Bunten reported:

> I continue to think that he has symptoms related to degenerative disc disease in the low back probably associated with some mild abnormal motion. I don't think he has sign or symptom of significant nerve root irritation. I can't clearly relate any of his signs or symptoms to specific injuries, although would expect episodes of injury to pre-cipitate or aggrevate [sic] symptoms.

The orthopedist thought claimant would be suited for sedentary activity, but that "a lot" of stooping, bending, and heavy lifting would be difficult. Claimant was assigned a 10 percent permanent partial impairment based on the condition of his low back. The doctor suspected claimant would have future episodes of low back pain.

Dr. Bunten completed a functional capacity form which found claimant able to sit, stand or walk for six hours with rest; to occasionally lift and carry weights to 50 pounds; occasionally to bend, squat, crawl, climb and reach above shoulder level.

Medical records show that the claimant was admitted to the hospital on January 11, 1981. Claimant previously was hospitalized on May 3, 1977 with an acute back strain and osteoarthritis in the lumbar spine. Erwin Wittenberg, M.D., recorded the sudden onset of pain in claimant's low back three years before with increasing pain over the last several months which was aggravated

by coughing or sneezing. Claimant was hospitalized for more intensive therapy. On examination claimant referred his discomfort to the sacral and sacral iliac joint areas. There was fairly good range of motion and minimal tenderness. Claimant was treated with bed rest, muscle relaxants and analgesics. Pain subsided during the hospitalization.

Dr. Wittenberg wrote on June 26, 1981 that claimant was seen the day before with a history of a back injury at work approximately three years before and a hospitalization in January of 1981. Claimant had pain in the low back with more on the right side, mild spasm of the right paravertebral muscle, and pain with straight leg raising at 50 degrees bilaterally. The doctor thought claimant was unable to return to work involving lifting or any significant activity. Dr. Wittenberg proposed that claimant should be able to alternate positions.

The doctor reported on March 16, 1982 that claimant continued to be seen for follow up of his back problems. The doctor expressed the opinion that claimant was unable to return to "significant lifting" and this inability would be permanent.

Dr. Wittenberg's most recent letter of July 1, 1983 states that claimant's pain is fairly well controlled with minimal activity, but that claimant "is unable to tolerate any significant work activity" and "will not be able to return to any work activity for which he is trained." Although he believed claimant disabled from job activity requiring heavy lifting, bending and twisting, Dr. Wittenberg proposed that claimant could be retrained for mild work activity. He did not believe that claimant's hypertension or varicosities contributed to his disability. The doctor also wrote that claimant's condition has remained stable for some length of time.

John A. Grant, M.D., saw claimant on September 9, 1982 at the request of the rehabilitation service. The doctor reviewed claimant's past work history as well as his evaluation by other physicians.

Claimant told the doctor of a sudden "pop" in his back in April of 1977 and of increasing discomfort in his back beginning in February of 1980. Claimant's complaints at the time of this examination were of constant aching in the low back and chronic right leg discomfort. Acute symptoms were produced by twisting or turning in the wrong direction. He was using aspirin and occasional pain medication. He was wearing a corset. He had no complaints suggestive of sciatica or intervertebral rupture.

Examination showed that claimant was able to flex within 12 inches of the floor. Extension, bilateral bending and rotation were through 10 to 15 degrees. Straight leg raising was to 80 degrees on the right and 60 to 70 degrees on the left. There was a decrease in right knee jerk. Claimant was tender to firm palpation from L4, L5 to S1.

X-rays showed a 2 mm. forward displacement of L4 on L5 with no evidence of spondylolysis. There was some evidence of degenerative arthritic changes in the facet joint particularly between L4, L5 and S1 with an asymmetry of the facets at L5, S1.

Dr. Grant thought claimant had degenerative changes in his spine, but no objective evidence of significant disc disease. Based on the "Manual for Orthopedic Surgeons" the physician assigned a permanent partial physical impairment rating of 10 percent of the body as a whole.

As to the type of work claimant would be able to do, the doctor proposed that claimant should have a balance between sitting and standing with moving about 30 to 40 percent of the time. Weight lifting was to be restricted to 10 to 20 pounds with minimal bending from the waist or reaching overhead and with no lifting of heavy objects out in front of him. Repeated twisting and lateral bending from the waist were to be avoided as was exposure to slippery and uneven surfaces or climbing ladders or scaffolds.

Dr. Grant expressed the opinion that claimant's motivation to return to work was not high and that claimant anticipated being free of aches and pains. He proposed an exercise program, anti-inflammatory medication and a rigid back support.

APPLICABLE LAW AND ANALYSIS

The sole issue in this case is the degree of claimant's permanent partial disability.

Defendants argue that at least some portion of claimant's disability is related to his 1977 injury. Claimant himself compared the two and said the incident in 1980 left him able to do "hardly anything" while he could do "most everything" after 1977. Claimant's spouse testified similarly; i.e., that claimant returned to most of his activities and to work after the 1977 incident. After 1980 his activities changed. No medical evidence was offered relating to the 1977 injury which would allow this deputy commissioner to assess and to compare claimant's conditions. The absence of medical evidence leaves the undersigned with claimant's testimony alone. Also there is no evidence claimant was placed under any restrictions until some were assigned by Drs. Bunten and Wittenberg in 1981.

When Dr. Bunten saw claimant in April of 1980 he recorded a history of low back discomfort stemming from a work incident in 1977. He noted that claimant was able to return to his usual work activities after this incident. Dr. Bunten was of the opinion claimant did not sustain additional significant injury or impairment as a result of the December accident, but he wrote "I can't clearly relate any of his signs or symptoms to specific injuries, although would expect episode of injury to precipitate or aggrevate [sic] symptoms." Dr. Grant wrote "I would anticipate that the work he has been involved in for the last 20 years would certainly be expected to aggravate any existing degenerative change and it is certainly possible that the episode of lifting in 1977 and again in 1980 precipitated acute symptoms."

Lower extremity complaints at the time of Dr. Grant's exam were on the right. Leg complaints in April of 1977 were on the left although claimant had complaints of varicosities on the right in August of 1977. He had no radiation of pain into his legs when he was hospitalized in January of 1981.

We know that a preexisting condition which is aggravated, accelerated or lighted up by employment activity is deemed a personal injury under the workers' compensation act. Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Fraze v. McClelland Co., 200 Iowa 944, 205 N.W. 737 (1925). An employee is not entitled to compensation for a result of a preexisting injury or disease, but rather for the extent of the injury when the preexisting injury or disease is aggravated, accelerated, worsened or lighted up. Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). It is important to keep in mind that claimant's injury does not need to be the only cause of his disability. A cause is proximate if it is a substantial factor in bringing about the result. Blacksmith v. All American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

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 industrial commissioner has said on many occasions:

> 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 Company, II Iowa Industrial Commissioner Report 39 (1981); Enstrom v. Iowa Public Services Company, II Iowa Industrial Commissioner Report 142 (1981; Webb v.Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981).

Both parties make reference to the philosophy and purpose of workers' compensation. Compensation is, of course, to provide income to the injured worker as he heals and to pay him for any reduction in earning capacity. The ultimate goal is to return the worker to work. Ideally, the worker goes back to his former employer thereby suffering minimal disruption in his life. If that is not possible, disability payments may give him time for retraining for employment which is more suitable.

Defendants in this matter have afforded a third alternative which sometimes is very useful; that is, returning the employee to former work with modification on a part-time basis at first. The advantages of this approach are that the employee engages in familiar duties in familiar surroundings. He sees what he can do. He has some time to ease back into the mainstream of his labors and eventually may discover he is capable of more than he initially thought.

Defendants in this matter actively have attempted to try to vocationally rehabilitate this claimant and those efforts and claimant's response thereto are important in assessing his industrial disability. Benson was able to work out a part-time position with claimant's former employer.

Benson performed a job analysis of the part-time position and concluded the work would entail walking on a cement floor and loose gravel, retreiving small parts as well as tires and alternators, standing 50 percent of the time, walking 25 percent of the time, sitting the remainder of the time, occasionally stooping and crouching, some bending at the waist and some reaching above shoulder and head level.

Claimant expressed what may be a legitimate concern that the job described on paper would be different from what he would be asked to do. Comparing Benson's analysis with Dr. Grant's limitations indicates that potentially claimant might have to lift more than 20 pounds and would have to walk on an uneven surface.

Claimant has a number of years of work life remaining. Admittedly, testing shows he does not have the aptitude for further formal academic training, but Weigel found claimant to have good work habits and concentration and an ability to follow through on verbal instructions. Although claimant may not have a large number of transferable skills, he has an excellent work record which includes running the business in which he was employed and doing a variety of tasks. All of his work was classified by Benson as semi-skilled in nature. While some of his work required brawn, other aspects certainly necessitated skills.

The economy is a factor in this claimant's likelihood in finding work. The industrial commissioner has spoken to the affect of the economy thusly:

> If one has a serious disability, there [sic] earning capacity is much lower in relation to the work force as a whole. If one has a poor education, there [sic] earning potential is also lower than the mainstream. But if the local economy situation is temporarily depressed, the earning capacity of the entire work force is decreased. The earning capacity of an industrial disabled worker because of an ecomonic downturn has then been decreased regardless of the fact that he has been injured. It stands to reason, therefore, that a claimant should not be entitled to additional compensation benefits because the employment opportunties are temporarily restricted for one reason or another.

Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430, 435 (appeal decision 1981) (district court affirmed, supreme court appeal dismissed).

Claimant argues a very substantial industrial disability. Ultimately that may be the case. However, this deputy commissioner is not convinced that an award of that magnitude should be made at this time. Claimant's motivation is less than one would like. Defendants have made an attempt to help him. He needs to respond in a more active way.

After reviewing the Iowa case law, the analysis provided in this section and the finding of facts set out below, this deputy industrial commissioner concludes that claimant has an industrial disability related to his injury of December 29, 1980 of 33 1/3 percent.

At the time of hearing claimant testified to some outstanding mileage expenses for which he previously had made no claim. No verification of those expenses was provided; however, the form 2 filed by defendants includes no payment for travel. Defendants are urged to pay claimant mileage expense for whatever trips he can document.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is fifty-two years of age.

That claimant has an eleventh grade education with no additional specialized training.

That claimant has been a sheet metal worker and press operator.

That a substantial portion of claimant's work life has been with defendant employer doing heavy work requiring good mobility.

That claimant's work primarily involved standing and walking with walking over uneven surfaces.

That claimant's work necessitated lifting in excess of 100 pounds.

That claimant injured his back on April 25, 1977 as he and a co-worker attempted to move a transmission.

That claimant was hospitalized with back complaints.

That claimant had a back problem in April of 1980.

That on December 29, 1980 claimant had further back trouble as he was pulling a motor.

That claimant currently complains of aching and swelling in his back.

That claimant has a brace for support.

That claimant has considered opening a business with his spouse.

That claimant has not actively sought work.

That claimant does not have the aptitude for further academic training.

That claimant has refused a part-time position with his former employer.

That claimant has a 10 percent impairment to his low back.

That claimant's condition requires work which allows him to move about, to alternately sit and stand, to lift no more than 20 pounds, to engage in minimal overhead reaching and bending from the waist, and to avoid repeated twisting, lateral bending from the waist, walking on slippery or uneven surfaces and climbing ladders or scaffolds.

That claimant's varicose veins, ulcers, and hypertension do not contribute to his functional impairment in any significant way.

CONCLUSION OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has a 33 1/3 percent permanent partial industrial disability related to his injury of December 29, 1980.

ORDER

THEREFORE, IT IS ORDERED

That defendants pay unto claimant permanent partial disability benefits for one hundred sixty-six and one half (166.5) weeks at a rate of one hundred sixty-nine and 73/100 dollars ($169.73).

That defendants be allowed credit for amounts previously paid.

That defendants pay interest pursuant to Iowa Code section 85.30 as amended.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

That defendants file a final report on completion of payment of this award.

Signed and filed this 20th day of October, 1983.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RANDY R. SMITH,	:	
Claimant,	:	File No. 708822
vs.	:	A P P E A L
M.D. and ASSOCIATES, INC.,	:	D E C I S I O N
Employer, Defendant.	:	

STATEMENT OF THE CASE

Defendant appeals from an interim appeal decision in which claimant was found to be the employee of defendant on August 14, 1981 and in the course of employment when he received an injury arising out of his employment on that date.

The record on appeal consists of the transcript of the arbitration proceeding together with claimant's exhibits A and B and defendant's exhibits 1 and 2. Appellant filed an appeal brief.

ISSUES

The issues on appeal are whether or not there was an employer-employee relationship between the parties, and if so whether claimant's employment arose out of and in the course of such employment.

REVIEW OF THE EVIDENCE

Claimant, 21 years old at the time of the hearing, began doing carpentry work for defendant in April of 1981. Claimant testified that he was hired by Don Hyde, vice-president of defendant, to do renovation work on a building located in Des Moines. Claimant was paid by the hour and furnished only his own hammer. He explained that defendant handled the supplying of materials and supplies as well as additional tools needed. Claimant stated that he was given specific instructions by Gary Mathes, his foreman, on each day or on the previous evening. He testified that he worked at the same site from April of 1981 until his injury in August of 1981. (Transcript, pp. 6-7, 10-14, 18-19)

On August 14, 1981 claimant had parked his vehicle at the home of Don Hyde in Newton, and had ridden to the job site in Des Moines with Gary Mathes in a truck owned by defendant. He recalled working until 1:00 or 2:00 when Mathes' wife appeared at the work site. Claimant testified that Mathes wished to ride with his wife to their home in Winterset and asked claimant if he wanted to drive the truck back to Newton. Claimant was involved in an accident after stopping at a convenience store on the way back to Newton, suffering a broken femur, injured spleen, fractured ribs, and a concussion. (Tr., pp. 8-10, 15-18)

Claimant testified that while knowing that the truck he had been driving was owned by defendant, he understood it to be in

the complete control of Gary Mathes. He stated that Mathes generally took the truck home with him in the evenings and weekends. Claimant admitted that he rode to Des Moines with Mathes only "once in a great while." (Tr., pp. 20-21)

On April 21, 1981 claimant signed a document entitled Independent Contractor Agreement which was also signed by Gary Mathes on the behalf of defendant. Relevent portions of the document are set forth below:

> 3. The parties intend that an independent contractor-employer relationship will be created by this contract. Corporation is interested only in the results to be achieved, and the conduct and control of the work will lie solely with Contractor. Contractor is not to be considered an agent or employee of Corporation for any purpose, and the employees of Contractor are not entitled to any of the benefits that Corporation provides for Corporation's employees. It is understood that Corporation does not agree to use Contractor exclusively. It is further understood that Contractor is free to contract for similar services to be performed for other persons while he is under contract with Corporation.
>
> 4. In the performance of the work herein contemplated, Contractor is an independent contractor with the authority to control and direct the performance of the details of the work, Corporation being interested only in the results obtained. However, the work contemplated herein must meet the approval of employer and shall be subject to employer's general right of inspection and supervision to secure the satisfactory completion thereof. Contractor agrees to comply with all federal, state, and municipal laws, rules, and regulations that are now or may in the future become applicable to Contractor or Contractor's business, equipment, and personnel engaged in operations covered by this contract or accruing out of the performance of such operations. (Defendants' Exhibit 1)

Donald Hyde testified that he holds the position of vice-president of M. D. Associates while his wife, Miriam holds the position of president. He testified that the corporation plans renovation projects of commercial office buildings and hires independent contractors to perform the tasks of renovation. Hyde recalled that claimant worked for him three to four years as a part-time maintenance worker in a care center. He was later hired to work on an addition to the care center under an agreement similar to which he entered with M. D. Associates. (Tr., pp. 30-35)

Hyde testified that the truck claimant was driving on August 14, 1981 had been purchased by M. D. Associates for the use of Gary Mathes. Hyde asserted that Mathes had full control over the use of the truck, and that he had no reason to want the truck returned to Newton on August 14, 1981. (Tr., pp. 36-37)

Gary Mathes testified that he is self-employed as an independent contractor, and carries his own health and disability insurance. He testified that on August 14, 1981 he rode home to Winterset with his wife. Mathes asserted that he normally would have driven the truck to Winterset, and that there was no reason for the truck to return to Newton other than to provide claimant transportation. Mathes did not recall whether he had been asked by claimant or had volunteered the use of the truck. (Tr., pp. 44-52)

APPLICABLE LAW

Iowa Code section 85.18 provides: "No contract, rule, or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this chapter except as herein provided."

Iowa Code section 85.61 provides, in part:

> 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 charter and bylaws of a corporation, including a person holding an official position, or standing in a representative capacity of the employer, and including officials elected or appointed by the state, counties, school districts, area education agencies, municipal corporations, or cities under any form of government, and including members of the Iowa highway safety patrol and conservation officers, except as hereinafter specified.
>
> "Worker" or "employee" includes an inmate as defined in section 85.59.
>
> 3. The following persons shall not be deemed "workers" or "employees":
>
> ....
>
> b. An independent contractor.

The law looks to the substance and not to the form of the contract to determine the relationship. Sanford v. Goodrich, 234 Iowa 1036, 1042, 13 N.W.2d 40, ____ (1944).

In Schlotter v. Leudt, 255 Iowa 640, 645, 123 N.W.2d 434, ___ (1963) the court stated:

> "In the construction of a contract involving a contractor's relationship, the contract must be construed from 'its four corners' and not from an isolated paragraph. Courts must declare the intention of the parties from the language employed in the entire instrument, regardless of the classification of the parties as determined by themselves, bearing in mind that it is not the nomenclature which the contract uses, but the provisions which it makes for control of the details of the work that determine the status of the parties."

In Mallinger v. Webster City Oil Co., 211 Iowa 847, 851, 254 (1931).

> 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. If the workman is using the tools or equipment of the employer, it is understood and generally held that the one using them, especially if they are of substantial value, is a servant.

Mallinger v. Webster City Oil Co., 211 Iowa 847, 851, 234 N.W. 254 (1931).

The court last addressed the issue of employer-employee relationship in Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503, (1981). The opinion stated in part:

> 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.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on August 14, 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).

"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.

The Iowa Supreme Court stated in Bushing v. Iowa Railway and Light Co., 208 Iowa 1010, 226 N.W. 719 (1929), which was cited with approval in Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979), that:

> [a]n injury occurs in the course of employment when it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury or if not so required employee's departure from the usual place of employment must not amount to abandonment of employment or an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.
>
> 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.

Linderman v. Cownie Furs, 234 Iowa 708, 714, 13 N.W.2d 677 (1944)

The general rule is that, absent special circumstances, and employee is not entitled to compensation for injuries occurring off the employer's premises on the way to and from work. Frost v. S. S. Kresge Co., 299 N.W.2d 646, 648 (Iowa 1980).

ANALYSIS

The first issue on appeal is whether an employer-employee relationship existed between defendant and claimant. Despite the existence of the signed document which labeled claimant as an independent contractor, the greater weight of the evidence supports the deputy's conclusion that an employer-employee relationship did, in fact, exist as between the parties. Claimant was paid an hourly wage and was not responsible for supplying tools, materials, or supplies. Furthermore, claimant appears not to have been in the position of controlling his work according to his own methods, rather was the recipient of daily instructions from Gary Mathes. While Mathes asserted that he too is an independent contractor, factors such as signing claimant's work contract as the representative of defendant, being designated as foreman, and being provided a vehicle owned by defendant indicate that he is in actuality, an employee of defendant. The testimony of Donald Hyde was rampant with legal conclusions that claimant was an independent contractor, but lacking with regard to the basis for such conclusion. Under the facts of this case, the independent contractor agreement signed by claimant appears to be nothing more than a shallow attempt on the part of defendant to avoid liability under the workers' compensation laws of Iowa.

The second issue on appeal is whether claimant's injury arose out of and in the course of his employment. The general rule is that an employee is not entitled to compensation off of the employer's premises while on the way to and from work. An exception exists when the employee performs an errand or task which in some way benefits the employer or is incidental to the employee's work duties. Contrary to the deputy's conclusion, the greater weight of the evidence indicates that defendant stood to benefit not at all from claimant's action of driving the particular pickup truck in question to Newton on August 14, 1981. Donald Hyde testified that there was no reason for the truck to return to Newton and that it had been provided for the use of Gary Mathes. Mathes testified to the effect that the truck would have been driven to Winterset had claimant not needed transportation back to Newton. Claimant made no employment related stops in route to Newton and was not paid for the time spent traveling to and from work. Furthermore, claimant did not regularly depend on this or any other employee of defendant for rides to and from work. For the above stated reasons claimant's injury is found not to have occurred in the course of his employment and the order awarding workers' compensation benefits to claimant is reversed.

FINDINGS OF FACT

1. Claimant performed carpentry work in Des Moines for defendant.

2. Claimant signed an employment contract purporting to classify him as an independent contractor.

3. Claimant was paid by the hour.

4. Claimant was not responsible for supplying tools, materials, or supplies.

5. Claimant was under the direct supervision of an employee of defendant.

6. Claimant was injured in an accident on August 14, 1981 while driving a truck owned by defendant.

7. Claimant was returning home to Newton when his injury occurred.

8. Defendant did not benefit from claimant driving the truck to Newton.

9. The truck driven by claimant had been assigned to Gary Mathes for his job and personal use.

10. Mathes had exclusive control of the truck.

11. Claimant was an employee of defendant.

12. Claimant was not acting in the course of his employment when he was injured.

CONCLUSIONS OF LAW

Claimant has sustained the burden of proving the existence of an employer-employee relationship.

Claimant has failed to sustain the burden of proving that his injury occurred in the course of his employment.

WHEREFORE, the deputy's decision awarding claimant workers' compensation benefits is reversed.

THEREFORE, it is ordered that claimant take nothing as a result of these proceedings.

Signed and filed this 9th day of November, 1983.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RHONDA KAY SMITH, Claimant, vs. BOB AND FRANKIE'S RESTAURANT, Employer, and TOWER INSURANCE CO., and BITUMINOUS CASUALTY CORPORATION, Insurance Carriers, Defendants.	File No. 681878 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 Rhonda Kay Smith, claimant, against Bob and Frankie's Restaurant, employer and Bituminous Casualty Company and Tower Insurance Company, insurance carriers, defendants, to recover benefits under the Iowa Workers' Compensation Act for an injury allegedly arising out of and in the course of her employment. It came on for hearing on December 20, 1983 at the office of the Iowa Industrial Commissioner in Des Moines, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file contains a first report of injury filed September 22, 1981. Also contained in the file is a denial of compensability received November 23, 1981, apparently from Tower Insurance Company.

The parties stipulated that the proper rate in the event of an award is $80.76; that the time off work is from September 16, 1981 to November 6, 1981 and that the medical expenses are fair and reasonable.

The parties indicated that Bituminous Insurance Company had coverage until August 27, 1981 and that Tower Insurance Company had coverage beginning on July 29, 1981 making for a period of overlap.

The record in this matter consists of the testimony of claimant, Frances Crouch, Jim Eastvold and Verna Nell; claimant's exhibit 1, records from claimant's hospitalization of September 22, 1981; claimant's exhibit 2, assorted medical reports and letters; claimant's exhibit 3, a bill from Des Moines General Osteopathic Hospital; claimant's exhibit 4, a report and charges from Norman Rose, D.O.; claimant's exhibit 5, a report and charges from Anthony A. Sciorrotta, D.O.; claimant's exhibit 6, a bill from Anesthesiologists Affiliated; defendants' exhibit A, a letter from Dr. Rose dated January 14, 1983; defendants' exhibit B,a report from Dr. Sciorrotta; defendants' exhibit C, a report from Dr. Sciorrotta; defendants' exhibit D, an insurance form dated September 16, 1981; defendants' exhibit E, a statement from claimant dated November 4, 1981; and defendants' exhibit F, a first report of injury. Defendant Tower filed an extremely thorough and well-argued brief.

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 there is a causal relationship between claimant's injury and any disability she suffered and whether or not claimant is entitled to temporary total disability benefits.

STATEMENT OF THE CASE

Twenty-two year old now married claimant, a high school graduate, testified to commencing work for defendant employer in April of 1979 while she was still in high school. She continued to work for defendant employer until August 16, 1982. Initially she was a dishwasher. After six months she was transferred to a position in which she alternated as the onion maker and salad maker. Claimant denied working at any other jobs from June to September 1981.

She described her duties from 4:00 p.m. to 1:00 or 2:00 a.m. with both the onions and salads: She took onions from a 50 pound sack on the floor under a table. A half bag of onions would be used on week days and a bag and a half on the weekend. Sometimes a small bunch of onions were taken as the table was a small one two or three feet square; at other times, the sack would be placed on the table. The onions were cleaned and placed in "goop" and flour and then fried. Flour in 50 pound bags was shifted to 25 pound cans. Grease came in 25 pound cans and was transferred to pans a few pounds at a time. Lettuce arrived in 24 pound cartons -- two on Tuesday and four on Friday -- which were placed on the floor under the salad table. The lettuce was cleaned and placed in a cooler in bags weighing 12 pounds. On Fridays there was a helper for salads. Lettuce was taken from the cooler and cut up for the salads. On a typical night, two bags of lettuce would be used. Salad dressing from gallon jars weighing six to seven pounds was stored on a shelf high enough "to make you stretch." The dressing was placed on the salads right before they were served. Claimant agreed that the kitchen workers frequently helped each other.

She asserted that she had no serious illnesses prior to June of 1981 and no injuries other than a broken collar bone as a first grade student. She claimed that she did no heavy lifting from June to September 1981 other than for her employer. She denied any prior hernia surgery or diagnosis of a hernia. She had a physical examination when she went out for track when she was in tenth grade. She stated that she did not participate in

sports in the summer of 1980 or in 1981. She acknowledged she had experienced throbbing pain for most of her life.

She recalled that her grandfather had a double hernia and that her brother had a hernia at age four.

Claimant remembered the circumstances surrounding her injury thusly: As she was bathing the night before her employer's daughter's wedding, June 25, 1981, she noticed a knot in her left groin area. She thought it would go away. She did not tell anyone at work about the knot nor did she complain of pain. She assumed that the pain was one of the throbbing variety she had encountered before. She performed her regular work with no difficulty. Although she knew knots are sometimes associated with hernias, she did not tell anyone of her knot because she did not want anyone to worry and she had some concern about being fired.

On September 15, 1981 at about 9:00 p.m., she was bending over a cooler to pick up a bag of lettuce weighing approximately 12 pounds. She felt a sharp pain and the knot in her side protruded more. She threw the lettuce back in the cooler. She told Nell she had to go home because she thought she had ruptured herself when she picked up the lettuce. This was the first time pain affected her work. She called her mother to tell her that she thought she was ruptured. She asked her brother to come in and work for her. The following day she went to Dr. Sciorrotta who examined her and referred her to Dr. Rose who recommended surgery which was performed on September 21. After staying with her mother for awhile, she went to her own apartment. She returned to work on November 6. She herself restricted her lifting on that return. She took lettuce and onions a few at a time or went to work early enough to get ahead.

Claimant was closely questioned regarding moves she made after she left her parents' home in September of 1980 where she had done general housekeeping. She said that she moved with her brothers' help first to Colfax where she lived alone doing her own housework and laundry. She denied ever carrying a full basket of washing as she "never had that many clothes." In November she moved to a house where she lived with another woman and the woman's child. Her housemate did the laundry, cooking and grocery shopping. She recalled that she herself did the housework. In June of 1981 she moved with the help of her brothers and mother to Mitchellville. She listed her furniture as a bed, dresser and couch.

Claimant denied telling Dr. Rose that she had severe pain in the groin two months before she saw him. Neither did she recollect reciting symptoms to him. She felt that she had told him about severe pain in September and throbbing pain before that time. She indicated that she did not relate the throbbing pain to the knot at the time it occurred. She was asked about interrogatory nine which apparently was answered on September 28, 1982:

> Describe in detail each injury, illness, disability or condition you claim to have received or suffered as a result of the injury alleged in the Petition, including the date when each such injury, illness, disability or condition first manifested itself.
>
> ANSWER: From June 25, 1981, through September 15, 1981, I had a small knot on my abdomen which caused some throbbing pain. However, I did not contact a doctor for treatment as I thought it might heal itself. Then on September 15, 1981, while lifting on the job I ruptured my abdomen for which I was treated and for which I make claim herein.

Claimant denied having pain that increased in either frequency or severity or which was triggered by anything specific. Ultimately she acknowledged that she was not sure exactly what caused the knot.

Claimant completed a form labeled Claimant's Statement which was signed on November 4, 1981. That statement says:

> I had been lifting 50 lbs of onions in June when it first happened. On Sept. 15, 1981 I was bending over lifting a 12 lb sack of lettuce when I was feeling pain in my groin. I stopped immediately and told Verna that I thought I had been ruptured. I walked around for a few minutes to ease the pain. Then I got on the phone to call my mother to let her know. I was told to stay off my feet and not lift anything. I sat until my relief came. I then went home to my mothers [sic] and went to bed until I could get to the doctor who sent me to another doctor. A week later went to the hospital [sic].

Frances Crouch, owner of Bob and Frankie's Restaurant, testified that she works in the restaurant all the time it is open and is sometimes in the kitchen. She "sort of" recalled the events of September 15, 1981. As she remembered, claimant's mother called, and then her brother phoned to say he would be in to work for claimant. Claimant did not say she had injured herself. The following day claimant's mother called to tell her claimant had a hernia. Crouch instructed the mother to call the insurance agency and then contacted the agency herself.

When the witness was presented with a paper to sign for compensation, she refused. She stated that no incident describing claimant's injury had been related to her.

Crouch was unable to say what the usual practice would be regarding the handling of lettuce and onions as she was not watching at all times and as each employee had a way of doing things. It was her impression, however, that the whole case of lettuce was not lifted up because there would not be room.

Verna Nell who was employed by defendant employer for four years, who worked alternately as an onion ring and salad maker, and who worked with claimant, testified that on September 15, 1981 she was working close to claimant making onions while claimant made salads. She remembered that claimant said "ouch" and then clutched her side and bent over. She had not seen claimant doing any strenuous work or lifting. Although claimant did not tell her how her injury had happen, she did tell her she thought she had hurt herself.

Nell believed claimant said she had hurt herself before, but she was afraid to tell anyone. The coemployee was not able to remember precisely; however, she thought this incident involved lifting onions.

The witness was again unsure and unable to remember, but she believed claimant had rubbed her right side before she went home on one occasion. She could not recollect if it was before or after June of 1981. Nell stated that it was not unusual for someone to ask for help as everybody helped each other. She personally took a few onions out of the sack at a time, but she said that some persons might lift the whole bag.

James Eastvold, an insurance agent with the agency which handles defendant employer's compensation insurance testified to filling out various forms. He said that the information to complete defendants' exhibit D was obtained from claimant and Crouch. That form contains this statement "Employee stated she had side pains and went home from work. She thought she had pulled a muscle several months prior while lifting sack of onions at restaurant." He thought that he had obtained this information from claimant as he had spoken to her on several occasions. He characterized the purpose of paragraph eight as to give description to the claim adjuster of what had happened. He claimed that if more than one incident was involved the incidents would be summarized and put together. He obtained the date of accident by using the date and time claimant gave notice to her first line supervisor. He assumed that claimant had done something which caused her to go home although his only information related to side pain and her going home.

Defendants' exhibit E, a form he sent to claimant, was filled out by her and then witnessed by him. He was unsure what he did with the form thereafter. On that form claimant indicated an injury date of June 6, 1981 which was reported on September 15. She detailed her injury as set out above. He agreed that paragraph eight of defendants' exhibit D made no mention of a June injury.

Notes from Anthony J. Sciorrotta, D.O., state: "At work, heavy lifting; pt. noticed a lump area around low pelvic area is tender to touch. Pt. initially noticed it 2 months ago." A report from Dr. Sciorrotta signed November 13, 1981 indicates that claimant consulted him on September 16, 1981 and relates claimant's condition to an accident. The "accident" is described as "pain experienced in the pelvic area after doing heavy lifting at work."

Claimant was admitted to the hospital on September 22, 1981 for left inguinal herniorrhaphy. The admission history indicates an onset of claimant's problem on July 15, 1981 after she was lifting a heavy sack (the figure on the admission history appears to be a 7; however, Dr. Rose recorded 9/15/81). Norman Rose reported that on September 15, 1981 the mass was reducible, but that "the pain and mass has returned on multiple occasions. The patient has noticed this to become progressively worse." A report from Dr. Rose dated September 30, 1981 gives this history: "Patient states approximately two months ago at work she was lifting & experienced great pain & weakness this area, regressing & recently (last 48 hrs.) lifting at work again & re-developed the extremely painful hernia." A letter from Dr. Rose to Dr. Sciorrotta gives a history of an onset with lifting two months before.

APPLICABLE LAW AND ANALYSIS

The issues are stated above.

In order to receive compensation for an injury, an employee must establish that the injury arose out of and in the course of employment. Both conditions must exist. Crowe v. Desoto Consolidated School District, 246 Iowa 402, 405, 68 N.W.2d 63 (1955).

In the course of relates to time, place and circumstance of the injury. An injury occurs in the course of employment when it is within the period of employment at a place where the employee may be performing duties and while she is fulfilling those duties or engaged in something incidental thereto. McClure v. Union County, 188 N.W.2d 283, 287 (Iowa 1971).

In addition to establishing that her injury occurred in the course of her employment, claimant must also establish the injury arose out of her employment. An injury arises out of the employment when there is a causal connection between the conditions under which the work is performed and the resulting injury. Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967). The test for arising out of has been described as "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." Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 700, 73 N.W.2d 732, 737 (1955) citing done In re McNicol, 215 Mass. 497, 102 N.E. 697 (1913).

An award of benefits cannot stand on a showing of a mere possibility of causal connection between the injury and the claimant's employment. An award can be sustained if the causal connection is not only possible, but fairly probable. Nellis v. Quealy, 237 Iowa 507, 21 N.W.2d 584 (1946). Questions of causal connection are essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). 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 (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 testimony 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 Musselman, 261 Iowa 352, 154 N.W.2d 128 (1967).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. 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).

Some inconsistencies exist in this record and many of them can be attributed to the finite questions which were at times confusing to claimant.

The undersigned believes that the record viewed as a whole supports the finding of a knot developing in claimant's groin in June. Claimant was able to attach her discovery of the knot to a wedding--a significant event and certainly one she would be likely to recall. Her work could entail lifting as much as 50 pounds if she were to lift a whole bag of onions. She did not tell anyone of the hernia partly because she didn't want anyone to worry and partly because she was afraid of losing her job. She had pain, but she had experienced that before. She continued to be able to do her job.

On September 15, 1981, a Tuesday and a day on which lettuce would routinely have been delivered, she had pain when she tried to pick up a bag of lettuce. While the testimony of Nell is not viewed as absoluely reliable in that she seemed to have very great difficulty remembering events, her recall of claimant's saying "ouch," clutching her side and bending over seemed to be clear.

Claimant's answers to interrogatories were done on September 28, 1982, more than a year after surgery. It would certainly be possible for claimant not to relate any throbbing to the knot when it appeared in June as she commonly had throbbing pain and found this no different, and then over a year, later connect the pain. At the time of hearing claimant indicated uncertainty as to what caused the knot that appeared in June. It is reasonable that she would not know exactly what caused the knot and also that she would attribute it to lifting she had done.

Little weight can be given to the testimony of Nell for the reasons set out above. Defendant Tower suggests that Nell saw claimant rub her side. Nell thought it was the right side. The hernia occurred on the left. The form filled out for the insurance company on September 16, 1981 does not contain reference to the lettuce lifting. A form signed on November 4, 1981 relates the lettuce incident.

The histories which claimant gave the doctor are not found to be inconsistent with her testimony at hearing other than some shortening of the time period. Dr. Sciorrotta, who was the first physician to see claimant, took a history of claimant's doing heavy lifting at work and then noticing a lump which had appeared two months before. Dr. Sciorrotta relates claimant's condition to pain after heavy lifting at work. Claimant also told Dr. Rose of lifting and experiencing pain approximately two months before her hospitalization. Claimant had not been diagnosed as having a hernia prior to September of 1981. Claimant has not established by a preponderance of the evidence an injury, a knot in her groin, which arose out of and in the course of her employment in June of 1981, but she has established an aggravation of that preexisting condition on September 15, 1981.

Defendant Tower argues that "[e]ven if an incident involving picking up lettuce on September 15, 1981 did occur, such an incident does not constitute an 'injury' within the meaning of the Iowa Workers' Compensation Act." citing Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967). The undersigned disagrees and believes there was an employment exertion. Admittedly, claimant did bending in her work and she had done bending before. However, employees frequently suffer compensable injuries while doing tasks they routinely do in both employment and nonemployment situations. Claimant was engaged in employment exertion when her pain became disabling.

Claimant will be awarded the temporary total disability she claims. Again, the record viewed as a whole supports the award. Defendant Tower argues Dr. Sciorrotta did not know of the existence of the knot prior to September 15, 1981. Notes show otherwise. He makes reference to an accident and later describes the accident as pain with lifting. Dr. Rose marked "no" in response to the question "Is condition solely a result of this accident?" The doctor then said the condition was a result of an injury at work. It seems that the doctor is distinguishing between accident and injury.

Claimant also will be awarded medical expenses.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That insurance coverage for defendant employer was provided by Bituminous until August 27, 1981.

That insurance coverage for defendant employer was provided by Tower beginning July 29, 1981.

That claimant commenced work for defendant employer in April 1979 and was employed until August 16, 1982.

That claimant alternated between work as an onion ring maker and as a salad maker.

That claimant's work could entail lifting 50 pound bags of onions and 24 pound cartons of lettuce.

That claimant did no heavy lifting other than at her work from June 1981 to September 1981.

That claimant moved in June of 1981 with the help of her brothers and mother.

That claimant had no prior diagnosis of hernia.

That claimant had experienced throbbing pain for most of her life.

That claimant first noticed a knot in her groin in June of 1981.

That claimant did her regular work after June of 1981 until September 15, 1981.

That claimant had sharp pain when she was bending over to pick up lettuce on September 15, 1981.

That claimant was hospitalized for a left inguinal herniorrhaphy on September 22, 1981.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant suffered an aggravation of a preexisting condition which arose out of and in the course of her employment on September 15, 1981.

That claimant's surgery and resultant temporary total disability was causally related to the aggravation of claimant's condition on September 15, 1981.

ORDER

THEREFORE, IT IS ORDERED:

That defendant Tower pay unto claimant temporary total disability benefits from September 16, 1981 to November 6, 1981 at a weekly rate of eighty and 76/100 dollars ($80.76).

That defendant Tower pay accrued amount in a lump sum.

That defendant Tower pay interest pursuant to Iowa Code section 85.30 .

That defendant Tower pay the following medical expenses:

Des Moines General Osteopathic Hospital	$2,020.75
Norman Rose, D.O.	700.00
Anthony J. Sciorrotta, D.O.	368.00
Anethesalogists Affiliated	235.00

That defendant Tower pay costs with the exception of the attendance of the shorthand reporter at the time of hearing whose charges for services are to be equally divided between defendant Tower and defendant Bituminous.

That defendant Tower file a final report in sixty (60) days.

Signed and filed this 26th day of January, 1984.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WARREN C. SMITH, Claimant,	:	
vs.	:	File No. 456459
FEGLES POWER SYSTEMS, INC., Employer,	:	A P P E A L
and	:	D E C I S I O N
LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from a proposed commutation decision which awarded claimant partial commutation of permanent total disability benefits for the purpose of paying attorney fees and advanced costs. The record on appeal consists of the testimony of claimant, Michael Lee Sandberg, and David Hammond; claimant's exhibits 1 through 3, 6, 8, and 9; defendants' exhibit A; and the filings and briefs of all parties on appeal. An application by claimant for authorization to present additional evidence on appeal was denied in accordance with Rule 500-4.28.

ISSUES

Claimant states the issues on appeal as:

(1) Whether it is in the best interests of Claimant to grant a full commutation;

(2) Whether, in the alternative, it was in Claimant's best interests to receive a sufficient partial commutation to pay not only legal fees and expenses, but the two substantial loans as well; and

(3) Whether it is in Claimant's best interest for the Agency to determine the specific method by which payment of the uncommuted benefits are to be paid.

REVIEW OF THE EVIDENCE

A review-reopening decision filed on January 26, 1983 awarded claimant permanent total disability compensation based upon a work-related injury of August 2, 1976. The decision set claimant's weekly rate of compensation at $174.00. No appeal was filed.

The record reveals that claimant has a high school education and was 63 years old at the time of the application for commutation. Claimant has recently remarried and has two children and six stepchildren, none dependent. (Transcript, pages 5, 42, 45) His monthly income consists of $659 in social security disability benefits, $132.45 in union pension benefits, and $222.75 from a contract sale of property. In addition, claimant receives workers' compensation benefits of $174 per week. (Tr., pp. 14-16) Claimant's wife receives $291.55 monthly in pension benefits and $379 in social security benefits. (Tr., pp. 6-7) Claimant testified he had $4,000 in a savings account and $1,101 in his checking account. (Tr., p. 17) He stated that he and his wife divide monthly expenses on a 50/50 basis. (Tr., p. 17) Claimant stated that in October of 1984, the balance will be due on his contract sale, and he will receive approximately $22,000 for the property. (Tr. p. 32) Claimant owns an acre lot in Wildewood Acres on which he owes $3,000, and a personal residence on which he owes $15,375. (Tr., pp. 24-25) Claimant testified he received $42,000 from a condemnation proceeding against his former residence. (Tr., p. 21) He purchased a fifth wheel camper for $6,000 and put the remaining $34,000 into building a new home. (Tr., p. 34) Claimant borrowed an additional $15,000 to pay off the labor on the house and the lot. (Tr., p. 34) The interest rate on that loan is between 19 - 20 percent. (Tr., p. 24) Claimant stated he had no written contract with the friend who did the labor on the house, and that the residence had cost more than he expected. (Tr., pp. 38-39) The property's assessed value is $41,835, which is approximate market value. (Tr., pp. 34, 91) Claimant stated he had paid the living expenses one winter for a family that was renting his house. (Tr., p. 49) The family damaged the property and moved out without repaying claimant. (Tr., p. 49) Claimant has had no experience in stocks and bonds and his prior investments have been confined to a savings account. (Tr., p. 51-53) Claimant's first wife managed the money and paid all bills until her death in 1976. (Tr., pp. 9, 57-58) Claimant testified that if he received a lump sum, he would pay off his present loans and talk to people who could help him invest the balance. (Tr., pp. 24-26, 31)

> I'm going to go people and talk to Money Market people and Mr. Sandberg back here. I will talk to him and see where I can get -- invest that money for the best for me and invest it and handle the money, you know. Talk to different people, banks. I can go to a bank. I can do -- go to a loan company and -- I don't mean like Thorp. I mean like real estate loan company like Bohemian or Perpetual. There's different routes I can go, but it will be invested. (Tr., p. 31)

Michael Sandberg, Ph.D., and associate professor of finance at Coe College, testified on behalf of claimant as an investment consultant. (Tr., pp. 59-66) Dr. Sandberg compared the advantages to claimant in investing $40,000 over a life expectancy period of 16 years as opposed to receiving weekly benefits for the rest of his life.

> Based on the objectives that I mentioned with respect to safety of principal, periodic income, I think -- and given the discount factor of 10 percent, I think it is safe to say that Mr. Smith could do better for himself or someone could do in conjunction with him such that he could earn with that safety of principal a return in excess of the discount factor which would imply that his weekly benefits could be higher than what he was currently receiving. (Tr., pp. 85-86)

Dr. Sandberg conceded that the shortcoming of many investment resources, such as long term bonds, was the practice of selling prior to maturity. (Tr., pp. 77) A second concern in long term investment involved drawing upon the principal periodically over a period of time. (Tr., p. 78) Dr. Sandberg stated that examination of claimant's financial records yielded no indications that claimant could not manage his affairs in a prudent manner. (Tr., p. 89)

David Hammond, Ph.D. and resource development specialist for Iowa State University, testified on behalf of defendants. (Tr., pp. 105-106) Dr. Hammond stated that a commutation would not be in the best interest of claimant as interest rates on secure investments are not likely to exceed an average of ten percent in the next 16 years. (Tr., p. 113) Dr. Hammond testified that people who receive lump sums tend to use the money for current consumption, rather than making investments for future income. (Tr., p. 114) In Dr. Hammond's opinion, claimant and his wife had sufficient combined income to handle their present financial obligations. (Tr., pp. 117-118)

APPLICABLE LAW

Section 85.45, Code of Iowa, provides in part:

> 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.

In determining whether commutation was 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), considered factors of the claimant's personal, family and financial circumstances, and the reasonableness of the claimant's plans for using the commuted value of his compensation.

In Dameron v. Neumann Bros., Inc., 339 N.W.2d 160, 164 (1983), the court stated:

> Ultimately, the Diamond analysis involves a benefit-detriment balancing of factors, with the worker's preference and the benefits to the worker of receiving a lump sum payment weighed against the potential detriments that would result if the worker invested unwisely, spent foolishly, or otherwise wasted the fund so it no longer provided the wage-substitute intended by our worker's compensation law.

Professor Arthur Larson advocates stringent standards for granting commutation. His treatise warns:

> 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 total income insurance system, it ordinarily does its share of the job only if it can be depended on to supply periodic income benefits replacing a portion of lost earnings. If a partially or totally disabled worker gives up these reliable periodic payments in exchange for a large sum of cash immediately in hand, experience has shown that in many cases the lump sum is soon dissipated and the workman is right back where he would have been if workmen's compensation had never existed. 3A. Larson, Workmen's Compensation Law §82.71, at 15-573 (1983 ed.)

ANALYSIS

With regard to the first issue on appeal, a full commutation would not appear to be in claimant's best interests. Both Dr. Sandberg and Dr. Hammond have acknowledged that any long-term investment plan is only effective if the plan is followed and the principal is not subject to periodic withdrawals. While claimant has expressed a vague intention to seek financial planning advice, a specific plan evincing prior investigation with a view to securing the principal, which would lend credence to such intent, has not been offered.

Claimant's previous experience in managing sums of money has been limited to purchasing real estate property and maintaining a small savings account. For years, his first wife handled all of the family finances.

Claimant has shown some defects in financial judgment in the purchase of his present home in that claimant had no contract with the builder, a good friend, and appears uncertain as to the nature of the services and materials for which he paid. While his ill-fated attempt to provide support to his renter was commendable in principle, such assistance leaves the impression that claimant, should he have a large sum at his disposal, might be inclined to other generous gestures on behalf of family and friends.

In denying full commutation, the deputy, who had opportunity to observe claimant at the commutation hearing, found that claimant's demeanor suggested impaired reasoning abilities. The deputy concluded he did not believe claimant would follow investment advice. In view of the previously stated concerns, the decision of the deputy is accepted and full commutation is denied.

Claimant's second issue on appeal is for partial commutation to pay off his two loans. Claimant's present monthly income should be more than sufficient to meet the monthly installment payments, and claimant has alternatives available. He can refinance the 20 percent interest loan and thereby lower his monthly payments; or he can utilize the $22,000 balloon payment from the sale of his property to pay off both loans. The concerns of financial mismanagement that governed denial of full commutation apply here, as well. There can be no assurance that funds earmarked for the payment of debts will be used for that purpose. However, should claimant encounter unanticipated expenses in the future, he can again seek partial commutation assistance.

Contra to the proposal advanced in claimant's appeal brief, the industrial commissioner may not order defendants to pay claimant's debts for him. The statutory obligations of defendants as defined by section 85.27, the Code, are limited to medical-related expenses.

In answer to the inquiry regarding the uncommuted portion of the award, the life expectancy of the claimant will be taken into consideration and the amount alloted for attorney's fees will be based on a commuted value to be deducted from the tail end of the award. Since the basis upon which the attorney's fee is computed is unknown at this writing, an actual order of a specific figure cannot be made. As indicated in the deputy's decision, the amount of payments previously paid and the future amounts to yet be paid will change up to the date this decision is finalized.

FINDINGS OF FACT

1. Claimant has a high school education and was 63 years old at the time of the hearing.

2. Claimant was awarded permanent total disability benefits as a result of an August 2, 1976 work-related injury.

3. Claimant receives monthly benefits of $659 from social security and $132.45 from union pension. He receives $174 a week from workers' compensation benefits. Claimant also receives $222.75 a month from a contract sale of real estate.

4. Claimant has $4,000 in a savings account and $1,101 in a checking account.

5. Claimant's wife receives $670.55 per month in social security and pension benefits.

6. The monthly income of claimant and his wife are sufficient to meet their current financial obligations.

7. Claimant has used questionable judgment in previous financial transactions.

8. Claimant has no specific investment plan to secure a long-term income from the proceeds of a full commutation.

9. It would not be in claimant's best interest to fully commute his disability benefits.

10. A partial commutation for the purpose of paying claimant's attorney fees and related expenses is in claimant's best interest.

11. Claimant has alternatives available to him to decrease the payments on his existing loans.

12. A partial commutation for the purpose of paying off the existing loans is not in claimant's best interest.

13. The commuted portion of the claimant's benefits, as yet to be determined, will be deducted from the tail end of claimant's award.

CONCLUSIONS OF LAW

Claimant has failed to prove a full commutation or a partial commutation to pay off his loans would be in his best interest.

Claimant is entitled to a partial commutation to pay his attorney fees and related expenses.

WHEREFORE, the proposed decision of the deputy is affirmed.

THEREFORE, it is ordered:

That defendants are to pay claimant a partial commutation for the purpose of paying claimant's attorney fees and related expenses.

That the parties will resubmit the current payment status so that the commutation may be computed.

That defendants are to pay the costs of this action.

Signed and filed this 29th day of May, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DARWIN SNOW,	:	
Claimant,	:	File No. 708253 701114
vs.	:	R E V I E W -
EARL MAY SEED & NURSERY CO.,	:	R E O P E N I N G
Employer,	:	D E C I S I O N
and	:	
TRAVELERS INSURANCE COMPANIES,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This matter came on for hearing at the Pottawattamie County Courthouse in Council Bluffs, Iowa on August 4, 1983, at which time the case was fully submitted.

This case involves two injuries:

1. File 701114 concerns an injury of March 23, 1982. An employers first report of injury was filed on April 27, 1982. A memorandum of agreement was filed on May 17, 1982 calling for the payment of $98.98 in weekly compensation. This rate was later corrected in an April 20, 1983 filing to indicate that the rate of compensation was $101.38. Claimant was paid six days of compensation.

2. File 708253 concerns a June 30, 1982 injury. An employers first report of injury was filed on July 22, 1982. A combined memorandum of agreement and final report was filed on August 2, 1982 indicating that claimant had been paid 2 1/7 weeks of temporary total disability compensation at the rate of $101.38.

The record consists of the testimony of the claimant, Aloma Snow, Judith Webster and Bruce Ringleb; the depositions of Thomas H. Largen, M.D., and Ronald K. Miller, M.D.; claimant's exhibits A and B; and defendants' exhibits 1 through 5.

ISSUES

The issues for resolution are:

1. The rate of compensation;

2. Whether there is a causal connection between the injuries and disability; and

3. The nature and extent of disability.

STATEMENT OF THE EVIDENCE

On the relevant injury dates claimant was employed by Earl May Seed and Nursery Company (Earl May). Claimant testified that he started for Earl May in May 1981. He was originally paid $3.35 per hour and by March 1982 he was being paid $3.70 per hour. In the thirteen weeks prior to the March 1982 injury claimant's average gross weekly wage was $137.67. The last thirteen consecutive weeks worked prior to June 30, 1982 shows that claimant averaged $134.30. (This is at variance with defendants' exhibit 2 since the exhibit does not show the gross wage for consecutive weeks worked.)

In March 1982 claimant testified that he was scooping dirt from the frozen ground and his right hand became numb. It appears that claimant sustained a twisting type injury at this time. Claimant went to Thomas H. Largen, M.D., on March 18, 1982 in his Hamburg office. Claimant was given anti-inflammatory medications. Claimant continued to work until April 1982. Claimant saw Dr. Largen again on April 16, 1982. Claimant was complaining of neck and shoulder pain and hand numbness. Claimant was taking blood pressure medication at the time. Dr. Largen testified that claimant came in again on May 14, 1982 where he reported another injury and was having right leg (claimant had a prior left leg amputation at age six). The prosthetic device was not all that good. Dr. Largen indicated that claimant had a compensatory scoliosis of his spine, which predisposed him to further injury. Claimant's knee was hurt and swelling. Apparently claimant's second injury involved slipping and hurting the knee.

Claimant had been hospitalized three days in late April 1982. X-rays of the spine showed the aforementioned compensatory scoliosis. Osteoarthritis and degenerative changes were noted in the lumbar spine as well as the fifth cervical disc space.

After the May injury Dr. Largen indicated that claimant was having problems with his medial cartilage.

Claimant returned to work for the last time in mid July 1982. Claimant was discharged from his employment on July 30, 1982. Claimant received unemployment compensation for about a year. He received a note (claimant's exhibit B) from Dr. Largen indicating that he could not work because he was disabled, so he was cut off unemployment.

Claimant testified that he has sought employment at several locations, but has been unsuccessful in obtaining employment. Claimant testified that his back has worsened and that he can only walk for about twenty minutes. Claimant is 52 with an eighth grade education. Most of his work experience has been at nurseries. He was a supervisor at a can redemption center for a period of about two years.

Claimant stated that he does nothing around the house. He testified that he used to do all his car repairs but does not do so anymore. In the mid 1970's claimant went through rehabilitation and learned the shoe repair business. He states that he is desirous of pursuing this vocation.

Aloma Snow, claimant's wife, testified that it was she who gave the history to Dr. Largen. She testified that claimant hurt his low back in the spring of 1982. She testified that complaints were made to Dr. Largen.

Judith Webster testified that she was the assistant personnel director for Earl May. She testified as to the foundation of claimant's pay which was discussed above. She also testified as to the confusion regarding the injury date. Although claimant reported the original injury as March 22, 1982, Ms. Webster's records indicate that claimant worked March 16, 1982, missed March 17 and 18, and returned to work on March 19, 1982. Insofar as the second injury is concerned, the witness indicated that the June 30, 1982 injury date came from Bruce Ringleb, claimant's supervisor.

Ringleb testified that after claimant returned to work he was laid off because of low quality performance. He testified that he told claimant to improve in December 1981, and that on one instance claimant didn't water plants as instructed.

Dr. Largen's testimony was offered into evidence and was most helpful in recreating the events and lessening the confusion created by the testimony. He testified as to the causal connection of claimant's condition as well as the extent of disability:

> Q. You have an opinion, Doctor, based on reasonable medical certainty as to whether or not the injury that occurred on or about the 18th day of March, 1982, and the injury that was in a form of aggravation of a previous injury, as well as the new injury

that occurred on or about the 14th day of May, 1982, was the approximate cause of the condition of being in the patient at the time you examined him in May of 1982?

And first answer the question yes or no.

A. Yes.

Q. What is your opinion?

A. As to the injuries, I think--I realize that he has some predisposing factors that would cause problems, but with injuries to these, like back and leg, and that's what actually happened to him, that's the cause of his disability at the present time.

Q. Do you have an opinion, Doctor, as to whether there's permanency in the conditions you've explained to me?

A. Yes, there's a certain amount of permanency there. You injure an already diseased joint and it never will return back to where it was before.

Q. This is in both the back and the knee?

A. And the knee, yes.

Q. Would you be able to give us a percentage of disability?

A. I would imagine that from the increase of this injury-- I don't think the man really thinks he's disabled, first of all, even with his amputation. He doesn't consider that a disability to himself as far as the way I feel his attitude is. From the injury, I think he has probably increased his already amputee disability at least 15, 20 per cent.

Q. That would be both the back and the knee?

A. Both back and the knee. I could not really tell you--I could not separate them. In other words, I can't say, yeah, the knee's given you 5, 10, and the back has given you this, but combine the two with an amputation that you already have, you have to take in the total picture of the patient.

MR. DAVIDSON: I believe that's all.

On cross-examination, it becomes clear that the April 1982 pitalization focused primarily on the neck and arm. Dr. Largen tified that "just recently" has claimant complained of roiliac pain. These complaints were voiced in June 1983. April hospital summary indicates acute back and neck strain.

Claimant was seen by Ronald K. Miller, M.D., a Council ffs orthopedist on May 17, 1983. The remarkable thing noted the extreme restriction in range of motion of the spine, ticularly on forward flexion. Right and left lateral bending wed mild restriction on bending and rotation. On the re- ning leg there was no neurological deficit. There was no sory or motor deficit. There was no instability in the knee hough some crepitus was noted. X-rays of the back showed hritic changes throughout the lower lumbar spine, but maximal the L3,4 interspace. Dr. Miller felt that claimant had a ational knee sprain on the right which was still giving imant trouble. Additionally, Dr. Miller indicated that there a possibility of medial meniscus problems. He thought imant's healing process was complete and that claimant had tained an aggravation of a preexisting arthritic process in back, maybe with a rotational type strain, both in his back his knee.

Dr. Miller felt that the injury (June 16, 1982) aggravated problem. No permanent impairment was given for the knee ce there was no objective signs related thereto. Dr. Miller ced limitations on claimant's back, however. He thought imant should be careful with respect to bending, stooping and ting. A five percent permanent impairment was assigned. Dr. ler had seen claimant for a Social Security evaluation in 8. At the present time Dr. Miller expressed surprise that imant returned to work. In 1978 claimant was in a wheelchair.

APPLICABLE LAW

1. Sections 85.3 and 85.20, Code of Iowa, provide this ncy with jurisdiction in workers' compensation cases.

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

3. The claimant has the burden of proving by a preponderance the evidence that the injuries of March 23, 1982 and June 30, 2 are causally related to the disability on which he now es his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W. 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d (1945). A possibility is insufficient; a probability is essary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa , 73 N.W.2d 732 (1955). The question of causal connection is entially within the domain of expert testimony. Bradshaw v. Iowa thodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

4. While a claimant is not entitled to compensation for the sults of a preexisting injury or disease, the mere existence the time of a subsequent injury is not a defense. Rose v. n Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 56). 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).

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. 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. Id. at 181.

ANALYSIS

Although the record in this case is confusing to say the least, it is still clear to me that claimant has established his claim. The records with regard to the dates, who told what history when, and the mechanics of the injury will probably never be resolved to everyone's satisfaction. Claimant's communicative skills are limited, as are his wife's. The wife does all the talking as is rather apparent from my observation and the testimony of Dr. Largen.

Dr. Largen's original discharge summary indicates that the final diagnosis was "acute back and neck strain." Despite this, it was another year or so before claimant voiced another complaint. I think that claimant's failure can be ascribed to his general slowness in these matters. I think that the causal connection is there, however elusive.

Dr. Largen's records indicate that the date of injury should be March 16, 1982. The testimony of Ms. Webster supports this finding. Insofar as the May date, it is clear to me that an injury occurred in May 1982. I cannot pin down the exact date. Again, this lack is related to the communication problem.

It is clear to me that claimant's back problems were aggravated by the first injury on March 16, 1982. All disability awarded hereby will be attached to the March 16, 1982 injury. It would appear, then, that the fixing of the May or June date would be immaterial. Defendants' exhibit 2 indicates that claimant's average weekly wage was $138 per week. Claimant was married and his wife indicated that four children were at home at the time of injury. This entitles claimant to be paid $101.96 per week.

No further healing period will be awarded since the record indicates that claimant worked after the injury.

The next item to be discussed is the amount of disability to be awarded. Claimant's functional disability is low and this is a non-surgical case. However, claimant will not return to nursery work, janitor work or a "supervisory" job in a sheltered workshop. The employment possibilities for claimant are bleak. Claimant probably fits the "first fired last hired" syndrome, but has managed to work and support his family. Despite the explanations that Earl May is improving its work force, the fact still remains that claimant is not working and is not working at Earl May. Claimant's case fits in the McSpadden mold.

Considering claimant's bona fide efforts to find employment and his past experience in so doing despite disability, it is found that claimant is permanently and totally disabled within the meaning of the law. Claimant has excellent motivation considering his impairments.

FINDINGS OF FACT

1. Claimant was employed by Earl May on March 16, 1982 and sustained an injury while working.

2. Although defendants filed a memorandum of agreement regarding a March 23, 1982 injury the mechanics of injury and the records of the employer indicate that the memorandum covers a March 16, 1982 injury.

3. Claimant returned to work and sustained another injury at work.

4. A memorandum of agreement was filed concerning this second injury. The date of injury on the memorandum is June 30, 1982, but this is clearly in error.

5. Claimant was paid compensation for both injuries.

6. Claimant materially aggravated a back condition because of the March 16, 1982 injury.

7. As a result of the aggravation claimant is permanently and totally disabled.

8. Claimant's gross weekly wage was one hundred thirty-eight dollars ($138.00) in March 1982.

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 March 16, 1982.

3. The rate of compensation is one hundred one and 96/100 dollars ($101.96) per week.

4. Defendants will be ordered to pay unto claimant permanent total disability compensation commencing August 1, 1982 at the

rate of one hundred one and 96/100 dollars ($101.96) per week during the period of his disability commencing August 1, 1982.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant permanent total disability compensation commencing August 1, 1982 at the rate of one hundred one and 96/100 dollars ($101.96) per week during the period of disability.

Costs of this proceeding are taxed against defendants.

Interest is to accrue from the date of this decision.

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

Signed and filed this 4th day of January, 1984.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN D. SOPPE,	:	
Claimant,	:	File No. 692322
vs.	:	A P P E A L
DURANT FOUNDRY & MACHINE CO.,	:	D E C I S I O N
Employer, Defendant.	:	

Defendant appeals from a proposed arbitration decision in which claimant was awarded temporary total disability benefits plus additional benefits for unreasonable denial of benefits together with related medical and transportation expenses. The record on appeal is without the benefit of a transcript of the arbitration proceeding as no court reporter was provided and reporting of the proceedings was apparently waived. The recitation of the evidence in the arbitration decision signed by the deputy is therefore the only record of the testimony of the witnesses at the arbitration proceeding for review on appeal. In addition the record on appeal contains claimant's exhibits 1-10, defendant's exhibits 1 and 2 and the briefs of the parties on appeal.

REVIEW OF THE EVIDENCE

The recitation of the evidence in the arbitration decision is sufficient and under the circumstances adopted and will not again be set out herein.

APPLICABLE LAW

The applicable law in the arbitration decision is adopted and expanded to include the following:

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. United States Gypsum Co., 252 Iowa 613, 620, 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. Id. at 620, and cases cited.

Section 85.55, Code of Iowa provides:

> No employee or dependent to whom this chapter applies, shall have power to waive any of the provisions of this chapter in regard to the amount of compensation which may be payable to such employee or dependent hereunder. However, any person who has some physical defect which increases the risk of injury, may, subject to the approval of the industrial commissioner, enter into a written agreement with his employer waiving compensation for injuries which may occur directly or indirectly because of such physical defect, provided, however, that such waiver shall not affect the employee's benefits to be paid from the second injury fund under the provisions of section 85.64.

ANALYSIS

The analysis set out in the arbitration decision is adopted with the exception of the last paragraph and expanded as follows:

The evidence does not disclose that defendant employer was without reason to question that claimant's hernia was caused or aggravated by the employment. The record indicates the existence of a hernia for a period of time prior to the date and it was not so unreasonable to believe claimant did not receive a job related injury which caused the necessity for surgery and disability.

Defendant's activities surrounding the handling of claimant's situation do evidence a disregard and disdain for the workers' compensation law and its procedures but do not in this case justify the imposition of the additional benefits provisions of section 86.13, Code.

WHEREFORE, the arbitration decision is hereby modified.

FINDINGS OF FACT

That on July 23, 1981 claimant was an employee of Durant Foundry & Machine Co.

That on July 23, 1981 while at the Durant Foundry & Machine Co. plant, in the course of his employment, Mr. Soppe sustained a personal injury in the form of an aggravation of an inguinal hernia.

That on July 23, 1981 the employer was uninsured in violation of section 87.1 of the Code.

That on July 23, 1981 the notice required under section 87.2 of the Code had not been posted.

That on the date of hearing, the employer remained in violation of section 87.1 and 87.2 of the Code.

That claimant was temporarily totally disabled for the period December 14, 1981 to March 24, 1982 as a result of surgery performed to repair the effects of the injury.

That claimant drove a total of five hundred sixty (560) miles for treatment of his injury.

That certain medical charges were incurred as a consequence of the injury and are found to be fair and reasonable and causally related to the injury in question.

CONCLUSIONS OF LAW

That claimant has sustained his burden of proof and established that on July 23, 1981 he sustained a personal injury which both arose out of and in the course of his employment with Durant Foundry & Machine Co. resulting in temporary total disability from December 14, 1981 to March 24, 1982.

That transportation expenses incurred for treatment are reimbursable at the rate of twenty-two cents ($.22) per mile.

That claimant's rate for temporary total disability benefits is eighty-six and 25/100 dollars ($86.25) per week.

That the medical expense to Muscatine Health Center is compensable.

ORDER

THEREFORE, it is ordered:

That defendant shall pay unto claimant temporary total disability for the period December 14, 1981 through March 24, 1982, a total of fourteen and three-sevenths (14 3/7) weeks at the rate of eighty-six and 25/100 dollars ($86.25) per week.

That defendant shall pay unto claimant for the following medical expense:

Muscatine Health Center $25.00

That defendant shall pay unto claimant as mileage expense:

560 miles x .22 = $123.20

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

That all accrued benefits shall be paid claimant in a in a lump sum together with statutory interest from the date of disability.

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

Signed and filed this 13th day of January, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RY SPARKS,	:	
Claimant,	:	FILE NO. 712561
	:	I N T E R I M
RBERGER CONSTRUCTION CO.,	:	D E C I S I O N
Employer,	:	
d	:	
TUMINOUS CASUALTY CORP.,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding brought by Gary Sparks, claimant, ainst Herberger Construction Company, employer, and Bituminous sualty Corporation, insurance carrier, defendants to recover ditional benefits under the Iowa Workers' Compensation Act for injury arising out of and in the course of his employment on ly 1, 1982. It came on for hearing on September 21, 1983 at e office of the Iowa Industrial Commissioner in Des Moines, wa. It was considered fully submitted at that time.

The industrial commissioner's file shows a first report of jury received October 7, 1982. A rate agreement was filed cember 7, 1982. A final report received March 11, 1983 shows e payment of medical and weekly benefits with the last payment compensation made on February 28, 1983.

The record in this matter consists of the testimony of aimant, Russ Hemmingson and Dennis Herberger; claimant's hibit 1, a series of medical reports and claimant's exhibit 2, terial from job service. Defendants' objection to pages 1 rough 6 of claimant's exhibit 1 and claimant's objections to fendants' exhibit A are sustained. Defendants submitted a ry good brief.

ISSUES

The sole issue in this matter is whether or not claimant ould have received notice of termination of benefits pursuant Iowa Code section 86.13 which codified the requirements of uxier v. Woodward State Hospital-School, 266 N.W.2d 139 (Iowa 978).

STATEMENT OF THE CASE

Married claimant, father of two children, a laborer working t of the union hall, testified to working for defendant ployer for four and a half to five years. He recalled the rents surrounding his injury of July 1, 1982 as follows: He s working with a crane which was being used to drive piles. had turned the leads. One of the leads hit his hard hat and ocked it off and him down. The day after the incident he saw . Vander Ploeg who referred him to Dr. Berg who in turn ferred him to Dr. Neiman. Claimant said that he was told by . Neiman sometime in January that he would be released to turn to work in February. On February 23, 1983 he discussed s going back to the job with the doctor who prepared a return work slip for February 28, 1983.

Claimant went to the home base for defendant employer's mpany where he talked to the bookkeeper. He also went to the b site where he spoke with three persons including Dennis rberger. Claimant testified to being told the company was arting a new job in April and he would be called, but he never s called. He performed no work for defendant employer and was id no wage by it. He agreed that if work had been available would have tried to do it.

Claimant's compensation ended on February 27, 1983. He nied being sent a letter of termination at that time.

Claimant reported calling Hemmingson and being told to sign for unemployment. He was unsure when he registered, and he mitted that he certified he was ready, willing and able to rk. He indicated he was instructed to write down the union ly as the place where he was actively seeking work although he d looked for work elsewhere. His unemployment ran out and th the termination of his compensation benefits he has had to on welfare. In consulting the union he was informed he would called if work becomes available.

Claimant acknowledged that after he tried to go back to nstruction work with defendant employer he tried some light rd work and found a problem bending over which was not anything w. Claimant claimed that his headache is worsened by straining bending. Claimant agreed that his restrictions when he tried return to work were the same as those he has now.

Russ Hemmingson, claims manager for the insurance carrier, stified to being in charge of claimant's file. He did not call a letter of termination. Neither did he remember telling aimant to file for unemployment, but he did recollect their alking.

Dennis Herberger, vice president of defendant employer, estified to knowing claimant, to having contact with him from ime to time and to supervising him. He said that claimant was onsidered a valued employee who took an interest in jobs, who howed promise and who seemed to want to be more than a common aborer.

Herberger reported that the company had 26 employees when laimant was injured. When claimant attempted to return to work there were only 20 employees with openings in the company for persons from claimant's local limited to four. There were no openings with the company when claimant attempted to come back. The witness indicated that claimant would have been returned to work had work been available.

Offered into evidence was a decision from the Iowa Department of Job Service which allows claimant benefits.

Claimant saw Kurt Vander Ploeg, M.D., the day of his injury. Claimant told him of a headache and of pain in the back of his neck and left foot numbness. He had good range of motion in the neck with some restriction on left lateral bending and rotation, and tenderness over the trapezius muscles in the left posterior part of the neck. The doctor's assessment was probable cervical strain. Flexeril and Tylenol were prescribed.

Claimant was seen for a follow-up visit with complaints of neck trouble with pain sometimes going over the shoulder and into the arms and hands with numbness in the fourth and fifth fingers on the left. Claimant also spoke of headaches in the occipital area radiating over the head, occasional blurred vision and pain deep in the ears. Range of motion in the neck was good except for lateral bending. Claimant was tender in several areas. Claimant was given a cervical collar and an appointment with Dr. Berg was made.

Claimant was seen by Donald Berg, M.D., as an outpatient on August 25, 1982, seven to eight weeks after his injury, at which time he complained of neck pain and headache. X-rays of the cervical spine appeared normal. The suspected diagnosis was cervical strain of the muscles and ligaments associated with headaches. Dr. Berg thought claimant would be able to return to work in two weeks following physical therapy and viewed his prognosis as good with permanent physical impairment doubtful. An appointment was set up with Dr. Neiman.

Richard F. Neiman, M.D., first saw claimant on September 15, 1982. Claimant had minor limitation on flexion and extension and on lateral rotation of the neck with no evidence of significant neurological abnormalities. The doctor's impression was concussion headache syndrome. An electroencephalogram taken September 15, 1982 was interpreted as normal and a CT scan was negative. Claimant was given Tylenol 3 and Inderal.

Claimant was referred by Dr. Neiman for physical therapy. On October 19, 1982, claimant's initial visit to the therapist, all range of motion was within normal limits. Forward flexion produced slight pain in the center and to the left of the cervical spine. Extension made the head tingle in the occipital and frontal areas. Claimant was instructed in the use of cervical hot packs, traction and a cervical pillow.

When Dr. Neiman saw claimant on November 17, 1982 his medication was changed to Amitriptyline. By January Darvocet N-100 was added to his regimen.

On February 23, 1983 Dr. Neiman released claimant to return to work on February 28, 1983 although the doctor reported that claimant continued to have headaches.

APPLICABLE LAW AND ANALYSIS

The sole issue in this matter is whether or not claimant should have received notice of termination of benefits pursuant to Iowa Code section 86.13.

In Auxier v. Woodward State Hospital-School, 266 N.W.2d 139, 142 (Iowa 1978) the Iowa Supreme Court held:

> ... [O]n the basis of fundamental fairness, due process demands that, prior to termination of workers [sic] compensation benefits, except where the claimant has demonstrated recovery by returning to work, he or she is entitled to a notice which, as a minimum, requires the following:
>
> [1] the contemplated termination,
>
> [2] that the termination of benefits was to occur at a specified time not less than 30 days after notice,
>
> [3] the reason or reasons for the termination,
>
> [4] that the recipient had the opportunity to submit any evidence or documents disputing or contradicting the reasons given for termination, and, if such evidence or documents are submitted, to be advised whether termination is still contemplated,
>
> [5] that the recipient had the right to petition for review-reopening under §86.34.

The requirements of that case were codified by the legislature in 1982 and are now a part of Iowa Code section 86.13 which states, in pertinent part: "If commenced, the payments shall be terminated only when the employee has returned to work, or upon thirty days notice stating the reason for the termination and advising the employee of the right to file a claim with the industrial commissioner."

As this is a July 1, 1982 injury, this case will be considered under Iowa Code section 86.13. Ultimately the question boils down to what it means to return to work.

While we are aware that the workers' compensation law is not intended to be and should not be construed as insurance for employees, Mincey v. Dultmeier Mfg. Co., 223 Iowa 252, 262, 272 N.W. 430, 434 (1937), it is "for the benefit of the working man and should be, within reason, liberally construed". Barton v. Nevada Poultry Co., 253 Iowa 285, 289, 110 N.W.2d 660, 662 (1961). See Rish v. Iowa Portland Cement Co., 186 Iowa 443, 451, 170 N.W. 532, 535 (1919).

The undersigned believes that return to work means performing

duties for the employer -- actual engagement in gainful activity furthering the employer's business. While claimant did report for work, he did not function in any manner benefiting his employer or providing himself with wages.

Although not entirely on point the commissioner's decision in Kniesley v. Brazos Transport, Inc., II Iowa Industrial Commissioner Report 227 (1982) is of some value in this case. Claimant therein was given a release to return to work in an air conditioned truck. Later he was placed on indefinite layoff. He was sent a letter stating that he was being terminated from benefits immediately. The commissioner held that the notice was defective and did not meet the requirements of Auxier. Additional benefits were awarded. Kniesley is cited herein because of the similarity in the claimants' positions; i.e., they were released to return to work and then placed on layoff.

We know that workers' compensation benefits are to provide money for the injured worker for the time he is unable to work. When the employee actually returns to work and begins receiving wages, compensation is no longer necessary. On the other hand, when an employee does not return to work and has no salary coming in, he must have a warning from those providing compensation that his benefits will be ending. This notice gives him an opportunity, albeit brief, to get his life in order or to make an attempt to obtain additional benefits.

Claimant in this case was not given that chance and additional benefits will be awarded. Claimant presented himself for work. There was no work. He performed no work. His employer received no benefit. He received no wages. See also McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Blacksmith v. All American Inc., 290 N.W.2d 348 (Iowa 1980).

The undersigned is not unaware that decision places a burden on the insurance carrier to communicate with the insured and find out whether or not an employee released for work has in fact been returned to gainful employment activity. It has been this deputy's experience that in many instances the insured's communication with the insurer is faulty. There is opportunity for better communication and for being assured a bona fide return to work has occurred. This is a responsibility which should not be ignored.

An interesting twist to this case is the claimant's receipt of unemployment benefits. Defendants' well written argument would be persuasive in that regard were it not for this agency's routine treatment of unemployment benefits which is that the fact someone has been paid unemployment is evidence entitled to some weight, but it is not determinative. See for example, Schotanus v. Command Hydraulics, Inc., I Iowa Industrial Commissioner Report 294 (1981).

At the time of hearing the parties agreed that in the event of an award claimant's number of exemptions should be adjusted from three to four. That adjustment results in a rate of $252.67.

FINDING OF FACTS

WHEREFORE, IT IS FOUND:

That claimant is a laborer working out of the union hall.

That claimant had worked for defendant employer in excess of four years.

That claimant was injured on his job on July 1, 1982 when he was hit on his hard hat and knocked to the ground by a lead on a crane.

That claimant was released to return to work on February 28, 1983.

That claimant went to defendant employer prepared to try to return to work.

That claimant performed no work which benefited his employer.

That claimant was paid no wages.

That claimant's workers' compensation ended on February 27, 1983.

That claimant received unemployment after termination of his workers' compensation.

CONCLUSION OF LAWS

THEREFORE, IT IS CONCLUDED:

That claimant was entitled to notice of termination when he performed no gainful activity benefiting his employer after he was released to return to work.

INTERIM ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant benefits at a rate of two hundred fifty-two and 67/100 dollars ($252.67) per week until they have complied with the mandates of Iowa Code section 86.13.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 21st day of October, 1983.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LAVERN STEINBACH,	:	
	:	File No. 675221
Claimant,	:	
	:	A P P E A L
vs.	:	
	:	D E C I S I O N
POLK COUNTY, IOWA,	:	
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

By order of the industrial commissioner filed December 15, 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.

Defendant appeals and claimant cross-appeals an order of June 22, 1982 and an arbitration decision of November 8, 1983. The order resulted from a motion to adjudicate law points and found that an employee-employer relationship existed between claimant and defendant; an interlocutory appeal was denied on that issue. The arbitration decision found that claimant sustained an injury which arose out of and in the course of his employment and awarded certain compensation payments.

The record consists of a stipulation of certain facts which was repeated in the order of June 22, 1982; transcript of the hearing of June 28, 1983; claimant's exhibits 1 through 17, inclusive; and defendant's exibits A through M, inclusive, all of which evidence was considered in reaching this final agency decision.

The outcome of this appeal decision will be the same as that reached by the above referred to order and the arbitration decision.

Defendant-appellant filed its brief, and claimant-appellee filed his brief, raising four new issues as cross-appellant. In its reply brief, defendant-cross-appellee not only replied to the four new issues but went into the original appeal issues again in an attempt to make a response to claimant's-appellee brief. Claimant thereupon moved to strike those arguments in the reply brief which should have been covered only in the appeal brief. That motion is hereby sustained.

ISSUES

As stated above, it was found claimant was an employee of Polk County and was awarded certain compensation, specifically for six months of healing period and 250 weeks of permanent partial disability. Defendant states the issues on appeal:

ISSUE I

One put to work by a county employee in a county program and compensated solely by vouchers payable to the worker's landlord issued by the county who, while so working, was under the exclusive control of representatives of the county, was an employee of the county within the workers' compensation law.

ISSUE II

An employee injured while attempting to retrieve a tool necessary for the performance of his labor, having never been instructed to not retrieve such tool in a particular manner from a particular location, meets his burden of proof to establish that the injury was sustained in the course of his employment.

Claimant states the issues on cross-appeal:

ISSUE III

Expert medical testimony expressing the opinion of possible causation of claimant's deep venous thrombosis to bedrest made necessary by claimant's injury when coupled with claimant's lay testimony of no previous history of deep venous thrombosis, is sufficient to establish a causal link between the claimant's January 6, 1981 injury and diagnosis of deep venous thrombosis.

ISSUE IV

A causal link having been established between claimant's injury of January 6, 1981 and claimant's diagnosis of deep venous thrombosis entitles the claimant to an award of healing period benefits from January 6, 1981 to September 2, 1981 and from September 8, 1982 to September 18, 1982.

ISSUE V

venous thrombosis of the lower extremities rendered unable to competitively compete in the employment area supports an award of permanent total disability.

ISSUES VI

Respondent's refusal to make voluntary payments and refusal to provide medical services entitles claimant to a penalty award pursuant to section 86.13.

STATEMENT OF THE CASE

The stipulation of facts recited in the order of June 22, 82 and the recital of facts in the arbitration decision of vember 8, 1983 are hereby adopted as a part of this decision. iefly, it may be said that on December 17, 1980, claimant plied for some relief assistance at the Polk County Department Social Welfare. Upon being qualified, claimant was told he uld have to repay Polk County for the financial assistance. vever, he was also told that he could participate in the Polk unty Work Experience Program in order to reduce the amount of it money. Claimant elected to work and on January 6, 1981 was ven some work to do cleaning walls and woodwork. Apparently e bannister was weak at the location site and he was instructed to lean upon it. In trying to retrieve a sponge, claimant mehow leaned on the bannister or reached through the railings grasp the sponge. In so doing, he fell through a false iling and sustained certain injuries, including a broken lvis.

APPLICABLE LAW

The propositions of law stated in the order of June 22, 1982 the arbitration decision of November 8, 1983 are correct and e adopted as a part of this decision.

With respect to the course of the employment, "the test is ether the employee was doing what a person so employed may asonably do within the time of the employment and at a place may reasonably be during that time." Buehner v. Hauptly, 161 N.W.2d) at 172 (Iowa 1968). Further, at 172, the opinion states, is sometimes a thin line which divides a finding that the timate act itself is prohibited from one that the act was per and was merely performed contrary to instructions." See so Stahle v. Holtzen Homes 33rd Report of the Iowa Industrial mmissioner, p. 157 (1978), and Larson on Workmen's Compensation, 1. 1A pp. 6-22 through 6-26.

ANALYSIS

As shown in the order of June 22, 1982, three Iowa Cases ver the question of relief workers. The first was Hoover v. dependent School District, 220 Iowa 1364, 264 N.W. 611 (1936) ich was decided on the basis of the loaned employee doctrine d is not applicable here. The second was Oswald v. Lucas County, 2 Iowa 1099, 270 N.W. 847 (1937) in which claimant was unable show the employment relationship because the county did not ke the payments and provided only the equipment. The third se, that of Arnold v. State, 233 Iowa 1, 6 N.W.2d 113 (1943) more on point. In that case, claimant made an application to county welfare board for groceries. Upon being found qualified, aimant was required to work if he was actually to receive the oceries. Claimant elected to do the work and was injured on e job, subsequently dying from the injury. The Iowa Supreme urt held that the case was compensable and distinguished over, 220 Iowa 1364, 264 N.W. 611 and Oswald, 222 Iowa 1099, 0 N.W. 847. In so doing, the court recognized that it was rhaps not following the majority rule around the country. Mr. stice Sager, stated: "With all respect for the distinguished urts of other jurisdictions which have reached a different sult, we are satisfied that the decision of the trial court re affirmed is in keeping with the humanitarian purposes of r workmen's-compensation law."

The case here is not so very much different from the facts the Arnold situation. In both cases, there was a condition claimants getting welfare relief: In Arnold, that condition s fulfilled by work, whereas here the condition could be lfilled by either work or subsequently repaying the relief ency. In holding for the claimant, this final agency decision llows the direction of the court in such cases.

There is more, however, that claimant must show than a mple analogy to a reported case. That is, claimant must show at the actual elements of the employment relationship were lfilled. The factors are (1) the right of selection or to ploy at will; (2) the responsibility for the payment of wages the employer; (3) the right to discharge or terminate the lationship; (4) the right to control the work; and (5) whether e parties sought to be held as the employer was the responsible thority in charge of the work or for whose benefits the work s performed. In addition, the court recognizes the overriding ement of the intention of the parties as to the relationship ey are creating. Nelson v. City Service Oil Co., 259 Iowa 09, 146 N.W.2d 161 (1967). As to the first factor, defendant gues that it did not have any choice but acted under legislative ndate of §252.25, The Code, which provides:

> The board of supervisors of each county shall provide for the relief of poor persons in its county who are ineligible for, or are in immediate need and are awaiting approval and receipt of, assistance under programs provided by state or federal law, or whose actual needs cannot be fully met by the assistance furnished under such programs.

at section requires assistance be granted by the county to rtain individuals, but it does not require the counties to ter into employment relationships with those individuals.

Defendant concedes that it had the right to control the work d was a responsible party in charge of the work. As the right discharge, the stipulation shows claimant could be removed om his assigned duties if he was unable to perform as requested. nally, it is clear that claimant was paid wages by the county.

Defendant suggests (first brief, p. 5) that claimant's work s part of a make-work project and that creation of such a oject showed no intention to create an employment relationship. the contrary, it would seem that the county could benefit om the labor of persons such as claimant who are unable to do ch cleanup tasks.

Considering all the elements of the employee-employer lationship, then, one concludes that claimant was indeed an mployee of Polk County at the time he was injured.

As to the second issue, which concerned whether or not laimant was in a prohibited place or acting in a prohibited anner, the evidence is in conflict. Suffice it to say that laimant's actions do not appear to have been unreasonable; negligent perhaps, but not unreasonable.

Thirdly, claimant claims on cross-appeal that a deep venous thrombosis should be compensated under the act; however, the medical evidence clearly shows claimant had a prior clinical history of deep venous thrombosis, and the inference is taken that this condition was independent of the injury.

The issue of the causal relationship between the deep venous thrombosis and the injury having been decided against claimant, it is not necessary to discuss the fourth issue.

The fifth issue is that of the extent of claimant's industrial disability. Claimant is 54 years of age and has an eighth grade education. He has experience mainly in nonspecialized areas of work. His main impairment, to the extent of 25 percent of the body as a whole, comes from his injuries, although the injuries were severe, the award of 50 percent permanent partial disability is sizable and will suffice. In making this determination, it is noted that the evidence is in conflict as to claimant's vocational potential. The vocational rehabilitation reports paint a rather grim picture; on the other hand, William L. Booker, M.D., states that claimant has no limitations which should keep him from gainful employment. (Report September 18, 1982) He states further, that claimant is capable of leading the normal activities of living, although he should avoid prolonged inactivity and further trauma. (Report April 12, 1983) Considering these medical reports against the vocational rehabilitation information, Dr. Booker's opinion is taken over that of the rehabilitation experts because Dr. Booker addressed claimant's physical abilities. It is these physical abilities which are the main cause of his disability. Thus, although claimant has further physical impairment, he can, according to Dr. Booker, compete in the labor market.

Finally, claimant asks that penalty be levied under the provision of §86.13, 1983 Code of Iowa, for defendant's refusal to pay compensation benefits in this case. The refusal to make such payments appears to have been the result of a bona fide dispute, and the county should not be punished for defending it rights.

FINDINGS OF FACT

On December 17, 1980 claimant applied for relief assistance to the Polk County Department of Social Services and was found to be eligible for relief.

Under the agreement, claimant was required to repay for financial assistance or elect to take part in a Work Experience Program.

Claimant elected to participate in the Work Experience Program.

That on January 6, 1981 claimant was directed by employers of Polk County to wash walls and adjacent surfaces in a county-owned apartment building.

That while performing this task claimant fell through a false ceiling and was injured.

That claimant was not instructed by a supervisor or coemployees to avoid certain areas of the apartment building or stairway areas.

That claimant was hospitalized as a consequence of this injury.

That claimant sustained a functional impairment of twenty-five percent (25%) of the body as a whole as a consequence of this injury.

That claimant is 54 years of age.

That claimant did not complete the ninth grade.

That claimant has no specialized experience in any field.

That claimant was in good health without physical impairment prior to this incident.

That the healing period extends from January 6, 1981 through July 6, 1981.

That claimant has sustained an industrial disability of fifty percent (50%) to the body as a whole.

CONCLUSIONS OF LAW

Claimant was an employee of Polk County, Iowa on January 6, 1981. On that date, he sustained a personal injury which arose out of and in the course of his employment.

As a result of said injury, claimant sustained a permanent partial disability to the body as a whole for industrial purposes of fifty (50) percent.

ORDER

THEREFORE, IT IS ORDERED:

That the defendant shall pay unto claimant two hundred fifty (250) weeks of permanent partial disability benefits at the rate of ninety and 86/100 dollars ($90.86) per week.

That the defendant shall pay unto claimant healing period benefits for the period of January 6, 1981 through July 6, 1981 at the stipulated rate of ninety and 86/100 dollars ($90.86).

That interest shall accrue as of the date of the arbitration decision of November 8, 1983 pursuant to the terms of section 85.30.

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

That the employer will file a final report upon payment of this award.

Signed and filed at Des Moines, Iowa this 23rd day of April, 1984.

Appealed to District Court;
Pending

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS C. STOUT, Claimant, vs. BABSON BROTHERS COMPANY, Employer, and AMERICAN MUTUAL LIABILITY INSURACE COMPANY, Insurance Carrier, Defendants.	File No. 732610 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 Dennis C. Stout, claimant, against Babson Brothers Company, employer, and American Mutual Liability Insurance Company, insurance carrier, for the recovery of further benefits as the result of an injury on June 15, 1981. Claimant's rate of compensation as stipulated by the parties at the time of hearing is $154.53. A hearing was held before the undersigned on May 17, 1984. The case was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant; claimant's exhibits 1 through 7; and defendants' exibits A and B.

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, if any, to which he may be entitled.

EVIDENCE PRESENTED

Claimant testified he was 28 years old, divorced with one child and has completed the 11th grade. Following high school claimant obtained training in mig welding and has been employed in that area since. He stated that at the time of his injury on June 15, 1981 he had been employed by the defendant employer for about six months.

With the aid of a drawing (claimant's exhibit 7) and photo slide (claimant's exhibit 8) claimant was able to explain how his injury occurred. He stated that he had been working on a large steel tank which was laid on its side in a machine and rotated in order to weld together the sections of the tank. As he was nearing completion of the tank the top portion came down and struck him on the back of the neck in a "guillotine" type manner. He indicated that he received a severe cut on the back of his neck and began to bleed profusely. He stated that although he became dizzy he did not pass out. He was taken to the foreman's office and waited for the arrival of an ambulance which took him to the hospital where the injury was treated.

Claimant advised that he was treated at Clarke County Hospital where he received 34 stitches for his lacerated neck and was released. Claimant testified that he went home and was off work for three working days. He alleged that he was not in very good condition when he returned to work and that he continued to suffer headaches. He contended that he had never or seldom suffered from headaches prior to this injury. He described the headaches as a dull numbing pain in the back of his head. Claimant revealed that although he had returned to work after three days, he did not return to his regular work until the stitches were removed from his neck.

Claimant admitted that after his injury he received both a promotion in responsibility and pay. He contended, however, that continued headache pain forced him to request additional medical treatment in August 1981. After he consulted with his employer, they sent him to the hospital where a doctor told him the pain would go away with time. Claimant said that at approximately this same time he was fired for what he was told was a bad attitude. After drawing unemployment compensation for about eight months, claimant went to work for IBM as a parts replacer for copy machines. Claimant advised that he was in this position for over two years when he left and went to work for M & M Welding as a blacksmith welder. He contended that throughout this time he continued suffering the headaches. He stated that sometimes the headaches are so severe he cannot work. He revealed, however, that during the time between his employment with defendant employer and M & M Welding he did not seek medical attention. Claimant asserted that his failure to seek medical help was due in part to his lack of knowledge that defendants were responsible for continued medical expenses.

Claimant testified that he often feels a burning sensation in his neck in the area where he received the injury. He also testified that since he started at M & M Welding he has experienced an occasional burning sensation in his left arm. Claimant is right handed. Claimant said that wearing his welding face shield seems to aggravate the condition somewhat.

Claimant denied that he has received any injuries since the occurrence at defendants which he thinks has been causing his problems. Claimant advised he is no longer employed at M & M Welding due to lack of work and personality conflicts with the boss. He indicated that he has been seeking work in a maintenance capacity because he questions his work as a welder.

On cross-examination, claimant conceded that his injury had not interferred with his search for employment.

Several medical reports were submitted into the record. A standard form surgeon's report dated July 28, 1981 and signed by J. D. Kimball, M.D., reveals in rather sparse detail claimant's injury and course of treatment. According to that report, claimant did not suffer any permanent defects as a result of the injury. The report also shows that no x-rays were taken of claimant's neck.

The next medical reports appearing in the file commence in December 1982. At that time, G. Eric Hockett, M.D., diagnosed claimant as suffering from muscular contraction headaches and paresthesia of the left arm with an undetermined cause. Dr. Hockett described the x-rays of claimant's cervical spine as negative. An x-ray report, however, of the same date by John Henderson, M.D., found a slight decrease in height of C5 and C6 which the doctor attributed to claimant's previous injury. Dr. Hockett's progress notes dated February 15, 1982 suggest claimant may be suffering from post-traumatic degenerative arthritis with possible nerve root entrapment. An EMG study done February 15, 1982, however, indicated no abnormalities in the cervical areas.

Although Dr. Hockett found claimant's headaches to be caused by post-traumatic degenerative changes, he declined to make any kind of prognosis of claimant's condition.

The most detailed report submitted was that of Robert A. Hayne, M.D. In a letter dated October 27, 1983 Dr. Hayne stated:

> I saw Dennis Stout for examination on February 28, 1983. At that time he had a history dating back to June 15, 1981, at which time while at work for the Babson Brothers Company a sheet of steel fell on the back of his head. He was not knocked out but he sustained a laceration of the suboccipital area. He was taken to a hospital and thirty-five sutures were taken and he was released. He was off work for three days. Since that time he had headaches over the back of his head in the suboccipital area. He felt his symptomatology was becoming worse in severity. He stated his symptoms were not present constantly, but did plague him approximately three-fourths of the time. At that time he stated he had continued to work steadily and he was doing fairly heavy work.
>
> His past medical history reveals he has enjoyed good health.
>
> Neurological examination was essentially within normal limits. The optic fundi were normal. There was no disparity between the right and left sides. Strength and coordination of the upper and lower extremities were normal. Sensation was normal throughout. The cranial nerves were intact.
>
> X-rays of the cervical spine that had been made on December 31, 1982, showed a slight decrease in the height of C5-6 vertebral segments when compared to their adjacent vertebral bodies and this was suggestive of minimal compression changes, but there was no evidence of an acute change.
>
> He was sent to St. Louis Park, Minnesota for a CT scan of the cervical spine on March 2, 1983, to rule out an associated herniated disc. I will enclose a copy of this scan. The scan was within normal limits.
>
> He was then seen for examination on March 9, 1983. At that time he was working but still experiencing severe headaches at times. I told him at that time he should continue with conservative measures and to continue working. I felt that with the passage of time there would be a gradual resolution of his symptomatoloy. I felt the pain was residual from injuries sutained in the accident of June 15, 1981. He has not been seen by me for check-up examination since March 9, 1983.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 15, 1981 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).

ndahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A ssibility is insufficient; a probability is necessary. t v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d (1955). The question of causal connection is essentially hin the domain of expert testimony. Bradshaw v. Iowa Methodist spital, 251 Iowa 375, 101 N.W.2d 167 (1960).

However, expert medical evidence must be considered with all er evidence introduced bearing on the causal connection. Burt, Iowa 691, 73 N.W.2d 732. The opinion of experts need not be ched in definite, positive or unequivocal language. Sondag Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). However, the ert opinion may be accepted or rejected, in whole or in part, the trier of fact. Id. at 907. Further, the weight to be en to such an opinion is for the finder of fact, and that may affected by the completeness of the premise given the expert other surrounding circumstances. Bodish, 257 Iowa 516, 133 N.W.2d . See also Musselman v. Central Telephone Co., 261 Iowa 352, N.W.2d 128 (1967).

An injury is the producing cause; the disability, however, the result, and it is the result which is compensated. ton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 61); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 43).

Direct expert evidence is not, according to the general e, always essential to establish the permanency or future ect of an injury. Permanency may, in some cases, be inferred m the nature of the injury alone. Kaltenheuser v. Sesker, Iowa 117 (1963).

A finding of impairment to the body as a whole found by a ical evaluator does not equate to industrial disability. s is so as impairment and disability are not identical terms. ree of industrial disability can in fact be much different n the degree of impairment because in the first instance erence is to loss of earning capacity and in the later to tomical or functional abnormality or loss. Although loss of ction is to be considered and disability can rarely be found hout it, it is not so that an industrial disability is portionally related to a degree of impairment of bodily ction.

Factors considered in determining industrial disability lude the employee's medical condition prior to the injury, er the injury, and present condition; the situs of the ury, its severity and the length of healing period; the work erience of the employee prior to the injury, after the injury potential for rehabilitation; the employee's qualifications ellectually, emotionally and physically; earnings prior and sequent to the injury; and age, education, motivation, and ctional impairment as a result of the injury and inability ause of the injury to engage in employment for which the loyee is fitted. Loss of earnings caused by a job transfer reasons related to the injury is also relevant. These are ters which the finder of fact considers collectively in iving at the determination of the degree of industrial ability.

There are no weighting guidelines that are indicated for h of the factors to be considered. There are no guidelines ch give, for example, age a weighted value of ten percent of al, education a value of fifteen percent of total, motivation ive percent; work experience - thirty percent, etc. Neither a rating of functional impairment entitled to whatever the ree of impairment that is found to be conclusive that it ectly correlates to that degree of industrial disability to body as a whole. In other words, there are no formulae ch can be applied and then added up to determine the degree industrial disability. It therefore becomes necessary for deputy or commissioner to draw upon prior experience, eral and specialized knowledge to make the finding with ard to degree of industrial disability. See Birmingham v. estone Tire & Rubber Company, II Iowa Industrial Commissioner ort 39 (1981); Enstrom v. Iowa Public Services Company, II a Industrial Commissioner Report 142 (1981); Webb v. Lovejoy struction Co., II Iowa Industrial Commissioner Report 430 81).

ANALYSIS

It is undisputed that claimant received an injury on June 1981 which arose out of and in the course of his employment. imant is not, however, entitled to compensation for that ury, but rather for the disability, if any, which arose as a ult of the injury. Several factors would indicate that imant has not suffered any disability beyond the three work s he missed immediately after the accident. As defendants nt out in their brief, there is no functional impairment ing given by any physician. In addition, there does not ear to be any medically indicated restrictions imposed upon claimant. There is no indication that he requires continuing ication. Perhaps most significant, however, is the medical ort of Dr. Hayne in which he opines that claimant's condition l gradually improve with time. Yet, with all of these evant factors so adverse to claimant's contention, the fact ains that all of the medical experts agree that claimant's tinuing headaches are the result of and causally related to work injury.

The issue then becomes a two part question. First, is imant's condition permanent? Second, if the condition is manent, has it caused a disability and to what extent? st, on the question of permanency it should be noted that imant's headaches began almost immediately after his injury have been continuing up to the time of hearing which is ost four years. In addition, claimant reported that his daches were growing more severe, not less so. Claimant's ury appears to have caused a narrowing of the C5-C6 disc erspace and according to Dr. Hockett post-traumatic degenerative hritis. Notwithstanding the lack of direct evidence of manency when the record as a whole is considered, it is fair infer that claimant's headaches are probably of a continuing ure. Dr. Hayne did not express any opinion as to how far in the future or how much time he thought it would take for claimant's condition to improve. For these reasons, it must be concluded that claimant has proven that he has suffered a permanent disability.

The next question is the extent of claimant's disability. Again, the record is less than fully favorable to the claimant. It is clear, however, from the testimony of claimant that he has on occasion suffered sufficiently severe headaches that he has had to miss work, thus reducing his earning capacity. While it does not appear that claimant is precluded from any particular type of employment, it is evident that whatever his employment, he will occasionally suffer a reduction of income due in part to his injury. Since this record only discloses such problems relative to the wearing of welding protection devices, however, it would be mere speculation to guess what effect other employment would have on the headaches. In the absence of evidence by the claimant, it must be presumed that any such disability would be minimal.

Little need be said about the other factors of industrial disability since claimant's potential loss is minimal. It should be noted that he has been able to continue working even with the occasional headaches.

Although the record does contain factors both in favor of an award and in favor of a denial of an award, it is sufficient to establish a five percent disability for industrial purpose. Since the injury is found to have caused a permanent disability, claimant is entitled to healing period benefits for his three days off in June 1981.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

1. On June 15, 1981 claimant received an injury at work which caused a severe laceration to the back of his neck.

2. Since the injury of June 15, 1981 claimant has continued to suffer headaches which are occasionally severe.

3. As a result of the injury of June 15, 1981, claimant missed three days of work.

4. The occasionally severe headaches suffered by claimant are the result of his injury.

5. The headaches claimant suffers cause him to miss work on occasion.

6. Claimant is well motivated.

7. Claimant's headaches are a permanent disability which is equal to five percent for industrial purposes.

8. Claimant's rate of compensation is $154.53.

CONCLUSIONS OF LAW

WHEREFORE, IT IS CONCLUDED:

On June 15, 1981 claimant received an injury arising out of and in the course of his employment.

Claimant suffers from a permanent partial disability equal to five (5) percent of the body as a whole as a result of his injury.

ORDER

IT IS THEREFORE HEREBY ORDERED:

Defendants shall pay unto claimant healing period benefits for three (3) days commencing June 16, 1981 at the rate of one hundred fifty-four and 53/100 dollars ($154.53) and permanent partial disability benefits for twenty-five (25) weeks at the same rate, all accrued payments to be made in a lump sum together with statutory interest.

IT IS FURTHER ORDERED that defendants shall pay the costs of this action.

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

Signed and filed this 22nd day of June, 1984.

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CYNTHIA STRAIT, Claimant, vs. AGRI INDUSTRIES, Employer, and AMERICAN INTERNATIONAL ADJUSTMENT COMPANY, INC., Insurance Carrier, Defendants.	File No. 702102 A P P E A L D E C I S I O N

Defendants appeal from a decision awarding claimant a full commutation of benefits to which she is entitled as a result of the death of her husband in an employment related incident. The record on appeal consists of the transcript of the commutation proceeding together with claimant's exhibits 1 and 2 and defendants' exhibit A, and the briefs and arguments of the parties.

REVIEW OF THE EVIDENCE

Claimant has no children or other dependents and has no plans for remarriage. (Transcript, pp. 1, 46) She is in perfect health. Claimant has a college degree and is presently employed by Younkers in a training position with expectations of becoming a buyer for the store. (Tr., pp. 8, 13-14)

Following the death of her husband, claimant received $124,000.00 of life insurance proceeds and invested all but $24,000.00 which was used as a down payment on a home. None of these proceeds were spent on personal consumer items or luxuries. (Tr., p. 20) The only debt she has is the mortgage on her home. (Tr., p. 20) Because of her employment and investment income, she does not need the weekly workers' compensation benefits for her daily living expenses. (Tr., pp. 24-25)

Claimant's prior employment experience includes analyzing income and expenses and preparing budgets for public welfare recipients. (Tr., pp. 11-12) She is presently enrolled in a college investment course, but also utilizes the services of a lawyer, an accountant and a broker in making her investments. (Tr., pp. 18, 24-25)

At the time of the hearing in April of 1983 claimant had been dating one individual exclusively for approximately eight months. She indicated there was an equal likelihood of her remarrying as not remarrying. (Tr., p. 47, l. 16 - p. 48, l. 22)

ISSUES

Defendants state the issues on appeal thusly:

1. The Deputy erred in finding commutation to be in the Claimant's best interest as Claimant did not show any need for the commutation beyond the potential greater earning power of the commuted value of the award.

2. The Deputy's finding was based on insufficient and incompetent evidence and the record does not support his findings.

3. Commutation based solely on "economic opportunity" is outside the spirit and purpose of the act and is manifestly unfair and inequitable to the Employer and Insurance Carrier.

4. Iowa Code §85.45 (1983) is unconstitutional as applied to this Employer and this Insurance Carrier.

APPLICABLE LAW

Code of Iowa section 85.45 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.

3. When the recipient of commuted benefits is a minor employee, the industrial commissioner may order that such benefits be paid to a trustee as provided in section 85.49.

4. When a person seeking a commutation is a widow or widower, a permanently and totally disabled employee, or a dependent who is entitled to benefits as provided in section 85.31, subsection 1, paragraphs "c" and "d", the future payments which may be commuted shall 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.

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.

Diamond v. Parsons, 256 Iowa 915, 129 N.W.2d 608 (Iowa 1964); Dameron v. Neumann Bros., 339 N.W.2d 160 (Iowa 1983).

ANALYSIS

The parties set out numerous citations in their excellent briefs in support of their positions. The commutation decision preceded the supreme court decision in Dameron, 339 N.W.2d 160, which is the latest word in Iowa on commutations and effectively supercedes most all that has been previously written.

We have been asked to review Diamond v. Parsons Co., in view of the facts in this case. As Dameron reviewed Diamond at length and attempted to set out the factors to be considered and balancing tests to be applied the facts will be considered in conjunction with the Dameron case.

In Dameron, at page 164, the court said:

In summary, Diamond held that the decision whether to allow commutation must turn on the statutory guideline, best interest of the claimant, and the focus should be on the worker's personal, family, and financial circumstances, and the reasonableness of the worker's plans for using the lump sum proceeds. Consequently, factors which can be distilled from the Diamond analysis include the following:

1. The worker's age, education, mental and physical condition, and actual life expectancy (as contrasted with information provided by actuarial tables).

2. The worker's family circumstances, living arrangements, and responsibilities to dependents.

3. The worker's financial condition, including all sources of income, debts and living expenses.

4. The reasonableness of the worker's plan for investing the lump sum proceeds and the worker's ability to manage invested funds or arrange for management by others (for example, by a trustee or conservator).

Ultimately, the Diamond analysis involves a benefit-detriment balancing of factors, with the worker's preference and the benefits to the worker of receiving a lump sum payment weighed against the potential detriments that would result if the worker invested unwisely, spent foolishly, or otherwise wasted the fund so it no longer provided the wage-substitute intended by our worker's compensation law.... a request for commutation is approved on the best-interest balancing test unless the potential detriments to the worker outweigh the worker's expressed preference and the demonstrated benefits of commutation.

and at page 165:

Notwithstanding changes in Iowa Code section 85.45 since the Diamond decision, our legislature has retained "best interest of the claimant" as the fundamental touchstone for deciding commutation cases. Had the Iowa legislature intended or peferred a more restrictive approach and more stringent standards than Diamond suggested, tougher requirements would have been enacted when section 85.45 was amended to shift to the industrial commissioner the responsibility to make the initial "best interest" determination in contested cases.

We further believe that the Diamond analysis, with its emphasis on the worker's own personal and financial circumstances, makes good sense. We reemphasize what Diamond specifically highlighted--commutation turns on what is in the best interest of the worker, not on what is in the best interest of the employer or insurance carrier.

Thus the first, third and presumeably fourth issues are resolved. The surviving spouse need not show a present need for the future benefits. She need only show that if the funds were advanced the result would be in her best interests as opposed to the potential detriments of advancing the funds.

The best interest of the claimant and not the employer or insurance carrier is the fundamental touchstone for deciding commutation cases. Economic opportunity would be decidedly in the claimant's best interest.

Although the constitutional issue was not raised in Diamond or Dameron, those rulings interpreting and applying the provisions of section 85.45 (Code 1983) certainly put it beyond the authority of this tribunal to declare the statute unconstitutional.

The first factor distilled from the Diamond case by Dameron was: "The worker's age, education, mental and physical condition, and actual life expectancy (as contrasted with information provided by actuarial tables)."

This factor weighs heavily in claimant's favor toward allowing commutation. Claimant is in her late 20's, in good health, college educated and favorably employed. The actuarial tables applicable to this claim would indicate that (assuming claimant to be 29 years old) she would be entitled to 942.97 weeks of compensation under the life and remarriage probability tables. This translates to just over 18 years of benefits. Periodic payments would continue for life or until remarriage in which event claimant would be entitled to a two year lump sum of

nefits. Although there is no direct indication one way or the her, indications are that claimant may well remarry within the xt sixteen years.

Although this result effectively circumvents the remarriage ntingency of the survivors benefits portion of the Workers' mpensation Act, it would appear we have been directed by the gislature and the courts to consider that as a favorable ctor in determining the best interests of the claimant.

Assuming that the remarriage expectancy should be looked at the same manner as life expectancy, i.e. actual as contrasted th information provided by actuarial tables, it would be in aimant's best interest to receive the money in a lump sum.

The second factor from Dameron is: "The worker's family rcumstances, living arrangements, and responsibilities to pendents."

Here we are considering a surviving spouse rather than a rker but presumeably the criteria are the same. Claimant has detrimental family circumstances, adequate living arrangements, d no responsibility to dependents. This factor works neither vorably nor disfavorably to the claimant. On the one hand she es not need the lump sum to cover family expenses or secure ternate living arrangements. On the other hand she does not ed periodic payments to cover ongoing expenses of dependents herself.

Dameron, as a third factor, recites: "The worker's financial ndition including all sources of income, debts and living penses."

Again considering the surviving spouse rather than "worker", e income, debts and living expenses of the claimant are a utral factor. Claimant has sufficient income, negligible debt d is capable of meeting living expenses on a regular basis thout the workers' compensation proceeds in either a lump sum periodic basis.

The fourth factor of Dameron is: "The reasonableness of the rker's plan for investing the lump sum proceeds and the rker's ability to manage invested funds or arrange for manage- nt by others (for example, by a trustee or conservator)."

Although this factor is the weakest link in claimant's quest r a lump sum it is not fatal to the granting of a commutation. mmutation of claimant's entitlement would be over $152,000 in esent value. Income derived from the investment of these nds will be taxable according to the type of investment. ceipt of the benefits on a weekly basis would amount to 4,835 a year tax free.

Claimant will be aided in her investments by professional unsel. Although this is in no way indicative of success in hieving an income producing portfolio past performance does dicate the funds are not intended to be squandered on frivolous rchases. It is doubtful that if claimant were to invest the tire amount to which she is entitled that she could come close matching the tax free proceeds she would receive on a periodic sis. This assumes, however, that claimant would remain married for a considerable period of time which is regarded as likely.

It is assumed also that the attorney's fee for services in is matter is not based upon a contingency basis but rather on work product basis as the right of the claimant to benefits s not secured by any legal action. It is only the advance of ose benefits that is secured by these proceedings.

Although claimant's lump sum will be reduced to some degree an attorney's fee and her investment income will be reduced commissions and taxes, her overall best interests appear to served, taking all factors into consideration, by granting e commutation.

WHEREFORE, the commutation decision is hereby affirmed.

FINDINGS OF FACT

IT IS FOUND:

That on April 20, 1982, claimant was married to decedent who as killed in an elevator fire and explosion.

That claimant and decedent did not have any children.

That claimant was twenty-eight (28) years old and in good ealth at the time of the original hearing.

That claimant is a college graduate.

That claimant is presently working in a training position in retail store.

That upon her husband's death, claimant received approximately ne hundred twenty-four thousand dollars ($124,000) from life nsurance.

That with the proceeds from life insurance, claimant put a own payment on a house and invested the remainder.

That claimant uses the services of an attorney and a stock roker in making investments.

That the only debt claimant has is on her home.

That claimant is a good money manager and is presently aking a course in investments.

That claimant does not need any of the workers' compensation enefits for living expenses.

That the reason claimant wants a commutation is so that she an invest the money.

That claimant would most likely receive more money over her lifetime by having a commutation and investing the proceeds than by being paid on a periodic basis during the period of her entitlement.

CONCLUSIONS OF LAW

The period during which claimant is entitled to compensation benefits is definitely determinable.

It is in claimant's best interest to have a commutation.

ORDER

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 30th day of December, 1983.

Appealed to District Court;
Affirmed

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HARVEY G. SUEHL,	:	
Claimant,	:	
vs.	:	
	:	File No. 677380
ALLIED STRUCTURAL STEEL CO.,	:	
Employer,	:	A P P E A L
and	:	D E C I S I O N
COMMERCIAL UNION INSURANCE CO.,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from a proposed decision in arbitration wherein claimant was denied temporary disability benefits and medical expenses, and it was ordered that he take nothing from the arbitration proceeding.

The record on appeal consists of the hearing transcript which contains the testimony of claimant and Barbara M. Suehl; claimant's exhibit 1, a letter dated September 10, 1981 from Saadi Albaghdadi, M.D., with an accompanying report of a cardiac catheterization; claimant's exhibit 2, a letter dated October 14, 1981 from Robert L. Frye, M.D.; claimant's exhibit 4, a letter dated March 29, 1982 from Robert L. Frye, M.D.; claimant's exhibit 5, the deposition of Saadi Albaghdadi, M.D.; claimant's exhibit 6, records from Medical Associates; claimant's exhibit 7, office notes, records, and correspondence from claimant's treatment by Saadi Albaghdadi, M.D.; claimant's exhibit 8, a list of medical expenses; defendants' exhibit 1, a report of consultation from Dr. Albaghdadi; defendants' exhibit 2, a history and physical prepared by J. E. O'Donnell; defendants' exhibit 3, an office note from Dr. O'Donnell; defendants' exhibit 4, a cardiac isoenzyme report; defendants' exhibit 5, a cardiac isoenzyme report; defendants' exhibit 6, a letter dated August 25, 1981 from claimant; the deposition of Hartzell Schaff, M.D.; and the briefs and filings of all parties on appeal.

ISSUE

Whether the deputy erred in finding that claimant failed to carry his burden of establishing that his myocardial infarction in July of 1981 was causally related to the electrical shocks he received on July 9, 1981.

REVIEW OF THE EVIDENCE

At the time of the hearing the parties stipulated the applicable workers' compensation rate, in the event of an award, to be $261.90. The parties also stipulated as to the time off work (thirteen weeks and two days) and the fairness of the medical expenses. (Transcript, pp. 4-7)

Claimant was 52 years old and had worked for defendant employer for 25 years at the time of the hearing. He continued to work for defendant employer as a foreman in the "fitup" department where steel bridges are assembled before being constructed at a job site. Claimant's base pay was $7.97 per hour and he also worked 15 hours of overtime each week. (Tr., pp. 10-15)

While working on July 9, 1981, claimant received a series of 220 volt electrical shocks when he touched a steel beam upon which an improperly grounded electric drill was lying. After receiving the first shock claimant fell backwards onto a steel girder which was also charged with the electrical current. He also suffered a cut to his right thigh when he threw himself off of the girder and landed on a steel plate. (Tr., p. 15-22, 32) Claimant testified that he returned to work later on the same day, but felt very tired and beat. He recalled soreness throughout his body, most noticably in the left arm and upper chest. Claimant did not see a doctor on the day he received the shocks. (Tr., pp. 2-28)

The following day claimant was requested by his supervisor and personnel manager to visit the company doctor. He performed his normal duties that morning before his medical examination and recalled feeling sore and tired. He testified that he did not have full strength in his left hand. Claimant described his symptoms to Dr. York of Medical Associates, and testified that no medication or treatment was prescribed. He recalled that Dr. York believed the symptoms would clear up by themselves within two weeks. (Tr., pp. 28-33)

Claimant testified that he continued to work the remainder of the week, and was notified through the plant personnel department that he was to be re-examined by Dr. O'Donnell of Medical Associates on July 14, 1981. Claimant testified that he in no way initiated the second visit to Medical Associates. He recalled that he specifically told Dr. O'Donnell about the pain and weakness in his left arm, and soreness and stiffness throughout his body. Claimant testified that Dr. O'Donnell confirmed the findings of Dr. York that no treatment was needed, and did not impose any limitation on his activities. (Tr., pp. 33-38)

Claimant testified that he had no contact with Dr. O'Donnell or Dr. York between July 14, 1981 and July 22, 1981. He recalled, however, that the pain and soreness in his chest had gradually worsened during that time period until he felt bad enough to call Dr. O'Donnell and check into a hospital on July 22, 1981. Claimant had just begun a family vacation to St. Louis when he decided he could no longer take the pain and asked his wife, who was driving, to return home. He testified that he had spent a sleepless night before entering the hospital on July 22 due to pain in his left arm and chest. Dr. O'Donnell took a cardiogram of claimant, and referred him to Saadi Albaghdadi, M.D., on the following morning. (Tr., pp. 38-46)

Claimant recalled that his stay in the hospital lasted approximately two weeks, five days of which were spent in an intensive care unit. He testified that the pain in his left arm and chest would subside for a couple of hours several times each day, but he did not regain strength in the left arm. He stated that every time the pain returned it was worse. (Tr., pp. 46-50) Claimant was released from the hospital, but instructed by Dr. Albaghdadi not to immediately return to work. He was released to work on October 1, 1982 with severe lifting, walking, and climbing restrictions. (Claimant's Exhibit 1)

Claimant testified that he returned to light duty work on October 1, 1981, but visited Robert L. Frye, M.D., at Mayo Clinic in mid-October. He stated that the pain in his arm and chest had subsided somewhat, but continued to exist along with continued fatigue and shortness of breath. He returned to Mayo Clinic in early November 1981 where Hartzell Schaff, M.D., performed coronary bypass surgery. Claimant was then off work from November 9, 1981 through February 10, 1982. (Tr., pp. 51-64)

Claimant testified that prior to July 9, 1981 he had never had a heart attack, nor had he been treated by any doctor for heart problems. He stated that he had previously missed only one day of work in his 25 years with defendant employer (Tr., pp. 67-68) Claimant testified that since the surgery he received at Mayo Clinic, he no longer has weakness in the left arm, pain in the chest, or shortness of breath. (Tr., pp. 72-73)

Barbara M. Suehl, claimant's wife, testified that claimant's condition continually worsened during the week prior to his July 22 hospitalization. She also testified that claimant had not slept well since the day he received the electrical shocks. She corroborated claimant's testimony concerning his inability to use his left arm and hand. (Tr., pp. 111-119)

Records from Medical Associates show that claimant was seen by Dr. York on July 10, 1981. He complained of sore wrists and a cut on the inner thigh. (Cl. Ex., B) He returned to Medical Associates on July 14, 1981 when he was seen by Dr. O'Donnell, who reported:

> This man had a 220 volt electric shock with a very obvious bruise of his right inner lower thigh and knee and some discoloration. This was about five or six days ago. He had no immediate cardiac problems. His examination was essentially, I think, within normal limits. He has a good many joint aches, especially in his wrists. In the last 24 hours, he has developed pain in his left hip. The x-rays of the pelvis and hip show minimal arthritic changes of the left hip joint. The only thing I can conclude here is that the sudden violence of this shock was such as to twist or aggravate his hip slightly. This, I think, may have set off his problems. He is to be on relatively light duty. (Cl. Ex. 6; Def. Ex. 3)

Saadi Albaghdadi, M.D., who specializes in cardiology, first saw claimant on July 23, 1981. He recorded a history of substernal chest pain radiating into the left shoulder and arm for approximately three weeks. Dr. Albaghdadi recalled that claimant attributed his symptoms to electrical shocks he had received, but that the chest pains had not been continuous. (Cl. Ex. 5, pp. 5-6) Dr. Albaghdadi conducted a physical of claimant and noted that he was not in heart failure. He testified that his initial diagnosis was a typical angina, and that claimant had had a nontransmural acute anterior wall infarction. Dr. Albaghdadi initially prescribed vasodilators which operate to open periphery arteries and allow the heart to work more efficiently. (Cl. Ex. 5, pp. 12-17) A cardiac catheterization done on September 4, 1981 indicated hypokinesis or diminished motion of the anterior wall of the heart, a 100 percent occlusion in the left anterior descending coronary artery, a 50 percent occlusion in one of the branches of the left circumflex artery, and a 20 percent occlusion in the proximal right coronary artery. (Cl. Ex. 5, pp. 17-18; Cl. Ex. 7) Dr. Albaghdadi testified that the blockage in the left descending artery was a plaque (cholesterol deposit on the luman of that artery) which could not be surgically removed.

Dr. Albaghdadi testified that enzyme tests and electrocardiograms, which are routinely given to anyone suspected of having an acute myocardial infarction, were taken of claimant for three consecutive days, beginning on July 22, 1981. The doctor explained that enzyme tests are utilized to identify excessive CPK, LDH, and SGOT deposits which are indicative of a myocardial infarction. He defined myocardial infarction as the death of a heart muscle due to obstruction of one of the vessels that supply the heart muscles. (Cl. Ex. 5, pp. 9-12) Dr. Albaghdadi testified that elevated CPK, LDH and SGOT enzyme levels tend to decrease quite rapidly following a myocardial infarction. He stated that CPK enzymes will return to normal levels within 24 to 72 hours following the infarction, wile LDH enzymes may take up to a week to return to a normal level. (Cl. Ex. 5, p. 28)

During the deposition taken May 10, 1982, Dr. Albaghdadi testified that none of the enzymes tested for were elevated. (Cl. Ex. 5, p. 28) An isoenzyme report from July 22, 1981, however, shows increased LDH and CPK fraction present. (Cl. Ex. 7; Def. Ex. 5) An isoenzyme report from July 23, 1981 revealed an increased LDH fraction which is greater than LDT and the presence of CPK. (Cl. Ex. 7; Def. Ex. 4) Dr. Albaghdadi wrote at the time of his first consultation that claimant's "serum enzyme elevations are definitely due to his MI since the electrocution occurred approximately 2 weeks ago and enzymes from muscle destruction had already been gone by now." (Cl. Ex. 7; Def. Ex. 1)

Dr. Albaghdadi was of the opinion that the electrical shocks received by claimant were probably the reason for him to have had a myocardial infarction at the time he did. When asked what role the electrical shocks played in the development of the plaque which occluded the left anterior descending artery, the following ensued:

> A. It would not have been a cause to form the plaque, but I will say that it had probably been the reason for him to have the heart attack at the time.
>
> Q. Why do you feel that way, doctor?
>
> A. Well, because of the stress that was involved with the shock itself. The painful shock is something that has to be considered, and the fact that he may have had gone into spasm -- his coronary artery may have gone into spasm to account for what he had had. Remember that the patient had not had any symptoms of chest pains or arm pain, or anything like that, prior to that episode.
>
> Q. When you say that the arteries may have gone into spasm, is there any way, based on the period of time that you examined him and the studies that you ran, that you could verify whether there had, in fact, been spasms?
>
> A. Clinically, no.
>
> ....
>
> A. That is correct. Now, it is conceivable that a clot may have formed on top of the plaque at the time of the shock, or immediately thereafter, to explain as to why this plaque looked as much narrowed as it had when he was catheterized. We would have to have catheterized him before to see what, actually, it had been. We do not think electrical shock would increase the plaque size. What we are looking at is a plaque with narrowing. Whether or not this is on top of some clot, we cannot tell.
>
> Q. In other words, you're telling us that a clot may have formed or come into place prior to the precise day of your catheterization, but you couldn't tell us precisely when that would happen?
>
> A. That is correct.
>
> ....
>
> Q. Okay. You mentioned earlier that an -- I believe you said an electrically-induced spasm of the artery might play a role in the development of the myocardial infarction.
>
> A. Yes.
>
> Q. How would that happen, doctor?
>
> A. Arteries can go into spasm from any stimulation; including electrical stimulation. Again, this is a clinical judgment. To be absolutely sure, you have to catheterize a patient at the time of his shock to tell for sure.
>
> Q. And that, of course, was not done in this case?
>
> A. That was not done here.
>
> Q. Doctor, in the course of your professional practice, do you treat patients who develop -- or who subsequently are found to have occlusive arteries who have no identifiable trauma or event that precedes their myocardial infarction?
>
> A. Yes.

Q. In those instances where there is no identifiable trauma that precedes the infarction, to what do you attribute, ordinarily, the fact that they have had a heart attack?

A. Well, the evidence now is that a clot may form on that plaque, and that's why streptokinase therapy is now available to dissolve clots in the acute phase of an acute myocardial infarction; and that would be done within three or four hours after a heart attack. And, of course, from autopsy studies people have seen clots forming on plaques.

Q. Is there any way to predict or indicate the conditions that will cause a clot to form on a plaque?

A. Again, this is a hypothesis from autopsy studies; that an ulcer may form on the top of the plaque which induces a formation -- platelet formation aggregation on the plaque surface on the ulcer and eventually form a clot. Not only that, we know now that spasm can also be induced on top of this complex mechanism -- a plaque, a clot and a spasm -- to produce a heart attack, and this has been demonstrated in the catheterization laboratory.

Q. In Mr. Suehl's case, did any of your tests rule out the possibility of the clot developing on the plaque, such as we've been discussing?

A. No.

....

Q. I confess that I got lost just slightly, doctor.

Did the electrical shock, in your opinion, cause the actual occlusion or blockage of the left descending artery?

A. Most likely so, yes.

Q. How is that, doctor?

A. We think it is probably a spasm, probably; also a clot on top of the plaque that produces that.

Q. But can an electrical shock cause or develop the clot that forms on the plaque, or do you know that?

A. Nobody knows that -- at least I don't know.

Q. I gather at this point, since the catheterization was done so late, we don't know how occluded the left descending artery was, say, the day of his attack or within a week of his attack --

A. That is correct.

Q. -- is that correct?

MR. SIVRIGHT: Wait a minute, now. What do you mean by "attack"?

MR. SHEPLER: I mean his -- that's a good point. His electrical shock.

THE WITNESS: We don't know.

Q. Is there at least, doctor, a medical possibility that there was a very serious if not total occlusion of that left descending artery prior to the date of the electrical shock?

A. We really don't know that.
(Cl. Ex. 5, pp. 27-36)

Dr. Albaghdadi released claimant to return to light duty rk on September 1, 1981. Claimant was restricted from climbing, d was restricted from lifting over 10 pounds and walking more an one-half mile. (Cl. Ex. 7)

Robert L. Frye, M.D., of Mayo Clinic, wrote to Dr. Albaghdadi letter dated October 14, 1981 that he considered claimant a ndidate for heart bypass surgery. He also casually related aimant's condition at that time and the electrical shocks:

I would conclude from all this that I think his infarct is associated with the electrical injury that took place. We obviously cannot be sure what sort of lesion was present before the electric shock but whatever it was it seems distress induced with such an event makes the association difficult to avoid. He tells me that he really began to have this constricting substernal chest distress the afternoon of the shock, and I would presume there is a relationship between this and his subsequent cardiac event. (Cl. Ex. 2)

The following was written by Dr. Frye in a March 29, 1982 tter addressed to claimant's counsel:

Thank you for your note of March 2, 1982, in regard to Mr. Harvey Suehl. It was my feeling that the electric shock experienced by Mr. Suehl did play a role in the subsequent heart attack as I have stated in my prior communications with Mr. Dean Peters and Dr. Saadi Albaghadi [sic]. It seems likely he had preexisting disease in his coronary arteries, but the stress associated with such an event as the electrical shock must have resulted in a significant increase in the oxygen demands of the heart. This in combination perhaps with the preexisting narrowing of the coronary artery could lead to a situation that could cause damage to the heart muscle. In support of this conclusion is that according to our history, he began to have constricting substernal chest pain the afternoon of the shock, and it was on this basis that I felt that it was not an unreasonable assumption that there was a contributory effect of the electric shock to his subsequent cardiac status. (Cl. Ex. 4)

Hartzell Schaff, M.D., a thoracic cardiovascular surgeon at Mayo Clinic, first saw claimant on October 8, 1981, on referral from Dr. Prye. Dr. Schaff performed surgery on claimant to bypass the occlusion on the left anterior descending coronary artery. He believed the blockage to be total, stating that it was typical of atherosclerosis which is a process of aging and degeneration of the arterial wall. Dr. Schaff noted that the development of atherosclerosis may be related to many factors including hypertension, cholesterol problems, and family history. He testified that it was speculative as to how long the occlusion had been present or in the process of forming, but that it had probably taken place over a period of months to years prior to surgery. While Dr. Schaff was unable to say that there had not been a myocardial infarction because he was unable to observe the internal portions of the heart, he noted that there was no evidence of transmural scar on the surface of the heart which would be indicative of an infarction. (Schaff Dep., pp. 3-10)

Dr. Schaff responded as follows when questioned as to what caused claimant's apparent myocardial infarction on or about July 21 of 1981:

A. In the vast majority of patients who present for coronary bypass surgery who have had myocardial infarctions, we know that atherosclerosis and subtotal or total occlusion of coronary arteries is present. In that context, patients who have myocardial infarctions have diminished coronary blood supply and at some point the coronary blood supply is exceeded by the demand for oxygen from the heart. In that situation infarction develops.

From my examination and from review of Mr. Suehl's catheterization we know that he had obstruction of the left arterior desending coronary artery. (Schaff Dep., pp. 12-13)

....

A. The narrowing in the coronary artery reduces coronary blood flow, and infarction is a result of reduced coronary blood flow. When the demand for oxygen supply on the heart exceeds that capability, it's unlikely that anybody would ever develop a myocardial infarction without obstruction. Many patients with obstructions who don't have demands that exceed the limits of the coronary circulation don't have infarctions.

Q. Do you have an opinion then based upon a reasonable degree of medical certainty, again based upon your training and experience and your treatment and care of Mr. Suehl, as to whether or not the occlusion of the left anterior descending artery was a substantial contributing factor to the apparent myocardial infarction sustained by Mr. Suehl on or about July 21 of 1981?

A. Yes, I believe that it was a substantial contributing factor to the myocardial infarction.

Q. Doctor, based upon your training in your field of experience, is there any known relationship between an electrical shock and formation, subsequent formation, of occlusion such as you found in Mr. Suehl's left anterior descending artery?

A. I'm not aware of information in regard to formation of athrosclerosis [sic] subsequent to electrical shock.

Q. Is there anything physically about introducing an electrical current into a human body that could explain or could cause, in your opinion, formation of such an occlusion?

A. I think it's unlikely that an electrical shock would produce atherosclerosis during the time frame that we are discussing.

Q. In other words, from July of 1981 until the time when you saw it in your operation of November of 1981?

A. Right.
(Schaff Dep., pp. 12-17)

Dr. Schaff later had the following exchanges with claimant's counsel:

Q. Okay. Doctor, Mr. Suehl is not contending that the electrical shocks which he experienced on or about July 9, 1981, produced atherosclerosis or the heart disease which, of course, would develop over time. Since he was asymptomatic prior to those shocks and after those shocks did experience chest pain which radiated into his arm, left arm, I believe, is it fair to say that the electrical shocks produced stress which therefore placed his heart in a position where it could not supply the demands brought about by that stress because of the pre-existing occlusions?

A. That's [sic] seems to be the point we are trying to determine and I'm not sure I would be able to say one way or another whether or not that did happen.

Q. Why not?

A. Because I didn't see him at the time that the shocks occurred. I didn't see him shortly after when he developed the angina. I'm not sure how I would prove that it did if I did see him at that time. I'm not sure if there is a measurement or clinical test that I can come up with to say with certainty.

....

Q. Do you feel that the electrical shock was a substantial factor in bringing about any of the conditions in Mr. Suehl that began to manifest themselves after the electrical shock?

A. I think that it's speculative as to whether the shock was a factor that increased his oxygen demands and resulted in an infarction, and I don't presume to be able to give you the answer one way or the other.

Q. That is possible?

A. That is a possibility. I don't think it relates to his angina for which he was treated with bypass surgery.
(Schaff Dep., pp. 21-24)

Dr. Schaff testified that there were no complications with claimant's bypass surgery, and advised him that he could resume normal activities after six weeks. The doctor indicated that the survival rate for patients who have had similar surgery is 98 percent over five years, and relief of angina is excellent. (Schaff Dep., pp. 17-18)

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on July 9, 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).

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; i.e., the injury followed as a natural incident of the work. Mussleman, 261 Iowa 352, 154 N.W.2d 128; 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."

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 9, 1981 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, 261 Iowa 352, 154 N.W.2d 128.

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).

In Sondag, 220 N.W.2d 903 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

At the outset it is noted that no dispute exists as to the fact that claimant suffered an injury (a series of electrical shocks) arising out of and in the course of his employment on July 9, 1981. It is also evident from the record that claimant suffered a myocardial infarction on either July 21, 1981 or July 22, 1981. The sole issue to be decided upon appeal of this case is whether or not claimant's myocardial infarction was causally related to the electrical shocks he received on July 9, 1981.

In concluding that claimant failed to carry the burden of establishing a causal relationship between the electrical shocks and his myocardial infarction the deputy pointed to several problems with the medical evidence presented. Claimant essentially argues on appeal that the deputy incorrectly analyzed the medical evidence. After having reviewed the medical evidence submitted by all parties it is concluded that while some of the evidence states that there was a possibility of a causal relationship between the electrical shocks and claimant's infarction, the evidence taken as a whole does not establish a medical probability of a causal relationship.

The evidence most favorable to claimant's case comes out the deposition testimony of Dr. Albaghdadi wherein he opined that the electrical shocks caused a blockage of the left descending artery and the subsequent myocardial infarction. Dr. Albaghdadi explained that a plaque had formed in the artery, and that a clot conceivably may have formed at the time of the shock if the artery went into spasm. Shortly after promoting his spasm theory, however, Dr. Albaghdadi admitted that there was no clinical means to verify whether there had been arterial spasms. He also discredited his own theory by stating that no one knows whether an electrical shock to the body could cause or develop a clot in the heart arteries, and further, that if a clot had been found on the plaque there would be no clinical means of determining how long it had existed. Dr. Albaghdadi appeared to have difficulty in accurately recalling claimant's medical history and treatment. He insisted throughout most of his deposition (including the sections where his "arterial spasm theory" was promoted) that claimant's serum enzyme levels had not become elevated. Medical records prepared by Dr. Albaghdadi, however, clearly indicate elevated serum enzyme levels on July 22 and July 23, 1981. In one of his notes Dr. Albaghdadi specifically noted that elevated levels were attributable to myocardial infarction since any elevation due to the electrical shocks would have decreased during the interceding two weeks. As was suggested by the deputy, the temporal relationships involved in the sequence of this case appear to further void the spasm theory as a trigger to claimant's myocardial infarction.

Dr. Frye indicated in several correspondence that there was a causal connection between the electrical shocks and the myocardial infarction. The deputy properly noted, however, that Dr. Frye's opinion was based upon a history of substernal chest pain since July 9, 1981 (the date of the shocks) which is not supported in the records of Dr. York and Dr. O'Donnell. Although claimant contends that he specifically advised Dr. York on July 10, 1981 of chest pain radiating into the left arm, no report or letter from Dr. York confirmed that history. Dr. O'Donnell, after examining claimant on July 14, 1981, detailed the development of pain in claimant's hip, but specifically stated that there were "no immediate coronary problems." It seems reasonable to assume that Dr. O'Donnell would not have made such a statement had symptoms of substernal chest pain been exposed to him at the time of the examination. The absence of any other medical evidence covering the time from July 9, 1981 to July 21, 1981 which would indicate symptoms of cardiac problems has a very detrimental effect upon claimant's case.

Dr. Schaff, who performed surgery on claimant, testified that claimant had a preexisting blockage of the left anterior descending artery which was typical of atherosclerosis. He explained that atherosclerosis is the process of aging and degeneration of the arterial walls and is caused by a variety of factors such as hypertension and cholesterol problems. He was unconvinced that an electrical shock could produce atherosclerosis, particularly during the time frame of July of 1981 through November of 1981 (the date of surgery). Dr. Schaff stated that it would be purely speculative to say whether a shock was a factor which increased oxygen demand and resulted in an infarction.

Taken as a whole, the medical evidence presented is found to be overly vague and inconsistant to support a conclusion that claimant's myocardial infarction was causally related to the electrical shocks he received. No error is found in the deputy's analysis of the medical evidence.

FINDINGS OF FACT

1. Claimant received two electrical shocks on July 9, 1981 which arose out of and in the course of his employment.

2. Claimant did not demonstrate symptoms of substernal chest pain or left arm pain on July 9, 1981.

3. Claimant was experiencing no immediate cardiac problems on July 14, 1981.

4. Claimant continued to work throughout the week during which he received the electrical shocks.

5. Claimant experienced chest pains on July 21, 1981 while riding in a car during a family vacation.

6. Claimant entered a hospital on July 22, 1981.

7. Claimant's cardiac enzyme levels were elevated on July 22, 1981 and July 23, 1981, indicative of a myocardial infarction within the previous 72 hours.

8. A cardiac catheterization done in September of 1981 showed a 100 percent occlusion of the left anterior descending artery.

9. Claimant suffered from atherosclerosis (the process of aging and degeneration of the arterial walls).

10. The occlusion of claimant's left anterior descending artery developed over a period of months to years, however, the precise date of its formation is not determinable.

11. The development of atherosclerosis is related to factors such as hypertension, cholesterol problems, and family history.

12. The electrical shocks suffered by claimant on July 9, 1981 did not materially aggravate claimant's preexisting arterial occlusion.

13. Claimant underwent surgery in November of 1981 to bypass the occlusion in his left anterior artery.

CONCLUSION OF LAW

Claimant has not met the burden of proving a causal connection between the electrical shocks he received on July 9, 1981 and his subsequent myocardial infarction.

WHEREFORE, the deputy's decision filed October 13, 1982 is affirmed.

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

Defendants are to pay the costs of the arbitration proceeding. The claimant is to pay the costs of the appeal.

Signed and filed this 28th day of July, 1983.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CATHERINE SWAN,	:	
Claimant,	:	File No. 720422
vs.	:	
INDUSTRIAL ENGINEERING EQUIPMENT CO.,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
TRAVELERS INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Catherine Swan, claimant, against Industrial Engineering Equipment Co., employer, and Travelers Insurance Company, insurance carrier, defendants, to recover benefits under the Iowa Workers' Compensation Act for an alleged occupational disease arising out of and in the course of her employment. It came on for hearing on April 23, 1984 at the Bicentennial Building in Davenport, Iowa. It was considered fully submitted at that time.

A first report of injury was filed January 7, 1983. No other filings have been made.

At the time of hearing the parties stipulated to a rate of compensation in the event of an award of $164.89, to time off from September 28, 1980 through January 3, 1981, to fairness of the medical expenses and to a conversion date for permanent partial disability of January 31, 1981. Posthearing, the parties agreed to total medical expenses incurred to date of $4,164.55.

The record in this matter consists of the testimony of claimant and Don Pedersen; claimant's exhibit 1, a series of medical reports; defendants' exhibit A, medical records from a hospitilization of April 19, 1979; defendants' exhibit B, notes from Douglas Vickstrom, M.D.; defendants' exhibit C, a letter from Dr. Vickstrom dated January 17, 1983; defendants' exhibit D, a letter from Dr. Vickstrom dated February 13, 1984; defendants' exhibit E, a letter from Pedersen dated December 3, 1980; defendants' exhibit G, a letter from Pedersen dated February 2, 1981; defendants' exhibit H, a letter from Mary Ellen Padgitt dated October 27, 1981; and defendants' exhibit I, the deposition of the claimant.

ISSUES

The issues in this matter are whether or not claimant's occupational disease arose out of and in the course of her employment; whether or not there is a causal relationship between that injury and any disability she may now suffer; whether or not she is entitled to healing period and permanent partial disability benefits. Defendants have raised the defenses of statute of limitations and notice.

STATEMENT OF THE CASE

Sixty-two year old married claimant, a non-smoker, testified to a sixth grade education. Her only training post sixth grade has been what she has received on the job. Her work career began in the 1940's when she ran a punch press and another machine in a manufacturing process that made small pieces for a large boat propeller. With the end of the war, she was laid off. In the early 1950's she went to work for a company that made gun cleaners operating an electric screw machine and occasionally a drill press. She read no blueprints and did not actually set up the machines herself.

In 1952 or 1953 she learned that defendant employer was hiring people and she applied for a job at more money. She described the work of the company as making motors, repairing welders, wiring transformers and doing requested machine work.

Her own personal work varied with what she was told by her boss to do. She sometimes made coils, stripped motors or cleaned parts. The latter operation entailed soaking parts for as long as overnight in a solvent and then washing them in the morning with cold water. She also worked with epoxy which she heated on a hot plate and then mixed with a catalyst. Her work was in an open shop where welding and painting were done.

In 1958 she was off work following an incident in which she opened an oven where two large transformers were being processed. She was hit by fumes. She experienced burning in her throat. She was able to return to work and was not bothered thereafter. She was unsure whether or not she got compensation. She also spoke of trouble with her back and a problem with her thumb. She believed she received group benefits for these rather than workers' compensation.

Claimant testified both that prior to 1979 she complained about fumes and that she did not complain about fumes.

Claimant recalled that her first episode of breathing trouble occurred in April or May of 1979. At that time she was going on a fishing trip with her spouse. She was tired from working overtime. Her work had involved cleaning clips and putting solder on them--a job producing fumes. She left work with an awful taste in her mouth and burning in her nose. She had trouble breathing on the day they arrived. When her wheezing was not better the following morning, she was hospitalized and given oxygen. She denied relating her trouble to her work. She testified:

> Q. At that time then in 1979 when you were hospitalized in Missouri, did you feel or believe that your work environment had caused this respiratory problem?
>
> A. I don't know. I was so sick. I didn't think nothing about it, really.
>
> Q. Did you talk about that aspect of it with your doctor at all in Missouri?
>
> A. No. It never come up and he never asked me. (Swan dep., p. 17 ll. 5-14)

Following her return to work in 1979, she noticed difficulty breathing when she was in the area of the sandblaster, when she dipped objects into hot varnish, when she was around parts that had been soaked in solvent or when spray welding was done. Some of these conditions troubled her before 1979.

Her care was transferred to her family physician, Dr. Pesenmeyer, who gave her medication but no diagnosis. She commenced a series of allergy tests in an attempt to discern her trouble. She was referred to an allergist. She denied being told by Dr. Pesenmeyer that her problem might be related to her work.

In September of 1980 she was taking medication. When her condition did not improve, she was placed in the hospital and given oxygen. During this admission Dr. Vickstrom was called in consultation. When she was told she could return to work in December, she spoke with Don Pedersen at the company about staying off work for the remainder of the month and she was allowed to do so under a personal leave of absence.

She remembered the circumstances of her return to work thusly: Dr. Vickstrom wanted to see if going to the shop would cause her to have a reaction. Prior to this time she did not think her trouble was anything related to her work. She eased into work and took her medication. She wound coils in an area near cleaning tanks. She became hoarse and had difficulty breathing. She reported the difficulties. Near the end of the month she called Dr. Vickstrom and went on Prednisone. She was told she had asthma and could not work in fumes.

After receiving the above information from her doctor she saw Pedersen and told him she was retiring. She asserted that

it was at this time she decided her trouble was caused by the fumes. When she gave her deposition she was questioned:

> Q. During the course of that hospitalization, did anyone discuss with you the possibility that your work environment could be the cause or one cause of your physical problems?
>
> A. Not until I went back, because they wouldn't say until I went back into the shop to work.
>
> Q. I guess I am confused then. When you were hospitalized in September of 1980, did someone, one of your doctors, Vickstrom or Fesenmeyer, tell you work was a cause of this breathing difficulty?
>
> A. He didn't talk to me about that. He just told me he wanted me to go back in the shop to make sure, to see if that would flare me up again.
>
> Q. So he discussed with you going back to the shop might cause you some problems.
>
> A. He told me that he wasn't probably sure either until I went back into the shop to work.
>
> Q. But did you discuss with him the possibility that work might be a cause of your problem then and you were going to check it out by going back to work and see if that is what it was?
>
> A. No. He suggested I go back, because I was a little bit leery about even going back in the shop.
>
> Q. Why were you leery about going back to the shop?
>
> A. Because I had such a bad time with my breathing, I was very scared.
>
> Q. Were you concerned that going back to work might aggravate your condition?
>
> A. I was concerned, yes. (Swan dep., p. 30 ll. 10-25; p. 31 ll. 1-16)

Claimant retired as of January 31, 1981 at which time she was having breathing trouble due in part at least to not breathing regularly and to a sore throat. Her spouse has been retired ten years. At present she has no volunteer community activities and pursues no hobbies, but she works in the yard in the summertime.

Although she has not been hospitalized since she stopped working, her breathing is thrown off by activity and she may cough up phlegm. She has to sit down to catch her breath. She tries not to overexert. Because she is unable to do her work at home, she is certain no one would hire her. She claimed that she must be careful where she goes as she is bothered by diesel fuel, exhaust fumes, smoke and even certain odors from stores. She went to some governmental office when she was well enough after her retirement to see about benefits. She was sent to job service. She said that she would have gone out for a job if they had sent her to any. She has made no application for work and has no intention of seeking a position.

Claimant acknowledged some trouble reading and doubted that she could work as a receptionist or secretary.

She testified that her occupation has been motor winder. She thought that she would need an enclosed room to be able to pursue this occupation. She admitted that fiberglass which is used as insulation would bother her.

Claimant denied episodes of bronchitis in the fall or wheezing before 1979 as Dr. Williamson had reported in his history. There was also an error in Dr. Vickstrom's history in that she did not go back to work until January of 1981.

In retrospect claimant was able to see that solder fumes bothered her before 1979, but she did not connect them with being sick. At some point she was provided with a mask to use when she was working with epoxy. That provision was made before her Missouri hospitalization. Use of the mask helped. Masks were also sometimes worn when work was being done with powdered asbestos. She had not tried to work with a mask and filter after November of 1980 and she had not asked defendant employer for a job away from fumes.

Claimant's use of nitroglycerin for chest pain has been uneffected by her retirement. She takes Prednisone when she has a flareup of breathing trouble. She is not certain what occasions the flareups, but she is troubled by fumes.

Don Pedersen, vice president of defendant employer, testified that the company first learned claimant was making claim for disability in December of 1982 when it received a letter from her attorney. He acknowledged, however, that prior to that time they knew that claimant had a medical problem, that claimant felt unable to continue working, and that fumes were creating problems with claimant's respiratory system. The latter knowledge was obtained in late 1980 or early 1981.

Regarding the circumstances surrounding claimant's return to work Pedersen recalled: Dr. Vickstrom was mistaken in that claimant did not return to work before January. In later November he was advised that claimant had been released to return to work in December. He suggested claimant ask for a personal leave as she was no longer on sick leave and needed to have some status with the company to protect her seniority. He sent her a letter granting a thirty day leave of absence for personal reasons.

Pedersen reported that claimant's medical expenses had been paid by the group plan. Her salary was continued on a fifty percent basis.

The witness stated that he had handled prior claims in claimant's behalf, but no claims had been made for breathing problems. Because claimant had been a union officer and steward, he had discussed with her breathing problems of various employees. He specifically remembered a discussion of the metal spraying operation, but he did not recollect if their conversation was about others or claimant herself.

Blake Williamson, M.D., admitted claimant to the hospital on April 17, 1979 at which time auscultation of the chest revealed diffuse rales and rhonchi with inspiratory and expiratory wheezes bilaterally. Intravenous antibiotics and oxygen were commenced. A gram stain showed some staph and numerous white cells. Claimant gave a two day history of gradually increasing shortness of breath, productive cough with chest pain, wheezing and chilling. She told of previous diagnoses of bronchitis which generally occurred in the fall and of wheezing which was worse with exertion in cold. The final diagnosis was acute bacterial bronchitis.

Claimant was hospitalized in October of 1980. Pulmonary function studies on October 4, 1980 showed an FVC of 1.1 litres or 41 percent of the predicted value, an FEV 1.0 of 85 litres or 39 percent of the predicted value, and FEF 25-75 percent of .65 litres or 12 percent of the predicted value and FEV .5 litres or 36 percent of the predicted value. Post bronchodilation the FVC improved to 51 percent, the FEV 1.0 to 41 percent and the FEV .5 to 39 percent. Patient cooperation and understanding were not assessed. Tests on October 7, 1980 continued to produce values outside the normal range. A sputum test showed gram negative rods identified as klebsiella oxytaca.

During this hospitalization claimant was seen in consultation by Douglas Vickstrom, M.D., who took a history of recurrent episodes of wheezing which had been intermittently severe and went back over a year and a half. Claimant did not recall anything that led to the flareup, but she described exposure to cigarette smoke and fumes from canned heat. She told of using bronchometers over the past year and a half. Claimant was found to be retaining carbon dioxide. On examination there was stridor on inspiration, increased diameter of the chest with little movement of the diaphragm and diffuse inspiratory and expiratory wheezes. Dr. Vickstrom's impression was that claimant had asthma of the intrinsic or nonallergic type. Claimant was discharged with Tagamet, Metaprel inhaler, Theo-dur and Prednisone.

When claimant was seen later in the month she was to continue tapering her dosage of Prednisone and add Vanceril to her regimen.

Dr. Vickstrom's note of November 20, 1980 states "Breathing very well except when around solvent fumes. Will not be going back to work at the shop."

Claimant called on January 27, 1981 at which time she was complaining of a productive cough, chest tightness and wheezing. Prednisone and Larotid were ordered.

Claimant was seen on January 29, 1981 at which time she gave a history of developing an upper respiratory infection six days before. The doctor observed that fumes were exacerbating claimant's wheezing.

Nitrostat and Valium were prescribed for claimant in July of 1981.

In November of 1981 claimant developed an upper respiratory infection with hoarseness and a productive cough. Scattered rhonchi were heard in her lungs.

In 1982 claimant complained of shortness of breath and beginning in September a productive cough. Prednisone was reinstituted. Claimant had wheezing.

Claimant developed bronchitis in early 1983.

On February 6, 1981 Dr. Vickstrom wrote: "There seems to be a definite connection between the fumes which the patient is exposed to with her work and her asthmatic attacks."

Dr. Vickstrom in a letter to the president of defendant employer on April 22, 1981 wrote:

> Mrs. Swan has referred me your letter of 4/16/81 asking for a doctor's statement as to her inability to continue working.
>
> Mrs. Swan has applied to Social Security for disability because of her intrinsic asthma. Intrinsic asthma is a type of asthma not related to allergy, but related usually to fumes or other inhaled irritants. She has attempted to return to work. However, her asthma again was severely exacerbated. There appears to be a definite connection between the fumes associated with her work and her asthmatic attacks, thus I feel the patient is disabled from her type of work.

Dr. Vickstrom updated claimant's history on January 17, 1983 at which time he reported claimant's discontinuing Prednisone in June of 1981. Prednisone was reinstated in October of 1982 when claimant had a flareup of her asthma. The doctor noted claimant had intermittent bronchitis which was treated with antibiotics. Dr. Vickstrom's most recent report makes note that claimant had exacerbation of her wheezing from work.

APPLICABLE LAW AND ANALYSIS

Defendants assert that claimant's claim is barred by Iowa Code section 85.26 which provides in part:

> An original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed or, if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits.

In Orr v. Lewis Central School District, 298 N.W.2d 256, 261 (Iowa 1980) the supreme court held: "The limitation period

nder section 85.26, The Code 1975, began to run when the mployee discovered or in the exercise of reasonable diligence hould have discovered the nature, seriousness and probable ompensable character of the 'injury causing...death or disability or which benefits [were] claimed.'"

Claimant filed a petition on December 22, 1982. It is pparent that claimant, a woman with limited education who has pent nearly half her life working for defendant employer, elied upon her doctors to diagnose her trouble. She denied aking any connection between her work and her hospitalization n 1979 or having any discussions with Dr. Williamson in that egard. His diagnosis of acute bacterial bronchitis suggested a isease entity rather than a chemical exposure. Dr. Fesenmeyer rovided her with no diagnosis. Dr. Vickstrom gave her no robable diagnosis until she went back into the plant and tried o work in early 1981. Until that time a causal relationship etween her work environment and her symptomatology was speculative. here is a note from Dr. Vickstrom in November of 1980 which efers to solvent fumes, but a subsequent note indicates "[i]s oing to try to return to work part-time will watch for exacerbation f wheezing." Claimant diligently sought medical care in the all of 1980. The record viewed as a whole supports the finding hat it was not until January of 1981 that claimant discovered he nature, seriousness and probable compensable character of er condition.

This matter has been pled as an occupational disease, and it ust be determined whether or not claimant has an occupational isease which arose out of and in the course of employment.

In McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (1980) the owa Supreme Court at 190 provided that "to prove causation of n occupational disease, the claimant need only meet the two asic requirements imposed by the statutory definition of ccupational disease, given in section 85A.8." That section rovides:

> 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 further explanation of section 85A.8, the opinion in cSpadden, said: "First, the disease must be causally related o the exposure to harmful conditions of the field of employment. ...Secondly, those harmful conditions must be more prevalent in he employment concerned than in everyday life or in other ccupations."

Claimant testified to varied tasks in an open shop entailing work with solvents, catalysts, epoxy, solder, powdered asbestos and fiberglass. She had an incident with fumes in 1958. At that time she complained of a burning in her throat. She subsequently was able to return to work unbothered. Whether or not claimant complained about fumes bothering her individually prior to 1979 is unclear. She and Pedersen discussed environmental problems within the plant, but he did not remember if she spoke on her own behalf or in her capacity as a union representative.

Immediately prior to her breathing difficulties in Missouri, claimant had been doing soldering which produced fumes. When she went back to work she had difficulty breathing. Some of the difficulty she had experienced before. She was off work for an extended period in 1980. On her return to the job in early 1981, she became hoarse and again had breathing difficulty.

Dr. Vickstrom causally relates the fumes in claimant's employment environment to her asthmatic attacks.

Clearly, claimant meets the test of a disease related to exposure to harmful conditions within her employment. The undersigned believes that her exposure to such items as solvents, catalysts, epoxy, solder, powdered asbestos and fiberglass was greater than that in everyday life or in other occupations.

The defendants have raised the affirmative defense of notice. Iowa 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.

This section contains the "occurrence of the injury" language found in section 85.26.

The Iowa Supreme Court in Reddick v. Grand Union Tea Co., 230 Iowa 108, 296 N.W. 800 (1941) set forth the rule for dealing with affirmative defenses. The opinion of the court in Reddick provided that once claimant sustains the burden of showing that an injury arose out of and in the course of employment, claimant prevails unless defendant can prove by a preponderance of the evidence an affirmative defense.

In DeLong v. Iowa State Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940) the court recognized the industrial commissioner's treatment of notice. The commissioner, quoted in DeLong at 702-03, 92, wrote:

> that while the weight of the evidence is not entirely free from doubt, much of which may be due to lapse of time...we are of the opinion claimant sustained the burden of proof in that respect, but in this the question upon whom the burden of proof may rest is not free from doubt. We are constrained to believe that want of such notice is an affirmative defense and if that be true the burden of proof would rest upon the defendant.

The Iowa Supreme Court most recently dealt with notice in Robinson v. Department of Transportation, 296 N.W.2d 809, 811 (Iowa 1980) as follows:

> 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 section 85.23.

Although Pedersen testified that the company first learned claimant was making a claim in December of 1982, he acknowledged knowing that fumes in claimant's work environment were creating problems with her respiratory system. He recalled that claimant told him in January that the work environment was adverse to her health. This deputy industrial commissioner believes that the employer in this matter had sufficient information to alert a "reasonably conscientious manager that the case might involve a potential compensation claim." Defendants' affirmative defense of notice fails.

The claimant has the burden of proving by a preponderance of the evidence that her occupational disease is the disablement 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).

Medical evidence from Dr. Vickstrom supports a finding that claimant's disablement is related to her occupational disease.

The next issue to be considered is claimant's entitlement to healing period benefits. At the time of hearing the parties stipulated to time off work from September 28, 1980 to January 3, 1981. Although the evidence is not entirely clear on when claimant was released to return to work, it appears she was released to return on December 8, 1980. She then took a personal leave. No healing period benefits will be awarded after December 7, 1980.

The remaining issue is claimant's entitlement to permanent partial disability. Iowa Code sections 85A.4 and 85.5 provide:

> 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.
>
> Compensation payable. All employees subject to the provisions of this chapter who shall become 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.
>
> If, however, an employee incurs an occupational disease for which he would be entitled to receive compensation if he were disabled as provided herein, but is able to continue in employment and

requires medical treatment for said disease, then he shall receive reasonable medical services therefor.

Claimant is an older worker with a limited education and limited work experience. She has become incapacitated from performing her work and the likelihood of her earning equal wages in other suitable employment is exceedingly remote.

The Iowa Supreme Court in McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 190 (Iowa 1980) discussed the criteria used to evaluate industrial disability under Chapter 85 and concluded that the criteria could be applied in determining the employee's capacity to perform work or to earn equal wages in other suitable employment.

Claimant continues to experience exacerbations of her respiratory problems. She must avoid fumes and even certain odors. She must take medication and use bronchial dilators. Claimant's physicians have not provided her with a specific functional impairment rating. Claimant is an older worker with an extremely limited educaion. Her earnings at the time of her retirement were well in excess of minimum wage.

Claimant's industrial disability might be much greater had she not chosen to join her husband in retirement. She has not made applicaion for work and she, in fact, testified she had no intention of seeking a position. On the other hand, claimant has impairment to her lungs. Claimant's permanent partial industrial disability is found to be twenty-five percent. See Adelmund v. Viking Pump Division, appeal decision filed October 31, 1983.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant's petition in this matter was filed December 22, 1982.

That claimant is sixty-two (62) years of age.

That claimant has a sixth grade education.

That prior to beginning work for defendant employer claimant ran various machines in assembly line manufacturing.

That claimant worked for defendant employer for nearly thirty (30) years doing varied jobs in a open shop using a number of different materials including solvents, catalysts, epoxy, solder, powdered asbestos and fiberglass.

That claimant experienced a burning in her throat in 1958 when she was hit by fumes from an oven where transformers were being processed.

That claimant was hospitalized with breathing problems in April of 1979 and with a diagnosis of acute bacterial bronchitis.

That claimant has never smoked.

That claimant retired as of January 31, 1981.

That claimant has made no applications for work and has no intention of seeking a position.

That claimant continues to have trouble breathing and to cough up phlegm.

That claimant is bothered by such things as diesel fuel, exhaust fumes and smoke.

That claimant continues to take medication for flareups.

That Pedersen knew in early 1981 that claimant's work environment was having an adverse effect on her breathing.

That claimant discovered in January 1981 that her work environment was causing her breathing problems.

That it was not until January of 1981 that claimant discovered the nature, seriousness and probable compensable character of her condition.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant's petition in arbitration filed December 22, 1982 was filed within the statute of limitations as set out in Iowa Code section 85.26.

That claimant has established an occupational disease arising out of and in the course of her employment.

That defendants have failed to establish the affirmative defense of notice.

That claimant has established her occupational disease is a cause of her disablement.

That claimant has estabished her entitlement to healing period and permanent partial disability benefits.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant healing period benefits from September 28, 1980 to December 8, 1980 at a rate of one hundred sixty-four and 89/100 dollars ($164.89) per week.

That defendants pay unto claimant permanent partial disability benefits for one hundred twenty-five (125) weeks at a rate of one hundred sixty-four and 89/100 dollars ($164.89) with payments to commence on February 1, 1981.

That defendants pay stipulated medical expenses totaling four thousand, one hundred sixty-four and 55/100 dollars ($4,164.55).

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

That defendants file a final report in ninety (90) days.

Signed and filed this 6th day of June, 1984.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FRED L. TAYLOR, Claimant, vs. GEORGE A. HORMEL & COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 424478 A P P E A L D E C I S I O N

By order of the industrial commissioner filed July 19, 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 review-reopening decision.

The record on appeal consists of the transcript; claimant's exhibits 1 through 14, inclusive, 16 and 18; defendants' exhibit A, B, D, F, G, H, I, J, K, L, M and O, so what we are out is C, E, and N, all of which evidence was considered in reaching this final agency decision.

The result of this appeal decision will be the same as that reached by the hearing deputy.

REVIEW OF THE RECORD

Claimant hurt his low back on October 7, 1974, and on November 8, 1974, a memorandum of agreement was filed. On August 13, 1979 a review-reopening decision awarded claimant ten percent permanent partial disability to the body as a whole. The decision presently under review was filed April 5, 1983.

and has not worked since December 23, 1980.

The file contains a large amount of medical information. Roy M. Hutchinson, M.D., claimant's family practitioner, testified that there was a causal relationship between the 1974 injury and surgery and the 1980 surgery and the permanent partial impairment. (Hutchinson dep., pp. 16-17) The testimony upon which the case turns is by Dr. Hayne and will be discussed below.

ISSUES

The proposed agency decision held that claimant was permanently and totally disabled as a result of his injury of October 1974 and was entitled to benefits under the provisions of §85.34(3).

On appeal defendants state the issues:

I. Whether the Deputy Commissioner erred in basing his decision upon the testimony of Dr. Roy M. Hutchinson.

II. Whether the Deputy Industrial Commissioner erred in awarding to claimant a permament total award in view of the claimant's condition existing prior to the date of injury and subsequent to his return to work in 1975.

APPLICABLE LAW

An injury is defined as a health impairment and may include a work aggravated pre-existing disease or condition. Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Ziegler v. Unites States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960); 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 (1936); and Almquist v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 (1934).

"The incident or activity need not be the sole proximate cause, if the injury is directly traceable to it." Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (1974); Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971).

"A cause is proximate if it is a substantial factor in bringing

bout the result." Blacksmith v. All-American, Inc., 290 N.W.2d 48 (Iowa 1980).

Claimant's disability is industrial which is loss of earning apacity and not mere functional impairment. Such disability ncludes considerations of functional impairment, age, education, ualifications, experience and claimant's inability because of he injury to engage in employment for which he is fitted. lson 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); and cases cited. See also Blacksmith v. All-American, nc., 290 N.W.2d 348, and McSpadden v. Big Ben Coal Co., 288 N.W.2d 81 (Iowa 1980).

ANALYSIS

In the review-reopening decision, the deputy industrial ommissioner placed great reliance on the opinion of Dr. Hutchinson. efendants argue that Dr. Hutchinson's knowledge of the case is o scanty to place great reliance upon. One would agree that Dr. utchinson's opinion is not as valuable as it might be. However, he testimony of Dr. Hayne adequately supports the award. In is answers to questions concerning whether a causal relationship xisted between the October 1974 injury and the necessity for he November 1980 surgery and the subsequent disability, Dr. ayne says that the October 1974 injury "certainly would be at east in part related insofar as causative factors are concerned" nd that the fall "probably added considerably to his symptomatology." Hayne dep., p. 16) Also, Dr. Hayne states that claimant did ustain an aggravation and "I think all one can say is that the all did aggravate an underlying problem with the low back in he nature of probably intervertebral disk injury, but it is not he exclusive cause, of course." (Hayne, p. 18)

Such testimony is convincing that there exists a causal elationship between the injury of October 1974 and the necessity or the subsequent surgeries and the resulting disability. It s clear that claimant had a preexisting condition, but it is ikewise clear that the law provides for compensation of aggravation f preexisting conditions. Applying Dr. Hayne's testimony to he law shows that claimant did sustain the compensable aggravation nd that the causal chain was not broken.

Claimant was 47 at the time of the hearing and testified hat he did not complete the ninth grade in school. His background ncludes several laboring jobs.

An assessment made in November 1980 by Dr. Lehmann at the niversity of Iowa states as follows: "the patient, most ikely, has L5 nerve root scarring on the right with denervation hanges on the EMG. We would not expect his symptoms or L5 adiculopathy to respond to surgical re-exploration." This ondition, which has already been found to be causally related o the injury is a serious and painful impairment. Considering laimant's restricted experience and education along with the ow back difficulty, it is clear that his earning capacity is il. Therefore the findings of fact and conclusions of law of he hearing deputy are adopted.

FINDINGS OF FACT

That on October 7, 1974 the claimant was an employee of the efendant.

That on October 7, 1974 the claimant sustained a personal njury which both arose out of and in the course of his employment.

That under the terms of the decision filed August 13, 1979 he claimant sustained a 10 percent permanent partial disability o the body as a whole, and had been compensated for said isability.

That since the hearing on the initial review-reopening ecision, claimant's condition has continued to deteriorate as a onsequence of his work injury.

That a second back procedure was performed in March 1980 by r. Hayne.

That claimant's physical condition has worsened since the econd procedure.

That claimant was 47 years of age at the time of hearing.

That claimant has an eighth grade education and no specialized raining in any field.

That claimant has been consistently employed by the defendant, r their predecessor in interest, since he was sixteen years old.

That claimant has been a reliable and faithful employee.

That claimant developed preexisting back abnormalities as arly as 1966 but these did not, on the whole, prevent him from eing a productive member of defendant's work force.

That claimant has a multitude of restrictions from certain orms of physical activity, none of which were present prior to he date of injury.

That the claimant's disability is permanent in nature and otal in extent, and directly traceable to the work injury of ctober 1974.

CONCLUSIONS OF LAW

That claimant has sustained his burden of proof and es- ablished a casual connection between his work injury of October 974 and his present disability.

That claimant is permanently and totally disabled.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay claimant disability benefits at the stipulated rate of eighty-nine dollars ($89) per week during the period of the employee's disability as contemplated by §85.34(3).

That defendants are given credit for all benefits previously paid.

That interest shall accrue at ten (10) percent per year from the date of the proposed agency decision, April 5, 1983 pursuant to §85.30.

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

That defendants shall pay unto claimant the following medical charges:

University of Iowa Hospitals $285.75

Signed and filed at Des Moines, Iowa this 14th day of September, 1983.

Appealed to District Court;
Affirmed

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

OWEN TAYLOR	:	
Claimant,	:	File No. 618211
vs.	:	R E V I E W -
HUBINGER 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 Owen Taylor, the claimant, against his employer, Hubinger 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 November 14, 1979. This matter came on for hearing before the undersigned at the Henry County Courthouse in Mount Pleasant, Iowa on October 13, 1982. The record was considered fully submitted on October 21, 1982.

On November 26, 1979 defendants filed a first report of injury concerning the November 14, 1979 injury. On February 20, 1980 defendants filed a memorandum of agreement, indicating that the weekly rate for compensation benefits was $235.06. On October 21, 1982 defendants filed a final report indicating that 15.714 weeks of temporary total disability (November 15, 1979 through January 13, 1980 and January 22, 1981 through March 8, 1981) had been paid pursuant to the memorandum of agreement. (The form 2A does not reflect that benefits were paid from April 12, 1982 through April 15, 1982, as mentioned in defense counsel's letter of October 20, 1982 and as suggested by defendants' exhibit A-1.)

The record consists of the testimony of the claimant, of the claimant's wife, of the claimant's son, and of LeRoy E. Shephard; claimant's exhibit 1, medical reports with identifying cover sheet; defendants' exhibit A-1, bound report from the Mercy Medical Occupational Evaluation Center; defendants' exhibit A-2, an August 3, 1982 letter reports from Paul From, M.D., and Robert Jones, M.D.; defendants' exhibit B, the deposition testimony of J. Keith Campbell, M.D.; defendants' exhibit C, records regarding claimant's hospitalization from March 18, 1977 to March 25, 1977; defendants' exhibit D, the discovery deposition testimony of claimant and of his wife.

ISSUE

At the time of the hearing the parties stated that the only issue was the existence and extent of permanent partial disability.

REVIEW OF THE RECORD

Claimant is 62 years old and has a G.E.D. He left high school to help his father farm. He was subsequently drafted to serve in World War II. While overseas he contracted malaria and also aggravated the poliomyelitis he had acquired as a child. He has been receiving a ten percent ($58.00 per month) disability pension from the Veterans Administration since the early 1950's for the service aggravated polio; he totally recovered from the malaria.

Upon honorable discharge from the Army in November of 1945, claimant worked as a drill press operator for a couple of years. He became employed with defendant employer in 1948 and worked in the syrup house, elastic department, starch bagging department and boiler house. Claimant married in 1948 and moved to Tennessee to attend an automobile/diesel school. Claimant changed his mind about the educational program before beginning classes and returned to the midwest. He drove a truck for The Railway Express for one summer and then operated various machinery for different employers (John Deere, International, J.I. Case, and the U.S. Arsenal) before returning to work for defendant employer in 1951. At the time of the hearing claimant was still employed by defendant employer and expressed no desire to seek retirement. (At the time of his deposition, claimant reported that retirement is voluntary at age 62 and mandatory at age 65.) Claimant enjoyed the assignment he has had for the last ten years--driving a dumpster truck.

Claimant was hospitalized from March 18, 1977 through March 25, 1977 following a fall of approximately ten feet off a dumpster truck. In a consultation report dated March 19, 1977, Howard Kim, M.D., stated:

> This is a 56-year old caucasian married male, a general laborer, who was a victim of poliomyelitis when he was six or seven years old. One time, his lower extremity was paralyzed, however, recovery was satisfactory. In his adult life, there was no obvious or severe sequelae or deformity at all except a prominant indentation on the left side of the lower back, probably due to disuse atrophy of the back muscle. He has been quite a nervous person who alledgedly [sic] showed some evidence of intermittent depressive episodes. The above information was obtained from the wife.
>
> About 24 hours ago, he fell from a ten foot height by accident at work, and he hit the top of the head inflicting a scalp laceration. EYe [sic] witnesses said that he did not lose consciousness. Of course, he complained of severe pain all over his head, neck and lower back. Admission was recommended. At the hospital he was observed closely and properly taken care of. This morning, he experienced severe dizziness and light headedness when he tried to wake up. Otherwise, he denies any nausea or vomiting and overall his vital signs have been stable.
>
> General appearance - he is quite apprehensive and agitated but he is alert and cooperative and he is oriented in all three spheres and his memory seems intact. Yet there is obvious external injury on the top of the head. The eyeball movements show mild evidence of horizontal nystagmus. The visual capacity is within normal range. The pupils are of equal size, and reactive to light, equally. No evidence of icteric discoloration of the sclera. The ear canals on the right side have ear wax, and the external ear canal is congested. There is no evidence of ear drum perforation, and no discharge. The hearing capacity is within normal range. Incidentally, he informed me that he had a chronic sinus problem with occasional ear ache on the left side. Oral hygiene fair. Dental condition fair. Throat not congested. Uvula in the midline. Neck - Severe tenderness on the right aspect, right posterior neck with some limitation of the rotative movement of the neck because of severe pain and tenderness. Shoulder shrugging limited because of neck pain. When I pressed the right carotid area, he experienced a shocking sensation on the posterior lateral aspect of the left neck. There is a transverse groove on the anterior chest and he does not remember if it was the same way beforethe [sic] injury or not.He [sic] denies any particular tenderness or bruise. No ecchymosis. MOderate [sic] protrusion with tenderness on the left Sternoclavicular junction. The lungs are clear. Heart with sinus rhythm, no murmurs. Pulse 62 per minute. B.P. 120/90. The abdomen is not remarkable. Extremities - no gross muscle wasting, however, he complains of severe tenderness of the left knee and the left elbow joint area. No particular swelling except the skin cut.
>
> Muscle grip, in the fingers of both sides is diminished to less than 50%. He denies any numbness in all of the extremities. Deep tendon reflexes decreased in the four limbs. Babinski sign questionably positive on the left side.
>
> Muscle weakness on both sides. I did not do any Romberg test, nor equilibrium test because of his discomfort and inability to stand still at this time.
>
> Diagnosis: 1. Brain concussion with scalp laceration. Probable injury of his spine.
>
> Prognosis: - fair.
>
> Recommendation: Continuous hospital care with bedrest. Close observation. Xray ordered by the attending physician. Observation for further developing neurological signs. Conservative medication to help his ear pain and injury site pain. After that, he requires further psychiatric interviewing to evaluate his depressive episode.
>
> (Defendants' exhibit C, pp. 2-3.)

X-rays taken on March 18, 1977 revealed narrowing and hypertrophic changes at C5 and C6, hypertrophic changes of the thoracic spine, negative findings for the right scapula and supine chest and soft tissue swelling over the vertex of the skull, especially on the left. In the discharge summary, S. Dalisay, M.D., reports:

> FINAL DIAGNOSIS
>
> Brain concussion
> Scalp laceration, 1 cm. calvarim, horizontally directed, sterastriped, sutured.
> Hypertrophic arthritise specially at the 5th and 6th cervical interspace, right trapezius muscle
> Possible neurophexis, right sensory nerve, cervicaltip.
>
> Summary:
>
> This 56 year old white male fell off the ten foot incline while at work. He was brought into the emergency room complaining of severe right sided cervical. Skeletal survey did not reveal any obvious fracture, however, patient was hyperventilating and extremely tense and anxious. HF had to have Valium 10 mg. 1M at the emergency room. The only significant external injury was that the patient had point tenderness at the mid trapezius muscle on the right side and there was a 1 cm. laceration at the scalp. In the emergency room the lacerated skull was cleansed and sutured with 2-9 silk, patient was admitted for observation and 24 hours later there was no neurologic deficit, however, he was complaining of severe dizziness, even when sitting up in the bed. He was extremely tense and nervous and I could not decide whether this patient's complaints were most subjective or they were really objective findings, therefore consultation neurological check with Dr. Kim was doneand [sic] no definite neurolitic finding was found. Patient was treated in the hospital for one week and he gradually improved, especially with reassurance. Patient kept complaining while in the hospital of right shoulder pain. He was reassured that there wasno [sic] fracture even on x-rays, physiotherapy fwas [sic] performed because hypertrophic arthritis and physiotherapy department knows this patient from previous admissions in this hospital and different doctors services and at several times had to have cervical traction because of complaints of right shoulder pain. Therefore physiotherapy was done and patient progressed in his improvement and after seven days in the hospital he was discharged to be followed up inthe [sic] office.
>
> Condition on Discharge: Improved. Continue taking Elavil and antidepressant and be seen in the office in one week. (Defendants' exhibit C, p. 1.)

Although claimant did not recall having a workers' compensation claim prior to the one under consideration, the hospital records suggest that the March 1977 injury was so processed. Claimant was off work approximately three months. He recalled some ongoing problem with his shoulders but denied difficulty with his memory, hearing or headaches. (Claimant did acknowledge being examined for possible hearing loss on the left [referrable to factory noise] a long time prior to the date of injury in issue.) He did not remember whether he suffered dizziness following the 1977 incident.

Despite the reference in the above quoted records to more than one prior admission, claimant recalled only one other hospitalization prior to the date of injury in issue. In or about 1978 claimant was involved in an automobile accident wherein he struck his head against the windshield and his chest against the steering wheel. He also skinned his hand. Claimant noted no dizziness following the accident and thought he fully recovered from his injuries at that time. With regard to any illnesses, claimant recalled contracting mumps several years ago.

Claimant has no recollection of how he was injured on November 14, 1979. Apparently he struck the back of his head on the concrete floor at work. There were no witnesses to the incident. He was taken by ambulance to the Keokuk Area Hospital Emergency Room where abrasion and swelling on the back of his head were noted. Claimant was then transferred to St. Mary's Hospital in Quincy, Illinois under the care of Felix Martin, M.D., neurologist. On November 27, 1979 claimant transferred back to Keokuk Area Hospital and his family physician, B. C. Kappmeyer, M.D. Final diagnosis included contusion to the skull and cerebral concussion, fracture of the occiput and contrecoup affecting the frontal lobes. It was noted that claimant's cerebration improved slowly during the hospitalizations but that his retention of recent information remained severely affected.

According to Dr. Kappmeyer's office notes, claimant complained of decreased vision, headaches, vertigo and loss of hearing in the left ear following the November 1979 work injury. He was treated with Antivert and Histamine injections on a routine basis. After claimant was released to return to work on January 14, 1981 and (according to the claimant) suffered another fall upon experiencing a dizzy spell, Dr. Kappmeyer referred the claimant to Dr. DeGala, an opthalmologist, who prescribed a change in claimant's eyeglass prescription but otherwise found claimant's examination to be normal. Claimant indicated that he does not find the correction helpful and therefore does not wear the new glasses.

Dr. Kappmeyer referred the claimant to Peter L. Leffman, M.D., an otolaryngologist, in June of 1980. According to Dr. Kappmeyer, Dr. Leffman "made a diagnosis of sensorial hearing loss, mild right and marked left with speech discrimination problem " and "thought it could have been precipated [sic] or aggravated by the blow on the head." (Claimant's exhibit 1, item 3 and item 1 respectively.)

Claimant continued to experience vertigo and nausea after his return to work on January 14, 1980. According to Dr. Kappmeyer's office notes, claimant was hospitalized from December

1980 to December 9, 1980 for such symptoms. Dr. Kappmeyer subsequently referred the claimant to the Mayo Clinic. In a letter dated February 25, 1981 and addressed to Dr. Kappmeyer, Joel Silverfield, M.D., from the Mayo Clinic wrote:

Thank you for referring your patient, Mr. Owen C. Taylor, for evaluation of his neurologic disorder. He was seen from January 27 through January 29, 1981, in conjunction with Dr. J. W. Worthington of the Division of Rheumatology. Discharge diagnosis included post-traumatic head injury with anosmia and hearing loss, plus memory impairment, vertigo secondary to left ventricular disturbance, head injury, and change in personality. He also had degenerative joint disease of both shoulders and spermatocele on the left.

His height was 178 cm, weight 69.8 kg, pulse 88, and blood pressure 100/70. The patient had mild scoliosis. There was a spermatocele on the left. There was bilateral crepitus and bilateral decreased abduction in the shoulders to a mild degree. Neurological examination showed the patient to be alert and oriented. He repeated himself often in relating his history. There was noted to be some mild degree of frontal lobe affect. He had a significant hearing loss, greater on the left, and absent sense of smell.

The following laboratory tests were normal or negative: WBC and differential, hemoglobin, platelet count, thyroid function, stool for occult blood, electrolytes, calcium, total protein, glucose, SGOT, sedimentation rate, and urinalysis. The creatinine was slightly elevated at 1.4 mg/dl (upper limit of normal 1.2). X-rays of the skull and chest were negative. Shoulder films revealed degenerative changes of the left acromioclavicular joint. CAT scan of the head revealed mild atrophic change with decreased attenuation in the frontal poles, more marked on the right. This could be due to previous trauma with post-traumatic encephalomalacia. EEG was normal. The electrocardiogram showed a sinus bradycardia and was otherwise normal.

Electronystagography by the Ear, Nose, and Throat Department was normal. Audiometric testing showed the left ear to have a significant decrease in hearing. The patient was seen in consultation by Dr. J.K. Campbell of the Division of Neurology who felt Mr. Taylor had had a significant head injury with a post-traumatic memory impairment, change in personality, and vertigo. He also found anosmia and hearing loss and thought he had a probable fracture of his left petrous bone. Doctor Campbell will write to you regarding his neurological condition.

In summary, Mr. Taylor was found to have a significant neurological impairment most likely secondary to his accident. This is also exhibited by the abnormal CAT scan. He was begun on Dyazide one every day.

(Claimant's exhibit 1, item 5.)

J. Keith Campbell, M.D., specializing in neurology, wrote following letter to Dr. Kappmeyer on March 9, 1981:

Further to Dr. Joel Silverfield's letter of February 25, I saw Mr. Taylor in neurologic consultation on the 28th of January, 1981, for the evaluation of several post-traumatic symptoms.

For the record, I will mention that on November 14, 1979, the patient sustained a blow to the occiput which produced a lump and much tenderness. He was concussed to the point that he repeatedly asked his wife the same question, was confused and combative. His post-traumatic amnesia lasted sixteen days. On recovery to a normal mental status, he complained that he had lost his hearing on the left and had lost his sense of smell. He has continued to have episodes of vertigo, particularly on changing position. These followed the accident and then subsided, but have more recently returned. X-rays of the skull taken some time after the accident revealed a fracture of the calvarium and a CT scan ten days post-trauma showed bifrontal edema (a contra-coup injury). When the CT was repeated one month later it was normal.

Neurologic examination confirmed that he has lost his sense of smell and has impaired hearing on the left. Dr. Stephen Harner of the ENT Department here was actually able to identify the fracture line as it is visible through the left ear drum. Although no particular labyrinthine disturbance could be identified, I believe the patient's symptoms are of an end organ nature, and are post-traumatic. As patients of this type are sometimes helped by fluid restriction, I did suggest a short trial of Dyazide and salt restriction. Anosmia produced traumatically is permanent, and while it does involve the subtle sense of taste, its only real danger is that the patient is not able to identify noxious or toxic odors such as exhaust fumes, smoke or gas.

The majority of the post-traumatic symptoms have diminished with time, apart from the vertigo. If this particular symptom continues, the patient's occupation will have to be reviewed as it involves driving and would clearly be dangerous if he continued to have episodes of severe vertigo without warning. The neurologic findings were discussed with the patient.

(Claimant's exhibit 1, item 6.)

In office notes for April 20, 1981, Dr. Kappmeyer indicates that claimant's dizzy spells ended a couple months earlier and claimant returned to work driving a dumpster truck on March 9, 1981. Claimant was pulled off truck driving on April 14, 1981. Apparently, Dr. Kappmeyer had to advise Dr. Campbell of such fact so that Dr. Campbell could determine whether claimant could return to truck driving and relay such conclusion to the company. On November 4, 1981, Dr. Kappmeyer notes claimant had not suffered any recurrence of vertigo since returning to work. Claimant testified that he no longer has dizzy spells as long as he takes his medication--one Dyazide pill and one Antivert pill daily, and one Histamine injection every three weeks.

At the time of his deposition, which was taken on April 2, 1982, Dr. Campbell elaborated upon certain examination findings:

A. The scan we had done here, showed that there was [sic] some changes in the frontal lobes of the brain, that is the portions of the brain immediately behind the forehead, which were consistent with a previous injury. The actual term is a post-traumatic encephalomalacia, which means a softening of the brain, as a result of an injury.

Q. And of what significance is that, in addition to showing that he had had a previous injury, or at least by a previous injury, is it significant to show that it was something other than hereditary, or genetic?

A. If I understand the question correctly, the changes we saw on the scan were consistent with an injury, but wouldn't be consistent with a hereditary or genetic change.

....

Q. (MR. HOFFMAN) What significance would this have on the patient himself, having such an injury?

A. The fact that these changes were seen in the frontal part of the brain, is highly significant, because we know from the history that he struck the back of his head. If a person is struck a significant blow to one side of the head, or one part of the head, it is very common to find the major damage diagonally opposite the injury. This is what is known as a contrecoup injury. It simply indicates that the brain was sufficiently shaken within the skull, that it was bruised by striking the inside of the skull, both at the point of the blow, and diagonally opposite to that point. It would not be seen in a minor head injury, and it confirmed my suspician that he had suffered a loss of of [sic] the sense of smell, because of the movement of the brain inside the skull, and it confirmed the fact that he had a blow to the head hard enough to fracture through the petrous bone, which we of course described as being visable [sic] down his ear, and that reduced his hearing.

(Campbell deposition, pp. 12-14. Objection on page 13 is overruled.)

Dr. Campbell revealed that when he examined the claimant in January of 1981 he speculated that the vertigo would subside. It was his understanding from a subsequent communication with Dr. Kappmeyer, that claimant no longer suffered dizzy spells. Dr. Campbell explained that his impairment rating of 14% of the body as a whole did not include consideration of vertigo because such condition is considered permanent only if it persists beyond one year. Dr. Campbell arrived at the 14% rating by totaling the following ratings from the AMA Guides: 3% for loss of smell; 6% for loss of hearing in the left ear; and 5% for changes in the frontal lobes of the brain. He further testified that although claimant would not be able to smell toxic odors, claimant's eyes would water upon exposure to some pungent substances. He acknowledged the likelihood that claimant had some preexisting loss of high frequency hearing consistent with age and exposure to noise but attributed the loss of 50 decibels (from the lowest frequency to mid frequency levels) to the injury in issue. He explained that the frontal lobe changes would interfere with claimant's ability to drive a truck only if the changes later caused seizures. He conjectured there was at least a 10% chance for the next ten to fifteen years that claimant would suffer a seizure. Dr. Campbell was not aware of the nature of claimant's prior accidents but discounted their significance.

Claimant was examined at the Mercy Occupational Evaluation Center from April 12 through April 15, 1982. Upon examination of the claimant, David Temple, M.D., the admitting physician, obtained the following impression:

Impression: 1) Status post closed intracranial trauma with significant frontal lobe contusions.

2) Post traumatic memory impairment, personality changes, and loss of coordination secondary to #1.

3) History of post traumatic vertigo which now appears controlled.

4) Anosmia, secondary to #1.

5) Mild degenerative arthritis of the shoulders.

6) Bilateral sensorineural hearing loss, left greater than right.

The patient's mentation may improve slightly with time, however, he has basically reached his point of maximum recuperation. No further treatment or diagnostic procedures would appear helpful at this time. Since the patient has already returned to work it is obvious that he can maintain gainful employment. He will, because of his decreased mentation, however, not be able to

function in a position with significant mental stresses, requiring careful mental judgments, or requiring skillful use of the spoken and possibly written word. The patient has definitely sustained significant functional impairment from his injury. However, I will leave to the specialists to assign a definite percentage.

(Defendants' exhibit A-1, p. I-4.)

Robert C. Jones, M.D., neurosurgeon, also examined the claimant and assessed the degree of functional impairment:

1. Anosmia - 3% of the whole man. Comment: in an industrial situation, the inability to perceive odors may be dangerous to the patient and this should be taken into consideration by the Industrial Commissioner. This figure is a physical impairment figure and must be related to industrial capacity, as all of the figures set forth below.

2. Loss of hearing, partial, left - 17%.

3 Headaches, personality change, problems with memory, loss of sexual desire - 20%. Total 40%.

(Defendants' exhibit A-1, p. II-2.)

David Friedgood, D.O., neurologist, reached similar conclusions upon evaluating the claimant:

This man is suffering from a significant post-concussion syndrome with decreased hearing in the left ear, plus traumatic vertigo and a loss of sense of smell and taste. He also has a significant change in his mental status and personality which can be directly attributed to his injury. It is not unusual for patients with severe injuries, particularly when they affect the frontal lobe, to have similar mental status changes as this man is describing. In response to your specific questions, I believe this man has essentially reached his maximum recuperation state. It is possible that over the next few years he will have continued improvement in his personality disorder; although this is by no means certain. I do not think any further diagnostic procedures are necessary, but I would strongly suggest that he receive a psychological evaluation. It is possible that the psychiatry people might be able to help him somewhat with his personality difficulties. Possibly the use of some medication such as a tricyclic antidepressant might be of some benefit. This man is already gainfully employed. He has been able to return to the same job he was doing prior to his accident, and I suspect that he will continue to function at this job. This man certainly has a marked functional impairment related to his accident. He has decreased hearing on the left. He has loss of his sense of smell and taste and has a marked personality change which has interferred [sic] with his life and his interpersonal relations.

(Defendants' exhibit A-1, p. III-2.)

Todd Hines, Ph.D., performed a psychological examination of the claimant and reported:

In addition to an extensive interview, the Wechsler Adult Intelligence Scale-Revised, the Bender-Gestalt Test, the World of Work Inventory and Minnesota Multiphasic Personality Inventory were utilized in the assessment. All validity and reliability indicators were within acceptable limits. He was cooperative and diligent in his efforts but his response patterns were very slow, so that time penalties on some test items caused a lowering of scores. There was a noteworthy variability to the quality of his performance.

There is no evidence of significant affective impairment beyond a modicum of exogenous depression which appears to be of rather chronic duration. Neurotic or psychotic behavior patterns are not noted. There are no indicators of character disorder or of any personality structure aberration. Psychological defenses are basically intact. Somatic conversion or hypochondriacal mechanisms are not at issue. Malingering, conscious manipulation of symptoms or the pursuit of secondary gain are not seen. There are no data suggestive of causation or exacerbation of symptoms by emotional variables.

Intellectually, Mr. Taylor functions within the average range with most cognitive skills of both a verbal and a manual nature trending toward the lower end of that range. His performance is consistent with both his educational and his trauma history. Thinking is highly concrete. It is imperative to note that his overall functioning with consistency and continuity could easily be overestimated and misperceived by virtue of a coping strategy which he has adopted; that is, he mobilizes a massive effort to focus his concentration and attention on a specific task, which he can then perform adequately, albeit slowly, until it becomes so difficult to sustain that effort that he gives up and his performance deteriorates rapidly. Therefore, his performance within a particular set of task demands tends to reflect more variability than his performance across tasks. He is able, through this process, to concentrate on areas of cognitive weakness and to thereby perform briefly at levels beyond expectation. It is quite possible that this coping strategy causes pain of a tension variety, as well as affective irritability born of efforts to sustain his maximum concentration.

There is no question that residuals of his head injury are in evidence in the form of cognitive skill impairments. However, he seems to be performing adequately on his job and there is no cause to believe that he cannot continue to do so. Further deterioration in his psychological condition is not expected and he has very likely reached a stable point of recovery. He is highly motivated to continue working and his work activity appears to represent an important source of self-esteem and self-perceived evidence that he has been able to maintain his primary source of security which had been threatened by the injury.

In summary, Owen Taylor presents symptom patterns which are not the result of emotional variables but which appear to be wholly caused by physiological anomaly and related coping strategies. There are residuals of organic brain damage which can be expected to endure but which do not seem to be highly problematic with regard to continuing employment. There is no recommendation for psychological treatment.

(Defendants' exhibit A-1, pp. IV-1-3.)

Claimant was also examined by Robert Smits, M.D., an otolarynogologist, who found:

Clinical examination at this time, reveals an alert, 61 year old male. The head is normal cephalic. Examination of the ears revealed the tympanic membranes to be intact and mobile. Otomicroscopy was carried out and was unremarkable. The nose, mouth and throat examinations were within normal limits. Otoneurological examination revealed that the patient had lost his ability of smell and that he could not distinguish camphor, wintergreen and menthol. His sense of taste for sweet and sour was within normal limits. Additional otoneurologic tests revealed that the Romberg, Crosby, finger-to-nose, and heel-to-knee tests were performed well. Audiometric testing was carried out and reveals a sloping sensorineural hearing loss on the right with speech reception threshold to 35 decibels and discrimination of 88%. In the left ear there is a flat sensorineural loss of approximately 70 decibels with a speech reception threshold of 70 decibels and 68% discrimination.

My impression is bilateral sensorineural hearing loss, greater on the left side, and anosmia, probably secondary to the concussion of November 14, 1979.

It would appear that Mr. Taylor has reached his maximum state of recuperation from his labyrinthine injury. I do not have any recommendations for further treatment or diagnostic procedures. It would appear to me that the patient can return to gainful employment. I can see no contraindication to him returning to a driving-type situation in the absence of any further vertigo and in the presence of a normal ENG. The patient appears to have sustained definite impairment in terms of hearing loss and temporary vestibular symptoms following his accident of November, 1979. Eventhough [sic] his ENG was normal at the Mayo Clinic, I would expect him to continue to have a reduced ability to respond to sudden positional changes.

(Defendants' exhibit A-1, pp. VI-1-2.)

G. Patrick Weigel, M.A., set forth the following conclusions in his vocational synopsis:

Owen is very highly motivated to continue on in his employment with The Hubinger Company. Because he is currently re-employed in a full-time capacity with his former employer, coupled with the fact that he insisted he had no range of motion or dexterity problems, no Valpar Component Work Samples were completed. We note that because of difficulty in concentration, coupled with problems of impaired memory, Owen had a great deal of difficulty with dates, and found the interview to be a very frustrating, non-productive experience. It is suggested that as regard employment recommendations, as much as possible, Owen should try to avoid mentally stressful situations.

Vocational data was obtained by way of the Career Assessment Inventory (CAI), the World of Work Inventory (WOWI), and an intensive interview. Indications are that Owen would generally be considered to be a practical person with good physical skills who would generally prefer working with things rather than people. He does get satisfaction out of working with his hands and tools. His occupational interest patterns are similar to those of people employed in the manual/skilled trades. He tends to see himself as a mechanically oriented, rather introverted individual. His relatively low educational orientation score would indicate that Owen would feel rather indifferent or have a dislike for any formal education activities.

In reviewing the results of the Inventories and the interview findings, it appears that Owen is very well-placed in his present employment as a truck driver with The Hubinger Company. Assuming he can continue to keep his dizzy spells under control with medication, we could find nothing to

preclude his continuing employment with that firm.

(Defendants' exhibit A1, pp. X-1-2.)

(The vocational report itself was noticeably short due to the claimant being a poor historian. Both the social worker and the biofeedback analyzer recommended further counseling. Finally, contrary to claimant's testimony, the social worker observed:

> Another significant area of concern for Mr. Taylor is that he fears Workers' Compensation is liable to discontinue payment of his medical bills. It is clear to Mr. Taylor that he will have permanent medical bills as a result of his head injury, and since he is planning to retire next year, he is fearful of how these medical bills are going to be met if Workers' Compensation is no longer available.

[Defendants' exhibit A-1, p. VII-3.])

Paul From, M.D., director of the Evaluation Center, summarized the above findings and adopted the 40% rating of Dr. Jones. (Defendants' exhibit A-1, XI--1-6.) However, in a letter dated August 3, 1982 and addressed to defendant carrier, Dr. From noted that the hearing impairment was 7%, not 17%, and the proper (combined) final rating was 28%. He then observed:

> In reviewing the deposition of Dr. Campbell that you recently forwarded to us, it appears our findings of functional impairment for anosmia and loss of hearing are the same, except that our hearing loss is 7% and his was 6%.
>
> Therefore, we feel it is now in order for us to further explain how we arrived at the aforementioned 20% impairment.
>
> We found three separate categories of impairment within the category of brain damage as a result of the changes in the frontal lobes as a result of Mr. Taylor's accident of November 14, 1979. Using the language of the AMA Guides we assigned the following impairments to those three categories:
>
> 1) Complex integrated cerebral function disturbances but can carry out daily living - 10%
>
> 2) Emotional disturbances only present under usual stress - 5%
>
> 3) Sexual Function (age 40-65) - Mild difficulties - 7%
>
> Therefore, combining 10% and 7%, this yields a combined value of 16%. Sixteen (16%) combined with 5% equals a total functional impairment for this category of 20%.

Claimant's present complaints include difficulty communicating, and concentrating (such as in reading and in adding), being nervous and short tempered, being unable to enjoy everyday activities, loss of taste and smell, hearing impairment on the left, hip discomfort when sitting and fear of heights. Claimant thought his eyesight had returned to pre-injury status. At the time of his deposition which was taken on February 24, 1982, claimant complained of constant headaches and also of occasional pain in the hip, elbow and shoulder which he related to the fall he sustained after returning to work in January of 1980. However, he maintained that he was capable of performing his job as well as before the November 1979 injury. He denied any problem with his present supervisor.

Claimant's wife of over 34 years verified his complaints and change in personality. She noted that claimant's memory was occasionally poor and that he worried about everything. She observed that claimant has difficulty sleeping and no longer enjoys history. Claimant's wife testified that since the 1979 work injury, claimant no longer prepares their income tax returns. She does them.

Claimant's twenty year old son likewise verified claimant's complaints. Although he no longer lives at home on a continuous basis, claimant's son observed that when he is at his parents' home he is no longer able "to talk things out" with his father or to play games with his dad as he did prior to November 14, 1979.

LeRoy E. Shephard, personnel manager for defendant employer's Keokuk operation, testified he was the truck drivers' foreman from 1975 to 1977 and recalled claimant being an excellent employee. He added that claimant was becoming excellent again. He acknowledged that claimant had some difficulty with a recent supervisor but speculated that any problems were caused by the latter. He praised claimant's performance, noted claimant's seniority was between 40 and 45 out of 342 and assured claimant would maintain his job with defendant employer as long as claimant desired it.

Mr. Shephard verified that an employee may retire at age 62 with full benefits (based on years of service) and that roughly 75% of defendant employer's work force does so.

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 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.

ANALYSIS

As noted earlier, the only issue to be determined is the degree of permanency, if any. The parties indicated at the outset of the hearing that the matter of causal connection between the alleged disability and injury was no longer in issue as previously indicated on the pre-hearing order. Of course, any inquiry into whether the injury arose out of and in the course of employment is foreclosed by the previously filed memorandum of agreement.

The medical record is without conflict that claimant did sustain permanent impairment. The various doctors agree that there is a loss of hearing, smell and taste and an effect on claimant's mentation and personality. However, whereas, Dr. Campbell did not take claimant's vertigo into account in rendering his 14% rating, the Mercy evaluation seemingly did so. Including such factor was proper since the record suggests that claimant remains symptom free only because he is under constant medication. Dr. Campbell's testimony leaves the impression that he thought claimant's vertigo ceased sans medication. Omission of such condition may explain, in part, why Dr. Campbell's assessment of claimant's impairment is so low. (It is not clear whether Dr. Campbell used the combination tables in arriving at his final rating. It appears more likely that he added the ratings which would mean there is even greater disparity between his evaluation and that of Mercy.)

The evaluators are in agreement with respect to the body as a whole loss rating for anosmia and seem to be in close harmony with regard to the hearing impairment. Although review of the Mercy reports implies that any prior loss of high frequency was not being distinguished in the given rating, Dr. From clearly states that he reviewed Dr. Campbell's deposition and thought the Mercy findings were similar to Dr. Campbell's. Since Dr. Campbell explained that his rating related to the low frequency loss and Dr. From did not negate such distinction, the 6-7% rating is likely an accurate one.

Taking the above distinctions and discrepancies into account, one is able to conclude only that claimant's functional impairment lies somewhere between 14 and 28% of the body as a whole. Since claimant's impairment does entail the body as a whole, it is claimant's loss of earning capacity which must be assessed.

That claimant has returned to work and need not fear losing his job, except to mandatory retirement, does not mean his earning capacity was not in any way affected by the November 14, 1979 injury. Prior to the date of injury and despite preexisting conditions and accidents, claimant was able to function in various factory jobs. The loss of hearing, smell, communicative skills and temper-control would have some effect on claimant's ability to acquire, to maintain and to function in similar jobs today. Mr. Shephard's comment that claimant was becoming excellent again implies that even though claimant was able to return to his same job there have been some problems.

Yet, the impact of claimant's impairment upon his ability to earn should not be hyperbolized--he has been able to perform his job well since returning to work with only one recorded confrontation and that was attributed to the other party. Indeed, claimant's motivation seems to be good. (The discrepancy in the record regarding early retirement is resolved in claimant's favor. His deposition and hearing testimony were not incompatible. The inconsistency of the social worker's report may be attributable to claimant's communication problem.) Although claimant would not be a good candidate for retraining, there seems to be no need to consider such avenue at present. If

claimant were not working for defendant employer he should, on the basis of present record, qualify for similar work elsewhere, if available. Hence, review of all the evidence bearing on industrial disability supports finding that claimant's loss of earning capacity is 35%.

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 contracted poliomyelitis as a child; he receives fifty-eight dollrs ($58.00) per month in disability benefits from the Veterans Administration for service aggravation of such preexisting condition.

FINDING 2. Claimant injured his back and suffered a brain concussion and scalp laceration when he fell off a dumpster truck on March 18, 1977; claimant was off work approximately three (3) months; no residual impairment was documented.

FINDING 3. Claimant injured his head, chest and hand in a car accident in 1978; no residual impairment was documented.

FINDING 4. As a result of an enigmatic injury at work on November 14, 1979, claimant sustained a contusion to the skull and cerebral concussion, fracture of the occiput, fracture of the left petrous bone and contrecoup affecting the frontal lobes.

FINDING 5. Claimant returned to driving a dumpster truck, the work he had been doing on the date of injury, on January 14, 1980 and until January 22, 1981 when dizzy spells made it impossible for him to continue such work; claimant returned to his job on March 9, 1981 and had remained so employed as of the date of the hearing--claimant's vertigo is controlled by daily medication (Dyazide and Antivert) and injections (Histamine) on a three week basis.

FINDING 6. As a result of the November 14, 1979 injury and in addition to the vertigo, claimant suffered a permanent reduction in hearing on the left, anosmia or loss of smell (and taste), decreased mentation and pesonality changes.

FINDING 7. As a result of the November 14, 1979 injury, claimant's functional impairment is between 14 and 28% of the body as a whole.

FINDING 8. Claimant is 62 years old.

FINDING 9. Claimant has a G.E.D.

FINDING 10. Claimant's employment history includes farming, varied factory work and truck driving.

FINDING 11. Claimant's motivation is good.

FINDING 12. Claimant is not a good candidate for retraining.

FINDING 13. Claimant's present complaints include difficulty hearing, loss of smell and taste, trouble communicating, concentrating and sometimes remembering, nervousness, and being short-tempered.

CONCLUSION A. Claimant has sustained a 35 percent (35%) loss of earning capacity.

ORDER

THEREFORE, IT IS ORDERED that the defendants pay the claimant one hundred seventy-five (175) weeks of permanent partial disability at the rate of two hundred thirty-five and 06/100 dollars ($235.06) per week. Pursuant to Code section 85.34(2) permanent partial disability benefits shall begin as of January 14, 1980 and shall be interrupted during the period additional time loss benefits were paid.

Compensation has accrued and 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.

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

Signed and filed this _____ day of September, 1983.

LEE M. JACKWIG
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JEFFREY R. TEMPLETON, Claimant, vs. LITTLE GIANT CRANE & SHOVEL, Employer, and BITUMINOUS CASUALTY CORP., Insurance Carrier, Defendants.	FILE NO. 624152 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 Jeffrey R. Templeton against Little Giant Crane & Shovel, employer, and Bituminous Casualty Corporation, insurance carrier. Claimant seeks payment for medical expenses and compensation for permanent disability arising as a result of the injury which occurred on May 24, 1979. Claimant's rate of compensation is $182.78 per week as established by the memorandum of agreement filed February 11, 1980 and by stipulation of the parties at hearing.

The hearing commenced May 11, 1984 in the hearing room in the Industrial Commissioner's offices in Des Moines, Iowa. Claimant appeared in person and with his attorney George H. Capps. Defendants appeared through their attorney of record William D. Scherle. Evidence was submitted and the case was considered fully submitted at conclusion of the hearing on that date.

The record in this proceeding consists of the testimony of Jeffrey R. Templeton, Beverly Jean Templeton and Richard Abel. Claimant introduced exhibits 1 through 14 and defendants introduced exhibits A through F.

ISSUES

The issues presented by the parties at the time of hearing are whether there is a causal connection between claimant's injury of May 24, 1979 and his subsequent back problems and surgery which are the basis of this claim. In the event a causal connection is found to exist, a determination of the nature and extent of any related disability claimant may have is required. Defendants also raised as a defense to their potential for liability under section 85.27 of the Code of Iowa a claim that the medical care claimant received was unauthorized and/or unnecessary. It was stipulated that the amount charged for the medical services rendered was fair and reasonable.

REVIEW OF THE EVIDENCE

Jeffrey R. Templeton testified that he is 28 years of age, married, has two minor children whose ages are nine and three and that he presently resides at Alexandria, Virgina.

Claimant did not complete high school, but did enroll in an adult basic machine course offered at Des Moines Technical High School. His only employment which he related at hearing has been as a machinist or work in a machine shop. He begain working for the defendant, Little Giant, in March, 1977 as a machinist. He worked there until July, 1981 when he moved to Odessa, Texas and obtained employment there as a machinist for Omega Geosource. He was subsequently laid off from that employment in March, 1982. He and his family moved to Virgina and he commenced work as a machinist at Bechdon Company, Inc., May 1, 1982 where he remained employed at time of hearing. Claimant stated that at the time he moved to Texas he earned approximately $1.00 per hour more than what he had earned at Little Giant. His position at Bechdon paid less than what he had earned at Little Giant or Omega, but that his pay at Bechdon has now reached the level of what he was earning at the time he left Little Giant. He stated that at Bechdon the pay is determined according to the worker's skills and that he earns the same amount as others doing the same work.

Claimant stated that in May, 1979, on the day of his injury, he was working heavy parts which weighed 30 to 40 pounds. He stated that while using a big wrench on the chuck of the machine he was operating, he felt a sharp pain in his back. He stated that he reported the same to his supervisors, was sent to see L. R. Gray, M.D., in Ankeny and was off work for two days. After returning to work he continued to experience discomfort and saw G. Charles Roland, M.D., commencing in October, 1979. Dr. Roland performed x-rays, provided therapy and kept him off work approximately one month. Claimant stated that the treatment had improved his discomfort but had not eliminated it completely. Claimant stated that he also received care for his back from D. E. Engelen, D.C., in early 1981. He stated that he received twelve treatments for which he was charged $12.00 each time for a total of $144.00. Claimant could not recall who recommended Dr. Engelen. Claimant stated that he paid Dr. Engelen's bills initially and does not recall if they were reimbursed by Little Giant. He stated that Dr. Engelen's treatments consisted of heat, ultrasound and manipulation which sometimes provided some relief but that it did not provide any general improvement of his discomfort.

Claimant stated that while working in Odessa, Texas he ran a horizontal drill which required him to turn heavy cranks, but that the job required no heavy lifting. He related an incident when bending and turning the crank which caused increased pains in his lower back and shooting pain into his left knee. He stated that he sought treatment with Medical Center Hospital in Odessa, Texas for which he was charged $63.50.

Claimant stated that beginning with the injury in May, 1979 he has constantly experienced discomfort. He denied having any previous back trouble of any significance and denied the occur-

cence of any particular incident subsequent to May, 1979 which he felt could have injured his back. He stated that he continued on the same job all the time he worked at Little Giant. He did not relate ever being placed on light duty as a result of his back problems.

Claimant stated that in December, 1982 he returned to Des Moines to celebrate Christmas with his family. He related that his back pain increased while driving and that it continued to increase after arrival in Des Moines. He stated that he contracted the flu which was accompanied by severe vomiting which further increased the pain in his back. He stated that the pain he experienced at that time was worse than what he had previously endured. He denied any incident of falling or other trauma. Upon his return to Virginia he sought medical care at Mount Vernon hospital and subsequently underwent surgery which was performed by James R. Schwartz, M.D.

Claimant stated that after surgery the sharp pain in his back was gone but that his left heel felt numb. He stated that he still has the same symptoms as before the surgery although not as intense. He continued to have a sore back even up to the time of hearing. He related that after he returned to work at Dechdon following surgery, he was placed at the same job and has not had any problems with his work. He stated that he has not seen Dr. Schwartz since the follow-up examination which occurred September 1, 1983.

Claimant identified exhibits 4, 5, 6, 7, 8 and 9 as charges he received in connection with the back surgery. He stated that the total charges from Mount Vernon Rehabilitation Center, Ltd., were actually $900.00 rather than the $530.00 shown on exhibit 9.

Claimant admitted that he received weekly compensation in payment of his medical expenses from Little Giant at the time of the injury in May, 1979. He stated that his symptoms had generally been stable since May, 1979 until he returned to Iowa in December, 1982.

Claimant admitted that he had not communicated the fact that he was having additional problems or receiving medical care to Little Giant or Bituminous. He stated that he believed all his back problems to be related to his work at Little Giant, but had not submitted the bills to the employer or its carrier. He stated that he had paid some bills himself and thinks that his regular hospitalization insurance had paid some of them.

Claimant specifically denied having had any other back problems for eight years prior to the time of his surgery and acknowledged only one other injury to his back and stated that such occurred in 1978 at work with Little Giant. He stated that he felt that the 1978 injury was of minor consequence. He denied an allegation that he had back and leg pains since the age of 19.

Beverly Jean Templeton stated that she and claimant were married in February, 1979 and that she had known him since May, 1978. She stated that she did not recall claimant sustaining any injury to his back in 1978 and that claimant did not complain of back pain until the May, 1979 injury. She stated that after May, 1979 until Christmas, 1982, claimant was in constant pain and complained of weakness in his legs. She stated that his complaints centered around one area in his back.

She stated that since his surgery the pain in his back is less but that he still has weakness in his legs and that he now has numbness in his left heel. She stated that she did not know of any other injuries which claimant had sustained.

Mrs. Templeton testified that she handles the family finances and that the bills with Dr. Engelen were paid at the time of each visit and that they had been reimbursed in the amount of approximately $80.00 by Connecticut General, a private health insurance carrier. She stated that the charges for rehabilitation were actually $900.00 and that exhibit 9 was an incomplete bill. She stated that she felt claimant should have had surgery prior to the time it actually occurred, but that he had been reluctant to do so.

With regard to exhibit D she stated that she was present at the time claimant gave his statememt and that he did not make any reference to having had back trouble for many years. She stated that she does not know who gave the statement of claimant's medical history at the hospital in Virginia.

Richard Abel was called by the defendants to testify and stated that he has known claimant for approximately six years dating back to when they both worked at Little Giant Crane where he is also a machinist. He stated that he knows claimant and his spouse socially and considers them to be friends.

Abel stated that he saw claimant and his wife during the Christmas season in 1982 on the evening before they were to return to Virginia. He stated that claimant told him he had injured his back being ill. He stated that he did not recall any discussion concerning a fall, but that he did recall something about a stairway.

Beverly Jean Templeton was recalled to the stand and stated that during the Des Moines visit in 1982, claimant had not stumbled or fallen on the stairs but that he did have to go up stairs to reach the bathroom. She stated that she had recently spoken with Abel on the telephone and that he told her that he did not remember the conversation which they had in December, 1982.

Claimant's exhibits 1 through 10 respectively are bills for medical care which are consistent with the care claimant related receiving for his back. Exhibits 11, 12 and 13 are reports from Dr. Roland dealing with claimant's treatment during late 1979 and early 1980.

Exhibit 14 is a series of reports from Dr. Schwartz dealing with claimant's surgery in early 1983. In a report dated July 20, 1983 he states:

Note is made of the history and treatment as noted in the hospital records, discharge summaries, and surgical description. His final diagnosis is "Herniated nucleus pulposis, left L-5, S-1, chronic." Note is also made that although the acute exacerbation symptoms were within 3 weeks of his surgery, the findings at surgery were chronic, i.e. long enough for chronic scar formation around the extruded segment. The changes in the bone found at surgery are also an indication of the chronic nature of the problem. Treatment, L-5, S-1 partial hemilaminectomy and discectomy with roots exploration left S-1.

PROGNOSIS: Good, with expectation of episodic low back pain.

DISABILITY EVALUATION: According to the Academy of Orthopedic Surgeons' Guidelines he has a good result from a laminectomy and discectomy without fusion, which rates at a 10 percent permanent physical impairment.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 24, 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 employment activity must be a proximate cause of claimant's disability but it need not be the only cause. Armstrong Tire & Rubber Company v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981).

If 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 R. Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in terms of percentages of the total physical and mental ability of a normal man."

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, 257 (1963).

Under section 85.27 of the Code of Iowa an employer has the responsibility to provide an injured worker with reasonable medical care and has the right to select the care the worker will receive. In order for the employer to be held responsible for claimant's medical expenses claimant must show that the treatment sought was either of an emergency nature or was authorized. Boyce v. Consumers Supply Distributing Company, 2 Iowa Industrial Commissioner Reports 51 (Appeal Decision 1981).

A memorandum of agreement conclusively establishes an employer-employee relationship and the occurrence of an injury arising out of and in the course of employment. Trenhaile v. Quaker Oats Co., 228 Iowa 711, 292 N.W. 799 (1940), Fickbohm v. Ryal Miller Chevrolet Co., 228 Iowa 919, 292 N.W. 801 (1940). It does not establish the nature or extent of disability. Freeman v. Luppes Transport Company, Inc., 227 N.W.2d 143 (1975).

ANALYSIS

The surgical findings made by Dr. Schwartz establish that claimant's herniated disc was something which was not of recent origin. There is no evidence in the record of this case to rebut claimant's testimony of the commencement of his problems on May 24, 1979. There is no medical evidence which contradicts claimant's impression that his disc became herniated at that time. There is no evidence of any prior or subsequent trauma to which it could be attributed. The incident which occurred in Texas when claimant sought medical care is as consistent with the injury at Little Giant being the source of problems as it is with whatever occurred at Texas being the source of the problem. The fact that claimant received medical treatment with Drs. Roland and Engelen substantiates his testimony that he was having continuing back pain subsequent to his return to work after the initial injury. It should be noted that he saw Dr. Engelen at his own expense after he completed treatment with Dr. Roland. Claimant is found to be credible concerning his description of the onset and continuing nature of his symptoms following the May, 1979 injury.

There is no medical opinion in the record which relates claimant's herniated disc to the injury of May, 1979. Exhibit E contains a notation in the diagnosis block of ruling out degenerative disc disease. From the reports it appears that claimant's problem was localized at the L-5, S-1 level. An identifiable incident capable of producing the injury occurred. Claimant's symptoms receded but were never completely resolved. Claimant's symptoms became acute and he was surgically found to have a herniated disc of chronic origin. The incident which was

described is not unlike those which are often found by competent medical practitioners to be the cause of a herniated disc. It is found that the injury of May 24, 1979 is a proximate cause of claimant's herniated disc.

Claimant is presently employed at the occupation for which he has been trained and he is performing it without any problem relative to the injury. He has a 10 percent permanent physical impairment as established by Dr. Schwartz. He is 28 years of age and there is nothing in the record to indicate that he will suffer any further loss of earnings in his chosen occupation. Dr. Schwartz notes, however, he expects episodes of low back pain in the future and a permanent functional impairment has been found to exist. Should the need to change employers arise at sometime in the future, claimant's ability to lift, bend and perform movements of that nature could very well adversely affect his ability to be employed or his wage scale. It is concluded that claimant has sustained a permanent partial disability in industrial terms of 20 percent of the body as a whole.

Claimant's medical care with Dr. Engelen was neither authorized nor in the nature of an emergency. Defendants will not be held responsible for whatever charges may have been incurred with Dr. Engelen.

It appears that claimant's medical expenses with Medical Center Hospital in Odessa, Texas, as shown by exhibit 3, were incurred as a result of an aggravation of claimant's condition which arose from the work he was then performing in Texas. It was neither authorized nor emergency in nature. Defendants will not be held responsible for its payment.

The amounts charged in exhibits 4 through 9 inclusive have been stipulated to be fair and reasonable. Based upon what is contained in exhibit 14 and taken in light of claimant's own testimony, it appears that the medical care which was provided was reasonably necessary for treatment of claimant's condition. It is likewise clear, however, that the care was not authorized by defendants. Claimant was in Des Moines, Iowa and could have easily contacted defendants at or about the time his symptoms became severe. He returned to Virgina and sought medical care near his home. There is nothing in the record of this case to indicate that defendants were notified that claimant was having problems which he felt were attributable to the May, 1979 injury. Claimant entered Fairfax Hospital on January 1, 1983. He was continually hospitalized thereafter until released following his surgery. The seeking of medical care was in response to acute symptoms, and as such, was in the nature of an emergency. Once a course of treatment was commenced it would be unreasonable to expect claimant to have varied from it. It is found that defendants are liable under the provisions of section 85.27 of the Code of Iowa for the medical expenses reflected in claimant's exhibits 4 through 9 inclusive. The stipulation regarding the reasonableness of the medical expenses was limited to those shown by the exhibits and defendants' liability will accordingly be restricted and limited to the charges shown on the exhibits.

Claimant entered the Fairfax Hospital on January 1, 1983. Exhibit 14, a progress note dated February 17, 1983, indicates that claimant would be allowed to return to work on light duty. There is no evidence in the record of a specific date when claimant did return to work and in view of the same, the end of his healing period is fixed as February 17, 1983. This results in a healing period of six weeks six days.

There is no evidence in the record regarding claimant's expenses for travel in obtaining medical care and no provision will be made in that regard.

FINDINGS OF FACT

1. Claimant is a 28 year old married male with two dependent minor children.

2. On May 24, 1979 claimant sustained an injury arising out of and in the course of his employment with Little Giant Crane and Shovel in Des Moines, Polk County, Iowa.

3. Following that injury claimant continued to suffer discomfort in his back at the site of the injury.

4. On or about October 27, 1981, claimant aggravated his back while at work in Odessa, Texas, but such did not produce any significant change in claimant's continuing symptoms or condition.

5. Claimant's chiropractic care with Dr. Engelen was not in the nature of an emergency and was unauthorized by his employer and its insurance carrier.

6. Claimant's medical care with Medical Center Hospital in Odessa, Texas was for an aggravation of his back condition attributable to the work he was performing at that time.

7. Claimant's symptoms became severe during late December, 1982. He entered Fairfax Hospital in Fairfax, Virginia January 1, 1983 and entered into a course of medical care and treatment which involved Dr. Schwartz, Drs. Wener, Boyle & Associates, P.A., Anesthesia Group Services, Fairfax Pathology Associates, Ltd., and Mount Vernon Rehabilitation Center, Ltd.

8. The services received during that course of treatment were reasonably necessary for treatment of claimant's condition.

9. Claimant was found to have a herniated disc of chronic origin which had been in existence long enough for chronic scar formation and changes in the L-5 vertebra.

10. Claimant's injury of May, 1979 was a proximate cause of the herniated disc found in January, 1983.

11. Although the medical care which claimant received commencing January 1, 1983 was unauthorized, it was in the nature of an emergency.

12. Claimant's only vocational training is in the area of work as a machinist.

13. Claimant did not complete high school.

14. Claimant has no demonstrated work skills outside the area of work as a machinist.

15. Claimant is presently performing work as a machinist without substantial impairment from the injury or resulting surgery.

16. As a result of the injury, claimant has sustained a 10 percent permanent partial impairment of the body as a whole.

17. Claimant's injury caused him to be totally disabled from January 1, 1983 through February 17, 1983 at which time he was authorized to return to his regular employment.

CONCLUSIONS OF LAW

The injury claimant sustained May 24, 1979, while working at Little Giant Crane and Shovel, is a proximate cause of the herniated disc which was surgically removed January 12, 1983.

Claimant sustained a permanent partial disability of 20 percent of the body as a whole as a result of the injury at Little Giant Crane and Shovel which occurred May 24, 1979.

Under the provisions of section 85.27 of the Code of Iowa defendants are responsible for expenses of claimant's medical care for the injury incurred commencing January 1, 1983 as shown by exhibits 4 through 9 inclusive in the total amount of $5,926.40.

Claimant's healing period runs from January 1, 1983 through February 17, 1983, a period of 6 6/7 weeks.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant six and six-sevenths (6 6/7) weeks of compensation for healing period at the rate of one hundred eighty-two and 78/100 dollars ($182.78) per week commencing January 1, 1983.

IT IS FURTHER ORDERED that defendants pay claimant one hundred (100) weeks of compensation for permanent partial disability at the rate of one hundred eighty-two and 78/100 dollars ($182.78) per week commencing February 18, 1983.

IT IS FURTHER ORDERED that defendants pay claimant the sum of five thousand nine hundred twenty-six and 40/100 dollars ($5,926. as and for the medical expenses incurred for treatment of his injury as follows:

Fairfax Hospital Association	$4,859.40
Sherwood Hall Orthopedics, Ltd.	130.00
Drs. Wener, Boyle & Associates, P.A.	312.00
Anesthesia Group Services	52.00
Fairfax Pathology Associates	43.00
Mount Vernon Rehabilitation Center, Ltd. . .	530.00
Total . . .	$5,926.40

IT IS FURTHER ORDERED that defendants pay interest pursuant to section 85.30 of the Code of Iowa.

IT IS FURTHER ORDERED that defendants pay the costs of this action pursuant to Industrial Commissioner Rule 500-4.33.

IT IS FURTHER ORDERED that defendants file a claim activity report within twenty (20) days from the date of this decision.

Signed and filed this 28th day of June, 1984.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ARY ANN TEN EYCK,

Claimant,

s.

ARMLAND FOODS, INC.,

Employer,

nd

ETNA LIFE & CASUALTY,

Insurance Carrier,
Defendants.

File No. 647318

A P P E A L

D E C I S I O N

By order of the industrial commissioner file October 20, 983 the undersigned deputy industrial commissioner has been ppointed under the provisions of §86.3, Code of Iowa, to issue he final agency decision on appeal in this matter. Defendants ppeal from an adverse review-reopening decision.

The record on appeal consists of the estimony; claimant's exhibits 1 through 4, inclusive; defendants' xhibits A, B, C and D (exhibit A is the deposition of Ronald iller, M.D., and exhibit D is the discovery deposition of laimant); and joint exhibits A and B, all of which evidence was onsidered in reaching this final agency decision.

The outcome of this decision will slightly modify the eview-reopening decision.

EVIDENCE

The facts basically are not in dispute and may be summarized iefly. Claimant first had symptoms of a work injury in February 1980. These symptoms continued on into March and reoccurred September of 1980. Defendants filed a memorandum of agreement ich admitted a work injury of September 2, 1980. On September 1980, R. L. Bendixen, M.D., diagnosed tendonitis of the right oulder and gave claimant an injection. In that month she was so treated by W. R. Hamsma, M.D., and by Ronald Miller, M.D., qualified orthopedic surgeon. Dr. Miller also diagnosed ndonitis and in October gave claimant two injections.

In December of 1980, claimant was admitted to the hospital ere she had surgery: "Arthrotomy, anterior acromionectomy, ceps tenodesis, right shoulder." (Report of surgery December 1980) Claimant did not improve as was anticipated and by rch of 1981 had an evaluation by Maurice P. Margules, M.D., a urosurgeon. Dr. Margules did not make a specific diagnosis t stated, "it is our opinion that the patient's problem is rictly one of a shoulder joint injury due to the repeated auma sustained during her employment." (Report March 21, 81)

Claimant continued to have problems and was admitted to the spital again in April 1981. At that time, Dr. Miller diagnosed hesive capsulitis of the shoulder. Claimant continued to have oblems and was seen by Dr. Miller again in August. She ntinued to have trouble and on January 5, 1981 [sic], Dr. ller stated in a report that he had seen claimant on December , 1981 and that claimant "apparently has reached the end of r healing period at this point." However, he referred claimant John Connolly, M.D., an orthopedic surgeon.

On January 18, 1982, Dr. Connolly saw claimant but made no rticular diagnosis other than shoulder stiffness. That doctor commended exercises. A pathology report of February 2, 1982 owed an examination of an automonic ganglion and peripheral rve tissue "showing no significant specific diagnostic patho- gical alteration." Likewise, a bone specimen was only diagnosed bone fragments. Also in February 1982, claimant was seen by bert D. Sellers, M.D., and again by Dr. Margules; these ysicians diagnosed a post traumatic sympathetic dystrophy of e hand. (Jennie Edmundson Memorial Hospital report typed ril 2, 1982)

On February 23, 1982, Dr. Margules performed a diagnostic nglion block on the right. This procedure was repeated on bruary 26, 1982 and it confirmed a diagnosis of severe reflex mpathetic dystrophy with causalgic pain involving the right per extremity.

On July 21, 1982, Dr. Margules assessed a permanent partial pairment to the body as a whole of 10 percent. Ronald Evans, O., examined claimant and reported on October 21, 1982 that he d diagnosed a severe rotator cuff tendonitis of the right oulder which "postsurgically deteriorated to chronic adhesive psulitis." Dr. Miller assessed a permanent partial impairment 15 percent of the arm.

ISSUES

The review-reopening decision awarded claimant 150 weeks of rmanent partial disability at $254.58 and healing period from nuary 5, 1982 to September 1, 1982 at the same rate.

Defendants state the issues thus:

The claimant has the burden of showing by a preponderance of the evidence the nature of her injury and the disability resulting therefrom. (Emphasis in the original)

ISSUE NO. II

Whether the deputy erred in concluding that claimant was entitled to additional healing period benefits for the period from January 5, 1982 through September 1, 1982 and whether the deputy erred in not giving the defendants credit against permanent partial disability benefits for payments made by the defendants to the claimant for the period between April of 1981 until claimant's last surgery in February of 1982.

APPLICABLE LAW

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

Rating of permanent losses of scheduled members of the body is covered under §85.34(2)(a) through (t) and 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) and Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

Industrial disability is disability to the body as a whole, as different from the schedule, and is determined by more than functional impairment. Such disability includes considerations of functional impairment, age, education, qualifications, experience, and the inability because of the injury to engage in employment for which the claimant 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). 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).

A shoulder injury is an injury to the body as a whole. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949).

Section 85.34(1) provides as follows:

> 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 improvment 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

Defendants argue vigorously that claimant's disability is to the arm and cite instances in the record where the extremity, as opposed to the body as a whole, is mentioned. For example, in a report dictated February 28, 1982, Dr. Margules states that claimant has a reflex sympathetic dystrophy of the right upper extremity and repeats that diagnosis in a hospital report dated March 2, 1982. Further, Dr. Miller states cogently:

> What we have generally done is if the difficulty goes up to the top of the humeral head or if the main part of the pathology appears to be in the humeral head as opposed to the scapula or to the -- like the clavicle or essentially the shoulder girdle itself, part of the axial skeleton, we've decided that this arbitrarily is going to be considered as an extremity injury, and we do the same thing in the hip. If they have an acetabular fracture, then it becomes to the body as a whole, because that's actually part of the actual skeleton -- axial skeleton. If it becomes, like, a femoral head or humeral head problem, then we've arbitrarily said this is an extremity injury.
>
> The other thing that we have done is we've set down and looked at them from a function or loss of function standpoint. Does it -- is it more applicable to an extremity or is it more applicable to the body? And in general, the other orthopedic surgeons that I've discussed this with tend to feel that it's more of an extremity problem rather than a body problem.
>
> There's an interesting interrelationship at this point, but I think generally the loss of function of the pathology would appear to be more an extremity rather than the body. (Miller dep., pp. 12-13 11. 21-25 and 1-16)

Contrasted to that opinion, however, is an office note of Dr. Miller, the date of which, unfortunately, is illegible. (It is definitely from the year 1982, however, and speaks of the 15 percent rating. Therefore, the note is rather late.) In that note he says claimant "appears to be relatively weak in her deltoid and rotator cuff functions." Both the deltoid muscle and the rotator cuff muscles (the supraspinatus, the infraspinatus, the teres minor and the subscapularis) are on the body side not the arm side of the anatomy. Of course, except for the subscapularis, those muscles are attached to the humerus; however, their greater mass, at least 90 percent of it, is on the body side. Anatomically then, these muscles must be considered a part of the shoulder, which leads one to the inescapable conclusion under the Alm case that the disability here is to the body as a whole.

With respect to the healing period issue, defendants first argue that claimant should not be awarded healing period from January 5, 1982 through September 1, 1982. The evidence shows that during that period of time, claimant saw Dr. Miller, Dr. Connolly, and Dr. Sellers and that she was treated regularly. Further, Dr. Margules states in a report of April 14, 1982 that

claimant had not reached her maximum medical improvement. It is true, of course, that Dr. Margules did give her a permanent partial impairment rating on July 21, 1982 and that July 19, 1982 (the date of the evaluation) would be the proper end of the healing period.

Secondly with respect to the healing period, defendants claim they should be allowed a credit for payments made between April of 1981 and claimant's last surgery in February of 1982. However, the case is the same as that just stated. Claimant was actively being treated for a work-connected condition from which she had not yet recuperated. In such a case, no credit should be allowed.

FINDINGS OF FACT

1. That on September 2, 1980 claimant was an employee of Farmland Foods, Inc. and on that date hurt her right shoulder at work.

2. That the injury and resulting disability attributable to this injury extended into claimant's body as a whole.

3. That claimant has a functional impairment of 10 percent of the body as a whole.

4. That claimant will not be able to return to the type of employment she performed for the employer herein.

5. That claimant will not be able to return to any form of employment requiring heavy physical or manual labor which required continuous movement of flexion, extension or elevation.

6. That claimant was 27 years of age at the time of the hearing.

7. That claimant has no particular training in any field.

8. That claimant finished the eleventh grade.

CONCLUSIONS OF LAW

That claimant sustained her burden of proof and established by a preponderance of the evidence that she sustained an industrial disability of thirty (30) percent of the body as a whole.

That claimant is entitled to a healing period from January 5, 1982 through July 19, 1982.

ORDER

THEREFORE, IT IS ORDERED:

That the defendants shall pay unto claimant one hundred fifty (150) weeks of permanent partial disability at the rate of two hundred fifty-four and 58/100 dollars ($254.58) per week.

That defendants shall pay unto claimant healing period benefits at the stipulated rate of two hundred fifty-four and 58/100 dollars ($254.58) per week for the period of January 5, 1982 through July 19, 1982.

That defendants shall pay unto claimant the following medical bills:

Nebraska Clinicians Group	$ 12.00
Associated Orthopedic Surgeons	57.00
Robert Sellers	720.00
Jennie Edmundson Hospital	3,337.58
Dr. Margules	2,430.00

That defendants shall pay unto claimant two hundred sixty-four and 80/100 dollars ($264.80), representing mileage expense (1,324 X 20).

That interest shall accrue pursuant to §85.30 from September 6, 1983.

That the costs of this proceeding shall be taxed to the employer pursuant to Iowa 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 25th day of January, 1984.

Appealed to District Court;
Affirmed in part, reversed
in part and remanded
Appealed to Supreme Court;
Pending

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHERMAN THOMAS, Claimant, vs. BABCOCK & WILCOX CONSTRUCTION COMPANY, Employer, and CIGNA INSURANCE COMPANY, Insurance Carrier,	File No. 705602 A T T O R N E Y S' F E E D E C I S I O N

This proceeding concerns a dispute over the attorneys' fees to be paid in this case and was brought by the attorney who originally represented claimant, Richard J. Schicker of Omaha, Nebraska, who filed a lien under §86.39, Code of Iowa. The respondent is Sheldon Gallner of Council Bluffs, Iowa who handled the case for the claimant, Sherman Thomas after the latter had discharged Mr Schicker. The case came on for hearing before the undersigned deputy industrial commissioner at the courthouse in Council Bluffs, Iowa on December 16, 1983 and was submitted for decision on that date.

The record consists of the testimony at the hearing; joint exhibits 1 through 10 and petitioner's exhibits 11 through 14, all of which evidence was taken into consideration in reaching this proposed agency decision. Those exhibits include the depositions of Sherman Thomas and Sheldon Gallner.

ISSUE

The issue is how the attorneys' fees in this case should be apportioned between the two lawyers.

STATEMENT OF THE CASE

During Mr. Gallner's representation of Mr. Thomas, the case was settled and on August 15, 1983 Mr. Gallner undertook to cover the amount of Mr. Schicker's fee so that the settlement could be approved.

Claimant testified that Mr. Gallner had represented him on two prior occasions, in 1978 and 1980. When he attempted to contact Mr. Gallner with respect to the alleged injury of June 1982, Mr. Gallner was on vacation. Claimant testified he went to see Gene Leahy of Omaha for representation and was shunted to Mr. Schicker. Claimant had some complaints about his representatic by Mr. Schicker, such as being mistakenly billed for some expenses and Mr. Schicker being uncommunicative. It was also clear, however, that claimant could not remember many of the facts. (See for example, deposition pp. 17 through 19, wherein response to questions, claimant stated some four times that he could not remember the facts.)

Richard Schicker, age 35, testified that he graduated from Creighton University Law School in 1974 and that he was licensed to practice law in Nebraska but not in Iowa. His practice is about one-third workers' compensation and two-thirds personal injury work. He met claimant through Mr. Leahy, who does not do workers' compensation. He stated that he did not know Mr. Gallner had represented claimant on prior occasions. He first saw claimant on July 1, 1982 and on July 9, 1982 conferred with an insurance representative and got claimant's payments brought up to date. He did not take a fee from those checks. He continued to represent Mr. Thomas in a rather routine way until March 1983 when he learned that claimant wanted to be represented by another attorney.

There was an offer of settlement of $34,363 and it was Mr. Schicker's opinion that his fee should be 25 percent of that amount, or $8,565.75.

Sheldon Gallner, who is licensed to practice law in Iowa testified as to his prior representation of claimant and that in mid 1982 he was out of the country. He testified that he called Mr. Thomas upon an inquiry by Mr. Thomas' daughter. Later, claimant came into Mr. Gallner's office and asked the latter to represent him. Mr. Gallner continued the representation of claimant and settled the case for $70,000.

Mr. Schicker's file shows an initial interview and attorneys' fee agreement. It also shows routine correspondence to Mr. Thomas of July 10, 1982, September 10, 1982, October 15, 1982, and March 1, 1983. Also included in the file are routine letters to and from the insurance company and R. C. Pitner, M.D., as well as various filings.

APPLICABLE LAW

Section 86.39, Code of Iowa, 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.

A federal district court stated:

> "[F]ees in compensation cases should not be fixed by reference to an arbitrary percentage applicable to all or most cases. The extent and character of

the legal work, the amount involved, the intricacy and novelty of the issues, and the results obtained must all be considered.

"Some authorities also include as elments for consideration in fixing the fees the circumstances of the claimant and the standing of counsel. The latter element has less application in compensation cases than in other fields. As to the former, the circumstances of the claimant are almost always needy, and should moderate the demands of counsel, but should not be so emphasized by those approving the fees as to drive competent counsel out of the field. In some compensation cases the issue of liability is bitterly contested and the collection of any fee is necessarily contingent upon success; in other cases, the only question is how much compensation will be awarded, some fee is sure to be allowed and to make a lien upon the award, and that factor should be considered in fixing the fee." Hillman v. O'Hearne, 129 F. Supp. 217, 218 (D. Md. 1955)

iting Kirkpatrick v. Patterson, 172 N.W.2d 259, 261 (Iowa 1969) he industrial commissioner stated:

In making this determination the following factors are considered: (1) the time spent by the attorney in the proceeding; (2) the nature and extent of the services rendered; (3) the amount of the award that is involved; (4) the difficulty of handling and the importance of the issues presented; (5) the responsibility assumed and the results obtained by the attorney; (6) the professional standing and experience of the attorney; and (7) any other element which may have a bearing on attorney fees. Lee v. John Deere Waterloo Tractor Works, 34th Biennial Report of the Iowa Industrial Commissioner, p. 186 (1978).

See also Lawyer & Higgs, Iowa Workers' Compensation-Law and actice, §28.

ANALYSIS

Concerning the various elements that should be considered, is clear that each attorney did a good job and that Mr. allner, perhaps did an excellent job. Of course, one cannot peculate as to the result Mr. Schicker would have obtained ecause he was not able to see the case through to its conclusion. s for the time spent by the attorneys, it would seem that either attorney spent a great deal of time on the case when ompared with other cases, especially those that go through a earing. The nature and extent of the services rendered was outine in the case of each attorney.

The amount of the settlement has already been remarked upon. he difficulty of handling and the importance of the issues was outine as was the responsibility assumed. Nothing is known of he professional standing of Mr. Schicker; it is assumed that he s in good standing in his community. Likewise, the standing of . Gallner in the legal community of Council Bluffs is apparently igh.

The fee, and no one disputes the overall amount of it, is 17,500. Of that amount, Mr. Schicker requests one-half. Mr. allner does not suggest any particular division of the fee. oth attorneys did good work, but Mr. Gallner got the result hich counts most, an apparently high settlement on the case. hus, whereas Solomon might split this fee in half, here Mr. allner will be allotted 60 percent and Mr. Schicker 40 percent. here is no clear indication in the record as to the amount of xpenses which should be deducted prior to determining how much the $17,500 would be a part of the final fee. The parties an work this out between themselves.

FINDING OF FACT

Richard Schicker represented claimant on an Iowa Workers' ompensation case and claimant decided to change his attorney nd hired Sheldon Gallner. Mr. Schicker obtained an offer of 4,363 and Mr. Gallner obtained a settlement of $70,000. Both ttorneys performed competently with Mr. Gallner obtaining a ery good result.

CONCLUSION OF LAW

That Richard Schicker is entitled to forty (40) percent of he fee obtained by Mr. Gallner and the latter is entitled to ixty (60) percent thereof.

ORDER

WHEREFORE, the parties are ordered to determine the amount expense which is to be deducted before dividing the fee hereupon to divide the fee as stated above.

Costs of this action are taxed equally.

Signed and filed at Des Moines, Iowa this 24th day of ebruary, 1984.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROY L. THRASHER,	:	
Claimant,	:	
vs.	:	
J. P. CULLEN & SON CONSTRUCTION,	:	File No. 464612
Employer,	:	A P P E A L
and	:	D E C I S I O N
UNITED STATES FIDELITY AND GUARANTEE COMPANY,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Defendants appeal from a proposed review-reopening decision wherein claimant was awarded permanent total disability benefits based upon a finding of 40 percent functional impairment of the body as a whole.

The record on appeal consists of the transcript of the review-reopening proceeding which contains the testimony of claimant, Patricia McLean, Deverne Houk and Paul Halferty; claimant's exhibits 1 through 16 and Sprague deposition exhibits 1 through 5, 27 and 32; defendants' exhibits A, B, C, D; and the briefs and filings of all parties on appeal.

ISSUES

1. Whether the deputy erred in admitting specified medical and vocational reports into evidence.

2. Whether the deputy erred in finding the weekly benefit rate to be $166.92.

3. Whether the deputy erred in finding the claimant permanently and totally disabled.

4. The duration of the healing period if the commissioner finds a permanent partial disability.

5. Whether the deputy erred in awarding contested costs.

REVIEW OF THE EVIDENCE

Claimant was single and 58 years old at the time of the hearing and has an eighth grade education. He has worked as a general laborer in construction since 1951. (Transcript, pp. 14-20) He had been working for defendant employer approximately eight months when he was injured.

On October 15, 1975 claimant was cleaning debris from the roof of the Hormel plant then under construction. He was working under the direction of his foreman, Steve Houk. (Tr., p. 23) Claimant fell through an open hole in the roof onto a concrete floor below. (Tr., pp. 23-24) The distance of the fall is estimated between 27 - 37 feet. (Tr., p. 23) Claimant suffered numerous injuries to the chest and the right side of his body.

He was taken to St. Joseph Hospital in Ottumwa and then to University of Iowa Hospital in Iowa City. (Tr., p. 24) Bruce L. Sprague, M.D., orthopedic surgeon and the treating physician at the University Hospital, described claimant's injuries as follows: "[O]ne closed cranial cerebral trauma, chest trauma, open T-condylar fracture of the right humerus, bilateral pubic rami fractures with a right sacro-iliac joint separation, a right femoral neck fracture, and L-1 vertebral body compression fracture." (Claimant's Exhibit 2, p. 7).

Claimant was in intensive care at University Hospital for 4-5 days. (Cl. Ex. 1, p. 14) He remained in the hospital from October 15, 1975 until November 15, 1975. (Cl. Ex. 1, p. 25)

Claimant underwent two operations to repair injuries to his right hand and right elbow (Tr., p. 25) He had two operations on his hip. (Tr., p. 26) He returned to University Hospital approximately 30 times for operations and appointments with Dr. Sprague. (Tr., p. 27) He was on crutches for a year and a half. (Tr., p. 31) At Dr. Sprague's final evaluation of claimant on January 21, 1980, the doctor found that claimant had one-half to five-eighths inch shortening of the right leg, deformity of the right elbow with a lack of 45 degrees full extension, and 30 degrees flexion contracture of the right hip. (Cl. Ex. 1, pp. 40-43) Claimant also had weakness in the muscles of the right hand and forearm which decreased his grip strength. (Cl. Ex. 1, pp. 44-45)

Dr. Sprague stated that claimant's loss of mobility and strength in the joints of claimant's elbow, hip, and pelvis would restrict the work tasks claimant could perform, and that such restrictions would be permanent.

Q. Now, from the August, 1978 examination, Doctor, and through the period ending with your examination of January, 1980, based upon that January 21, 1980 examination, was Mr. Thrasher ever in a condition because of his injuries to return to work?

A. I don't think that he would be able to return to work as a laborer doing heavy manual labor.

Q. Now, you are saying between that period he was not able?

A. I don't think he is able to at this period. Okay?

Q. Will you give me your reasons, Doctor?

A. I don't feel that the elbow that he has now would withstand heavy manual labor -- pushing, pulling, lifting -- because of pain that would develop and inflammation, and I think probably the same is true with the hip.

Q. Now, when you say heavy labor, Doctor, how heavy does it have to be?

A. Well, I think we all probably have a concept of what a laborer does, but that's basically move objects manually that can't be moved by machinery.

Q. And when you are talking about laborer, you are not necessarily talking about heavy type of construction labor?

A. Well, he could be -- labor can either be ditch digging, right, he can be moving reinforcing bars, could be painting, he could be doing anything, but it's considered something that requires a certain amount of joint mobility, strength, to be able to perform. Now, I can't tell you what specific tasks he can perform, what he can't perform, but I think if we are going to take as a general category "laborer", he would be an unlikely candidate to be able to do it.

Q. And this is again, Doctor, because of the injuries received in October of 1975?

A. Yes.

Q. Essentially to the hip and elbow?

A. Hip, elbow and pelvis.

Q. A combination of the three, Doctor?

A. I think the pelvis is probably the less significant of the three, yes.

Q. In your opinion do these three injuries -- are they permanent?

A. I believe they are at this time, yes.
(Cl. Ex. 1, pp. 48-49)

Dr. Sprague determined that claimant has a physical impairment of 40 percent of the body as a whole. (Cl. Ex. 2, p. 15)

Prior to the injury, claimant worked full time for defendant employer. (Tr., p. 100) His duties included pouring cement, tending masonry and carpentry crafts, building scaffoldings, and digging ditches. (Tr., p. 96) Testifying as business manager for Construction Labor Local 566, Deverne Houk stated:

> [I]t's called unskilled labor. But in some cases you could call it skilled. You just don't go pour concrete unless you know how to pour it. And building a scaffolding, you build it up in the air. I would call somebody that could do that a little skilled.
>
> Q. Prior to October 15, 1975, was Mr. Thrasher able to perform the full range of duties that would commonly be assigned to construction laborers?
>
> A. Yes, he was.
> (Tr., p. 96)

On the question of whether light duty jobs in construction might be available, Mr. Houk stated:

> Not in the construction labor business. There might be some of that in plumbers or electricians. I don't know. But not in our business.
>
> Well, we have light-duty work, as I say, sweeping a floor. You might clean a building. You might work four hours, but they are not going to pay you just eight hours a day, forty hours a week to just sweep floors. It just don't work that way.
>
> If you are sweeping floors right at that point and the contractor wants you to go help those guys pour concrete, you've got to be able to do that.
> (Tr., p. 105)

Claimant has not worked since the October 15, 1975 injury. (Tr., p. 37) Defendants contend that claimant is not totally disabled and is able to work in some occupations which do not require heavy physical labor and would give him an income. Patricia McLean, coordinator of the Career Assessment program of Lifetime Learning Center, testified that claimant was administered general learning, reading, and mechanical aptitude tests. (Tr., p. 81) On the basis of test results and information from claimant on previous work experience, claimant appeared to have the aptitudes or abilities necessary to train for work as a custodian, security guard, service station attendant, parking lot attendant, taxi driver, and small appliance repair. (Tr., pp. 81-82; Defendants' Ex. D)

Paul Halferty, vocational counselor in Rehabilitation Services for the state of Iowa, evaluated the vocational employability of claimant using assessment reports from the Lifetime Learning Center and claimant's medical file. (Tr., pp. 110-114) With regard to claimant's ability to retrain and compete in the labor market in Ottumwa, Mr. Halferty stated:

> A. It appears to me that Mr. Thrasher does not have the physical ability at this time to do common labor. It appears to me that Mr. Thrasher does not have the learning ability to be retrained in sedentary activity.
>
> What I have seen of Mr. Thrasher's ability to understand a situation, to understand written material would lead me to believe that you are not going to make what is typically known as a desk worker out of Mr. Thrasher.
>
> And of those few jobs that would exist that entail no physical labor and also no great deal of training, for example, a parking lot attendant, which is an idea that frequently comes up, those jobs are so few, so very few that the competition for them is so fierce to get them. The persons who need them are unable to do other work. And that makes the competition for them very fierce.
>
> ....
>
> Q. From your experience in what area would Mr. Thrasher compete with the average student in a retraining program that you had part in?
>
> A. The only type of retraining program that Mr. Thrasher might compete in would be an on-the-job training program. On-the-job training would be of the sedentary nature which would rule out common labor which again gets us back to the difficulty of finding a sufficient quantity of jobs to engage in. And then it gets back to the competition.
>
> Q. Workers who are more physically able and that sort of thing? Is that what you are saying?
>
> A. Physically able, yes, and mentally able, yes.
>
> Q. Mr. Halferty, do you have an opinion as to whether Mr. Thrasher will ever be able to work again given his age, his physcal [sic] limitations and his prior work experience?
>
> A. Mr. Thrasher would find it very, very difficult to return to work unless his physical condition improved significantly.
> (Tr., pp. 120-125)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 15, 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).

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).

ANALYSIS

In the first issue on appeal, defendants contend the deputy erred in admitting certain evidence over defendants' objections. With regard to admission of the 1980 deposition of Dr. Bruce Sprague, following an application by claimant for a declaratory ruling on this same issue, Deputy Commissioner Barry Moranville held that under Rule 500-4.18 I.A.C. the deposition may be entered as a narrative report of the doctor. The deputy was correct in admitting the deposition as a medical report.

Dr. Sprague's opinion with regard to claimant's physical mobility and strength for manual labor are well within the physician's area of training and expertise. However, the deputy's findings of claimant's insufficient mental capacity for retraining cite the information received from Paul Halferty, vocational counselor, and not Dr. Sprague.

There is no indication in the deputy's ruling that his findings for claimant relied on either the exhibits to Dr. Sprague 1982 deposition or the clinical notes of Stewart Rothenberg, M.D., Thomas Thurman, M.D., or Donald Berg, M.D.

Defendants object to the deposition and testimony of Paul Halferty, in addition to letters written by Mr. Halferty.

Industrial Commissioner Rule 500-4.18 states:

> In any contested case a signed narrative report of a doctor or practitioner setting forth the history, diagnosis, findings and conclusions of the doctor or practitioner and which is relevant to the contested case shall be considered evidence on which a reasonably prudent person is accustomed to rely in the conduct of serious affairs. The industrial commissioner takes official notice that such narrative reports are used daily by the insurance industry, attorneys, doctors and practitioners and the industrial commissioner's office in decision-making concerning injuries under the jurisdiction of the industrial commissioner.

> Any party against whom the report may be used shall have the right, at the party's own initial expense of cross-examination of the doctor or practitioner. Nothing in this rule shall prevent direct testimony of the doctor or practitioner.
>
> This rule is intended to implement sections 86.8 and 86.18 and to interpret section 17A.14. The Code.

There is no definition of the word "practitioner" provided, but the rule contains no technical language, and agency decisions construing the rule to not ascribe peculiar meanings, known only to the agency, to the words and phrases therein. "Practitioner" is defined in Black's Law Dictionary as "[h]e who is engaged in the exercise or employment of any art or profession." Black's Law Dictionary, 4th Ed. Rev. 1968, p. 1335. A profession is defined as:

> A vocation, calling, occupation or employment involving labor, skill, education, special knowledge and compensation or profit, but the labor and skill involved is predominantly mental or intellectual, rather than physical or manual. Maryland Casualty Co. v. Crazy Water Co., Tex.Civ.App., 160 S.W.2d 102, 104. The method or means pursued by persons of technical or scientific training. Board of Sup'rs of Amherst County v. Boaz, 176 Va. 126, 10 S.E.2d 498, 499. Supra, at 1375.

Paul Halferty states he has a master's degree in guidance and counseling and is currently working as a vocational rehabilitation counselor in the field for which he has been trained. A master's degree represents advanced college preparation, and the field of counseling falls within the definition of a profession. Mr. Halferty is, therefore, a practitioner employed in a profession. His narrative report, in the form of his deposition, and his direct testimony are both admissible as evidence under Rule 500-4.18. Mr. Halferty's May 19, 1982 letter to claimant and June 7, 1982 letter to claimant's counsel are hearsay and are not considered in this appeal.

Defendants contend that Paul Halferty is not qualified to assess claimant's ability to obtain and perform work. Mr. Halferty is qualified to assess employability based on a combination of aptitude scores, medical reports and past work history. Given such data, Mr. Halferty could match claimant's abilities to the work opportunities of the Ottumwa area job market. He concluded on the basis of such information that claimant had neither the physical nor the learning abilities to retrain and compete in the labor market.

Defendants are incorrect in asserting that the deputy found claimant to be permanently and totally disabled solely on the basis of the information provided by Mr. Halferty. Dr. Sprague, the treating physician, has determined that claimant has a physical impairment of 40 percent of the body as a whole. 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, II Iowa Industrial Commissioner Report 39 (1981); Enstrom v. Iowa Public Services Company, II Iowa Industrial Commissioner Report 142 (1981); Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981). If at a later time it can be shown that claimant's vocational capacity has improved, defendants can petition for review-reopening as to claimant's disability.

The second issue on appeal concerns the weekly benefit rate. The award of $166.92 was a scrivener's error and the January 4, 1977 memorandum of agreement was also in error. According to the pleadings, claimant's gross weekly wage appears to have been $248.00. Under the July 1, 1975 corrected benefit schedule, the correct weekly benefit would be $145.32.

The assertions of the third issue have already been addressed.

In finding claimant has incurred a permanent total disability, the commissioner does not reach the fourth issue of duration of healing period.

The last issue in defendants' brief concerns the awarding of costs.

In the proposed review-reopening decision, the deputy awarded the cost of transcriptions of the two evidentiary depositions of Dr. Sprague, together with a total expert witness fee of $300 for the depositions, in addition to medical examination charges rendered by Dr. Sprague in February and March of 1980. Also awarded as costs were medical report charges of the University of Iowa, Medical Services, and Ottumwa Hospital. The St. Joseph Hospital charge for reports was also held payable by defendants.

By declaratory ruling, the 1980 deposition of Dr. Sprague was admitted into evidence, not as the equivalent of testimony, but as a narrative report of a doctor as provided under Rule 500-4.18. The reasonable costs of such evidentiary reports may be taxed under Rule 500-4.33(6). Since the appearance of the doctor is not contemplated in the procurement of such report, expert witness and transcription fees do not constitute reasonable costs for the report. Further, the $90 charge by Dr. Sprague for the February 8, 1980 examination of claimant is disallowed as a reasonable cost incurred in obtaining the medical report. Claimant is awarded $50 as a reasonable cost for Dr. Sprague's 1980 narrative report. Section 622.72, The Code, allows for expert witness compensation, not to exceed $150 a day. Industrial Commissioner Rule 500-4.33(5) provides for the costs of doctors' deposition testimony, including transcription costs, Rule 500-4.33(2). The deputy was correct in awarding the costs of the 1982 Sprague evidentiary deposition but not the 1980 deposition.

The $50 charge from Ottumwa Surgical Associates for a March 24, 1980 consultation with claimant's attorney is not taxable to defendants under Rule 500-4.33.

The hospital medical report charges from the University of Iowa, Medical Services, Ottumwa and St. Joseph's are not allowed under Rule 500-4.18 since such reports do not meet the criteria of a signed narrative report.

FINDINGS OF FACT

1. Claimant was single and 58 years old at the time of the hearing.

2. Claimant has an eighth grade education.

3. Claimant has worked as a general laborer in construction since 1951.

4. Claimant had worked full time for defendant employer for approximately eight months.

5. In 1975 claimant fell from a roof while working and suffered multiple and severe injuries.

6. Claimant had surgery on his right hand, right elbow and hip.

7. Claimant was on crutches for a year and a half.

8. Claimant's injury has resulted in a shortened right leg and a deformity of the right elbow.

9. Claimant's loss of mobility and strength in the joints of his elbow, hip and pelvis restrict his physical activity.

10. Claimant's treating physician has determined a functional impairment of 40 percent of the body as a whole.

11. Prior to the injury, claimant could perform the lifting, climbing and digging tasks necessary to his job.

12. Claimant can now perform only sedentary tasks which require no pushing, pulling or lifting.

13. There is no work in construction labor limited solely to light duties.

14. Claimant has neither the physical nor intellectual abilities to successfully retrain and compete in the labor market.

15. Claimant has a permanent total disability as a result of the October 15, 1975 injury.

16. Claimant's rate of compensation is $145.32.

CONCLUSION OF LAW

Claimant has sustained the burden of proving a permanent total industrial disability as a result of his work related injury of October 15, 1975.

ORDER

WHEREFORE, the deputy's decision filed May 18, 1983 is affirmed in part, and modified in part.

THEREFORE, it is ordered that defendants pay the claimant weekly benefits of one hundred forty-five and 32/100 dollars ($145.32) for the period of disability, in accordance with section 85.34(3), Code of Iowa, (1975), together with statutory interest from the date due.

It is further ordered the defendants be credited for those amounts previously paid.

The requested commutation should be limited to the amount necessary for claimant to buy out his joint tenants' share of claimant's residence.

Costs are charged to the defendants in accordance with Rule 500-4.33 and shall include:

1980 Sprague Medical Report	$ 50.00
1982 Sprague Deposition	150.00
Deposition Transcription	75.45

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

Signed and filed this 16th day of April, 1984.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EMERY THROCKMORTON,	:	
	:	
Claimant,	:	
	:	File No. 667806
vs.	:	
	:	A P P E A L
RUAN TRANSPORT CORPORATION,	:	
	:	D E C I S I O N
Employer,	:	
	:	
and	:	
	:	
CARRIERS INSURANCE COMPANY,	:	
	:	
Insurance Carrier,	:	
Defendants.	:	

By order of the industrial commissioner filed October 20, 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.

On appeal the record consists of the transcript; joint exhibits 1 through 11; and claimant's exhibits A, B, C and E (exhibit D was not admitted as part of the evidence), all of which evidence was considered in reaching this final agency decision.

The result of this appeal decision will be the same as that reached by the hearing deputy.

STATEMENT OF THE CASE

Claimant was hurt in a trucking accident on December 11, 1980. The primary issue before the hearing was stated to be whether or not claimant was an employee of Ruan Transport Corporation. The arbitration decision held that claimant was an employee and was entitled to healing period benefits and permanent partial disability benefits to the extent of 25 percent industrial disability.

ISSUE ON APPEAL

Defendants do not appeal the ruling on the employment relationship, nor do they appeal the healing period award. The issue on appeal stated by defendants is as follows: "There was insufficient evidence submitted at the hearing on this case to support a finding that claimant sustained disabling injury causally related to this accident and that claimant was twenty-five percent (25%) industrially disabled."

APPLICABLE LAW AND ANALYSIS

In their appeal brief, defendants argue:

> The Defendant, Employer and Insurance Carrier, would submit that an issue on appeal is whether there was sufficient evidence submitted at the hearing of this matter to support the finding by the Deputy Commissioner that the Claimant sustained a 25% industrial disability as a result of his injuries. Other than the hernia condition described above, there was little in the way of medical evidence to suggest that Claimant has sustained any objective injury as a result of this accident.

It is true that claimant's complaints of pain in his hips, right leg, bottom of the right foot, and inability to stand low temperatures are subjective. That the evidence is subjective is found in the reports of P. J. Crowley, M.D., the original treating physician, in the reports of Bryon W. Rovine, M.D., a neurosurgeon, in the testimony of Steven R. Jarrett, M.D., a physiatrist, and in the testimony of Charles R. Clark, M.D., an orthopedic surgeon from the University Hospitals in Iowa City, Iowa.

Of course, where the symptoms from which permanent injury can be inferred are subjective, medical testimony is required. Kaltenheuser v. Sesker, 255 Iowa 110, 121 N.W.2d 672 (1963). And, in this case, Dr. Crowley says in a report of March 26, 1981: "I feel the hernia, back problems, elbow injury, plus the superficial injuries all were due to the truck accident."

Dr. Clark gives greater detail:

> Well, certainly as physicians we want to help someone, make someone better. Hopefully I wasn't myself too frustrated because I have seen a number of patients with this same problem. Yes, it is frustrating. You want to get the patient functioning the way they had been previously. Mr. Throckmorton's case there was -- there were no objective deficits, nothing orthopedically that we could find nor neurologically. However, the patient was impaired; he was not able to function, and that is very frustrating and based on that we did refer him to the Pain Clinic. That's a clinic we have which deals specifically with the complaint of pain, and generally it's this type of patient that I have not been able to cure -- if I can use that term -- that I do refer to the Pain Clinic.
>
> ....
>
> We talked about impairment. Of course the major basis we use for impairment are objective findings. In general, they are related to range of motion. The standards we use are based on the American Medical Association or American Academy of Orthopedic Surgeons. However, we did have pain as a factor which the physician himself has to judge as far as how significant that factor is based on objective findings. I did not have any objective findings, but the patient did appear to be impaired because he could not function in my judgment. (Clark dep., pp. 18-19 ll. 10-25 and 1-2, p. 28 ll. 1-12)

This testimony is from the treating physician and the doctor who saw claimant more than any other specialist and agrees with that of Dr. Crowley, the original treating physician. Therefore, their evidence will be taken over any possible evidence from Dr. Rovine or Dr. Jarrett. Actually, none of the testimony questions claimant's pain, only that there are no objective symptoms of it.

With respect to the question of employment relationship, the record has been reviewed and the arbitration decision appears correct. The element of the employment relationship are as follows:

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

Also, the court speaks of the "overriding element of the intention of the parties as to the relationship they are creating." Usgaard v. Silver Crest Golf Club, 256 Iowa 453, 455-456, 127 N.W.2d 636 (1964). In this case, the hearing deputy made very specific findings on pages 10-11 of his arbitration decision. No change will be made.

There is a scrivener's error in the second paragraph of the order portion of the arbitration decision. That error will be corrected. Otherwise, the findings and conclusions of the hearing deputy are adopted:

1. That this agency has jurisdiction of the persons and the subject matter.

2. That the claimant was told by a dispatcher employee of the defendant that claimant was "under workers' compensation."

3. That on December 11, 1980 claimant was an employee of the Ruan Transport Corporation.

4. That the claimant underwent hernia surgery on January 14, 1981 and that the condition requiring the surgical intervention was causally connected to the injury under consideration.

5. That the claimant was unable to perform any acts of gainful employment from December 11, 1980 until April 2, 1982 at which time claimant had reached his maximum medical improvement.

6. That the claimant has sustained an industrial disability of 25 percent of the body as a whole.

7. That claimant's rate of weekly entitlement is three hundred eighty-seven and 54/100 dollars ($387.54), as stipulated.

8. That no evidence was produced at this hearing as to the claimant's unpaid medical expenses.

THEREFORE, IT IS ORDERED that the defendants pay the claimant healing period disability at the rate of three hundred eighty-seven and 54/100 dollars ($387.54) per week, beginning on December 11, 1980 to April 2, 1982 together with interest from the date due.

It is further ordered that defendants pay the claimant permanent partial disability for one hundred twenty-five (125) weeks at the same rate, benefits beginning on April 3, 1982 together with interest from that day.

Costs are assessed to the defendants in accordance with Rule 500-4.33 and should include an expert witness fee in the sum of one hundred fifty dollars ($150) payable to Charles R. Clark, M.D.

A final report shall be filed upon completion of payments.

Signed and filed at Des Moines, Iowa this 31st day of January, 1984.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

UCILLE M. TIDD,

Claimant,

s.

ABOR GRAIN COMPANY,

Employer,

nd

DEAL MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 518242

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 the mployee, Lucille M. Tidd, to recover additional compensation enefits under the Iowa Workers' Compensation Act from her mployer, Tabor Grain Company, and its insurance carrier, Ideal utual Insurance Company, for a personal injury she sustained on ovember 13, 1978. The case came on for hearing before the ndersigned deputy industrial commissioner at the courthouse in ount Pleasant, Iowa on October 24, 1983 and at the industrial ommissioner's office in Des Moines, Iowa on December 8, 1983. he case was considered as submitted for decision on December 8, 983.

The record consists of two partial transcripts of testimony rom the dates above; claimant's exhibits 1, 2, 3, 7, 13, 14 and 5; defendants' exhibits A, B, C, D, F, G, J, K, and L; and oint exhibit 1, all of which evidence was considered in reaching his proposed agency decision. (The depositions of Todd F. Hines, h.D., and Thomas R. Lehmann, M.D. were exhibits B and D respectively, nd the deposition of Koert Robert Smith, M.D., was joint xhibit 1.)

The parties agreed that any outstanding medical bills were o be considered to be fair and reasonable charges.

ISSUES

The issues in this case are whether there is a causal elationship between claimant's injury and her subsequent isability, and, if so, the extent of that disability.

STATEMENT OF THE CASE

Claimant injured her back on November 13, 1978 when she was pulling on a bin spout, changing from one hole to another." (Tr., ctober 24, 1983, p. 110) A doctor's report by Martin Carrillo, .D., shows that claimant was treated for a muscle strain of the umbar spine and hip on November 14, 1978. Dr. Carrillo referred laimant to an othropedic surgeon.

Koert Robert Smith, M.D., a qualified orthopedic surgeon, aw claimant on December 12, 1978 and diagnosed a herniated ucleus pulposus, right, L4-5 (Dep., 7). On December 29, 1978, e performed a hemilaminectomy on the right, at L4, 5 and L5, S1 nd a discectomy at L4, 5. In a report of January 19, 1979, Dr. mith states that the injury was the cause of claimant's condition, amely the herniated nucleus pulposus. (Defendants' exhibit -13) With respect to the cause of claimant's present pain and hether or not the condition is permanent, Dr. Smith testified:

> Q. What is the cause of that trouble, as you understand it?
>
> A. The continued trouble she's having now?
>
> Q. Yes.
>
> A. It's my opinion that the persistent back and leg pain that she has is a result of scarring that's occurred around the nerve and spinal cord in that area of the surgery.
>
> Q. Is this opinion of yours based on a reasonable medical certainty?
>
> A. Yes.
>
> Q. What are her present complaints?
>
> Is this a permanent condition that she has, before I go farther?
>
> A. At this point in time, I certainly think it is, yes.
>
> Q. And is this opinion that you gave me on permanency based on reasonable medical certainty also?
>
> A. Yes. (Smith dep., p. 10 11. 8-23)

Dr. Smith assigned a permanent partial impairment of 20 percent f the whole person. (Dep., 12)

On October 31, 1979, claimant visited Thomas R. Lehmann, M.D., qualified orthopedic surgeon at University Hospitals in Iowa ity, Iowa, who diagnosed a chronic lumbar radiculitis. (Dep.,) With respect to the treatment, Dr. Lehmann testified:

> Q. What was her course as treatment then progressed?
>
> A. Well, we admitted her to the hospital on January 14th, 1980 for a three-week inpatient rehabilitation program.
>
> Q. What was the outcome of that program as you regarded it?
>
> A. Well, I don't think it changed things very much. I think it didn't have any real effect.
>
> Q. The complaints were essentially the same as when she completed the three weeks of hospitalization --
>
> A. Yes, they have been. (Lehmann dep., p. 6 11. 8-17)

As to cause, Dr. Lehmann testified:

> Well, in her case I think it probably started off with a ruptured disc, which was documented by Dr. Smith, and that rupture then we think probably creates an inflammatory condition inside the nerve. That is, it becomes red and swollen as a response to the pressure from the ruptured fragment of disc. Now the nerve root doesn't have a very good venous blood supply, which is one of the vascular parts that takes blood products away from an area or tissues. It also does not have very good lymph supply, which is another way to get rid of water or swelling in an area, if you would. So I don't know but I mean it would be my best opinion that in some cases a nerve gets damaged and it just doesn't recover. It doesn't have the ability to recover, and then therefore it always stays enlarged and swollen. (Lehmann dep., p. 11 11. 7-20)

Dr. Lehmann last saw claimant March 9, 1983 and recommended no further treatment. He assigned a permanent partial impairment of ten percent of the whole person (Dep., 8) and had this to say about the AMA Guidelines:

> Well, I think the American Medical Association Guidelines are injust [sic] and unreliable because if a patient wanted to make his impairment rating very great and you ask him to bend over and he didn't bend over, he could end up with a very high rating. On the other hand, if you had a stoic individual who does what the doctor tells him regardless of the pain, when the doctor says touch the floor, he might, even though he has a severe impairment. By the AMA Guidelines a patient trying to comply with the doctor's request would get a very low rating, and the guy who maybe is artificially trying to increase his rating would get a high rating. It's also been found with several studies that range of motion of the spine is highly linked to hysteria and hypochondriasis scores on personality tests, and I don't think it adequately evaluates one's low back impairment. (Lehmann dep., p. 18 11. 7-21)

Claimant herself testified that she was 51 years of age at the time of the hearing, quit school some six weeks before graduation from the 12th grade and had had numerous jobs including heavy work in a cannery, work as a waitress at U. S. Borax, work as a bartender and for a short time at Tabor Grain prior to her injury. She complained of pain in her lower back and right leg and sometimes down her left leg. (Tr., October 24, 1983, p. 118) She testified that she quit a work retraining program (to be described later) because she couldn't stand the sitting and typing. (Tr., October 24, 1983, pp. 117, 123) She was somewhat ambivalent in her testimony about the retraining program stating on the one hand that she had no interest in office work and on the other that she was at least enthused at first. (Tr., October 24, 1983, pp. 126, 128)

Raymond Hanks, Jr., a doctor of chiropractic testified as to claimant's disability. As to Dr. Hanks' qualifications to give such rating, he testified:

> Yes, in 1973 I was qualified by examination of The American Orthopedic Association of the American Chiropractic Association, was qualified in orthopedics in 1980 from the same society, I took post-graduate work in impairment rating and received certification at that time.
>
> ....
>
> Certification in the impairment rating, certification from the American Orthopedic Society of the American Chiropractic Association in the National Association of Chiropractic, where I completed 36 hours of studies on using the AMA Guides and other guides that were being used at the present time. (Tr., October 24, 1983, p. 15 11. 20-24 and p. 51 11. 17-22)

As a result of Dr. Hanks examination and tests, he assessed a rating of 45 percent permanent partial disability of the whole person as a result of the residuals of the surgery.

Todd F. Hines, Ph.D., a qualified clinical psychologist, saw claimant on March 3, 1983. He administered standard psychological tests. Dr. Hines testified at length as to claimant's motivation and ability for retraining. With respect to motivation he stated:

> Q. Did she indicate to you in a statement what her, other than what you have told me about, that would pertain to her motivation vocationally at the present time?
>
> A. Well, she indicated that she would like to learn about computers, which I think is a motivational statement. She said that she believed

that she could sit or stand, she could alternate, she could sit a while, she could stand a while doing that, doing computer work.

She indicated that she's tried vocational rehabilitation course in office skills, but indicated that there was a problem, somewhat of a problem, with sitting, but that more of the problem was that it was all new to her and she didn't understand it. (Hines dep., pp. 19 and 20 ll. 16-25 and 1-3)

With respect to computers (which was not the retraining program claimant attempted), Dr. Hines stated:

Q. Did she speak of any problems physiologically, problems sitting or standing in connection with that? Did she indicate in any way to you a belief on her part that physical inability to sit or stand was the primary reason for not completing the developing office competencies program?

A. Well, she did. I think the significant work there for me in responding to the question would be primary. Whether it was primary factor. She did indicate to me that she had a problem sitting. The major thrust, though, of her response to me as to why it wasn't successful was that it was new to her and she didn't understand it.

She also indicated to me as I think I mentioned, that in talking about wanting to go into computers, that she believed that she could sit or stand in periods that would allow her to do that job. (Hines dep., p. 21 ll. 1-17)

As to her desire, Dr. Hines testified:

Mrs. Tidd wants to believe that she's strong. She wants to believe that she can recover. If Mrs. Tidd were told directly or indirectly that she's not strong, that she can't recover, that she's in terrible trouble, that would have a significant impact on her ability to try to recover, to try to be resilient. (Hines dep., p. 31 ll. 5-10)

As to her ability to be retained, Dr. Hines testified:

Q. In your opinion, and based upon reasonable psychological probability and based upon your counseling and treatment of other patients presenting similar clinical pictures and your training and experience in general, do you have an opinion as to whether, as to what Mrs. Tidd's potential is for correcting the problem?

A. Yes, I have an opinion in that regard.

Q. And what is your opinion?

A. I think there are some very specific things that could be done, because I believe that her potential is much better, much stronger than she believes or perhaps even that the record might indicate to the casual observer. See, the difficulty here almost by definition is that she doesn't believe in herself, and as that gets translated into behavior she believes that she's so depressed or in so much pain or has such a loss of physiological capability, whatever it might be, that she's not moved toward recovery, and so it becomes very difficult to know what her rehabilitation potential might be.

But I think in general terms it becomes easy to discern the fact that her rehabilitation and recovery potential has not been tapped. And I think there are some very specific things that could be done that I believe have a high probability of not only returning this woman to the world of work, but what I think is just as important as that is returning her to a quality of life across the board that is at a much higher, much more comfortable, much more satisfactory level than anything she's experienced in the last four years. I think that's highly feasible. (Hines dep., pp. 47-49 ll. 19-25, 1-25 and 1)

Concerning claimant's failure to finish the retraining program referred to above, Dr. Hines testified that she had not been adequately prepared to enter the program. (Hines dep., p. 56)

George Brian Paprocki testified that he was a self-employed vocational consultant and first saw claimant on March 12, 1982. In the witness' opinion, her age (50 at that time) hurt claimant's employment chances, that she could not do sedentary work and that she had no earning power. (Tr., December 8, 1983, pp. 22-23) With respect to her motivation, Mr. Paprocki testified:

You mentioned motivation after you mentioned psychological. This is where Doctor Hines also makes a comment that he indicated in his deposition that he saw no significant malingerer or conscious manipulation.

So, in other words, she feels that she is truly disabled. This is not an act. She has a consistent work history, as I indicated -- that would be a good sign. That's a good sign in terms of what her motivation was immediately prior to the accident and as well as an employer possibly hiring her, he is going to look for a good work history rather than something that's sporatic [sic]. She also stated a desire for a job, I believe, to Crawford Rehabilitation, and it was the reason for getting her in to rehabilitation -- into the DOC program. And there was also a comment in a report of Doctor Lehmann's of 1-13-81 from an unnamed rehabilitation counselor where he indicated that she was very motivated -- in his estimation. (Tr., December 8, 1983, p. 20 ll. 4-22)

Roger Kromphardt testified that he was a consultant for Crawford Rehabilitation Services and that he administered a Vocational Diagnosis Assessment of Residual Employability (VDARE) to claimant. From the results of the VDARE and other information he gathered, the witness concluded claimant could do sedentary and light work. (Tr., December 8, 1983, p. 80) Further, a career assessment inventory showed claimant's primary interest was in the clerical field. (Tr., December 8, 1983, p. 8 With respect to the office-clerical retraining program, Mr. Kromp testified: "I believe she has the capability to be rehabilitated and the program outlined through the DOC program would have enhanced her skills to the point where, I think, she would have made a good candidate to be placed somewhere." (Tr., December 8, 1983, p. 94 ll. 18-22)

Dennis Lloyd Hinkle testified that he was a special needs supervisor at Southeastern Community College in Burlington. He described the retraining program claimant attempted to complete as follows:

Okay, the Developing Office Competency Program is an individualized office skills training program providing services primarily to handicapped and disadvantaged persons though those are rather broad terms because the program is open entirely, and open access so that the person can start any day of the week, leave any day of the week. Goals are individually prescribed between the student and the instructor and the person is completed, finished, graduate, whatever when they have achieved those goals. (Tr., October 24, 1983, p. 76 ll. 8-17)

He further testified that claimant's first day was March 10, 1982 and her last day was April 28, 1982, with several absences. (Tr., October 24, 1983, p. 84) He further testified claimant's intellectual capacity was sufficient to complete the program. (Tr., October 24, 1983, pp. 85-86)

Ruth Ann Johnson, M.S., a clinical psychologist, testified that she had not actually met with claimant but that she believed claimant had some capabilities. (Tr., October 24, 1983, p. 105)

APPLICABLE LAW

Claimant must show that the health impairment was probably caused by her 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 v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 (1934). Claimant also has the burden to prove the extent of her permanent 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 her inability, because of the injury, to engage in employment for which she is fitted. Id., at 255; 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).

The Iowa 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 impariment 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).

ANALYSIS

The file presents no real question as to causal relationship: It is clear claimant hurt herself on the job and that her surgery and subsequent disability were caused by that injury.

The main question is the extent of permanent partial disability. With respect to the impairment rating, claimant showed that, although Dr. Hanks is not a medical doctor and particularly is not an orthopedic surgeon or neurosurgeon, he is well grounded in the techniques of impairment rating under the AMA Guides. Thus, his impairment of 45 percent is given some weight. Considering that the treating surgeon gives claimant a rating of 20 percent and considering claimant's own testimony, Dr. Lehmann's rating of 10 percent permanent partial impairment is given less weight. The impairment, therefore, is beyond the range of moderate and into the area of serious.

This impairment has impact upon a person who does not have much education and whose mental abilities are in the low range of normal. Her experience is limited. There is also evidence that her age, 50 at the time Mr. Paprocki made his assessment, is a detriment. These factors show that claimant's earning potential has been substantially reduced.

Although claimant has a serious job injury and lowered capabilities, she should be able to perform some jobs. In order to find these jobs she must be retrained. It is too bad that the office retraining program appears to have been a waste of time. Claimant has expressed some interest in computers and perhaps could pursue that area of endeavor. Considering the various factors, then, her industrial disability is found to be 65 percent.

FINDINGS OF FACT

1. Claimant was hurt at work on November 13, 1978 when she twisted her back.

2. Because of this injury, she has a permanent partial impairment of 20 to 45 percent.

3. Claimant was age 51 at the time of the hearing had an 11th grade education.

4. Her experience is mainly in heavy and light labor and working as a bartender.

5. Claimant enrolled but failed to complete a program in Developing Office Competency.

6. Claimant has the intellectual capability to perform office work.

CONCLUSIONS OF LAW

Claimant sustained an injury which arose out of and in the course of her employment on November 13, 1978 and which resulted in industrial disability of sixty-five (65) percent.

ORDER

WHEREFORE, defendants are hereby ordered to pay weekly compensation benefits unto claimant for a period of three hundred twenty-five (325) weeks at the rate of one hundred fifteen and 14/100 dollars ($115.14) per week, accrued payments to be made in a lump sum together with statutory interest at ten (10) percent per year from the date due.

Costs of this action are taxed against defendants.

Defendants are ordered to file a final report of payments upon completion thereof.

Signed and filed at Des Moines, Iowa this 24th day of February, 1984.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

N. S. TODD,	:	
Claimant,	:	File No. 711211
vs.	:	
DEPARTMENT OF GENERAL SERVICES, BUILDINGS AND GROUNDS,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
STATE OF IOWA,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by N.S. Todd, Claimant, against State of Iowa Department of General Services, Buildings and Grounds, employer, for benefits as a result of an injury on December 17, 1980. On July 27, 1983 this case was heard by the undersigned. This case was considered fully submitted at that time.

The record consists of the testimony of claimant, Larry Johnson, Donald McCabe, Jim Campbell, Joan Kehoe, Thomas Hardy, Virginia Moore, Emil Vecchi, and Robert Schemmel; claimant's exhibits 1 and 2; defendants' exhibits 1, 2 and 5; and joint exhibits 1 through 7.

ISSUE

The issues presented by the parties at the time of the pre-hearing and the hearing are whether claimant received an injury arising out of and in the course of his employment; whether there is a causal relationship between the alleged injury and the disability on which he is now basing his claim; the extent of temporary total, healing period and permanent partial disability benefits he is entitled to; and a question as to notice under section 85.23.

The parties stipulated that claimant was paid $5.55 per hour, worked a 40 hour week and is entitled to two exemptions.

FACTS PRESENTED

Claimant testified that he has worked for defendant as a carpenter since 1969. Claimant stated that in 1972 he injured his neck while working in the Lucas Building. Claimant revealed that surgery was required.

Claimant testified that in October and November of 1980 he was pouring a great deal of cement for defendant. Claimant stated he told Emil Vecchi about his neck hurting, especially when he was down pushing 2 x 4's over the cement. Claimant indicated he saw defendant's nurse and told her his neck hurt because of the cement work. Claimant disclosed that the nurse sent claimant home for a few days. Claimant went to see the nurse again and was also seen by the doctor who told claimant to see his own doctor.

On April 29, 1981 Robert A. Hayne, M.D., put claimant into the hospital and later was released by Dr. Hayne with restrictions.

Claimant testified that his back continues to bother him. Claimant indicated that if he overdoes something, his neck becomes stiff, as well as his shoulder and he begins to have headaches. Claimant stated that he was sick from December 17, 1980 until July 31, 1981 and estimated that half of the time he was off was because of his neck problems. Claimant also stated that since May of 1982 half of the time he has been off is because of his neck problems.

On cross-examination, claimant indicated that he previously missed 2 1/2 years of work because of his neck problems. Claimant disclosed that defendant has given him a helper for the last six to eight months, and he has done very little heavy work for the last year. In 1982 claimant had surgery on a tumor. Claimant revealed that in February of 1983 he was involved in a rear-ended motor vehicle accident which affected his neck, back and resulted in headaches. Claimant testified he never has had a garage fall in on him.

In his deposition claimant revealed that he claimed time lost for his neck injury for April and until May 11, 1981 when Dr. Hayne released claimant to return to work. Claimant also indicated he took sick days prior to April of 1981 for his neck problems but just reported in as sick. Claimant revealed that he did not know how many days he took off for sick leave because of his neck. Claimant stated he was only in the hospital once for this injury and that was for a three day period.

Larry Johnson testified that he has worked for defendant for ten years as a trades helper. Mr. Johnson also disclosed that he is president of the local union. Mr. Johnson stated that in November of 1980 the defendant was pouring a lot of cement. Mr. Johnson indicated that claimant complained about his neck and went to defendant's nurse. Mr. Johnson testified that he didn't know if claimant told Emil Vecchi that he hurt his neck while pouring cement but told the rest of the workers that is how it happened.

On cross-examination, Mr. Johnson disclosed that claimant had not previously complained of neck problems.

Donald McCabe testified that he has worked for defendant as a trades helper for four years and remembers claimant indicating he hurt his neck while pouring cement. Mr. McCabe stated these complaints occurred when the cement was being poured. Mr. McCabe indicated that after claimant's alleged injury Emil Vecchi came in to see how claimant was doing.

Steve Carter testified that he has been employed for defendant for four years and remembered claimant stating his neck was hurting and wanted to see the nurse.

Jim Campbell testified he is a locksmith and safeman with defendant. Mr. Campbell stated that in the late 1970's claimant came in one morning limping and declared that a garage had fallen in on him. Mr. Campbell said he couldn't say when that conversation took place but that he remembered claimant complaining of neck and back pain.

Emil Vecchi testified that he works for defendant and was claimant's supervisor in October, November and December of 1980. Mr. Vecchi indicated he first became aware of claimant's neck complaints when they were pouring a slab of cement. Mr. Vecchi couldn't remember if December 17, 1980 was the first time claimant complained of neck problems but would have only been a couple of weeks earlier if he had. Mr. Vecchi testified claimant said he injured himself when pouring cement but indicated it was on an earlier date.

Robert A. Hayne, M.D., who testified by way of deposition, indicated he is a neurosurgeon and first saw claimant on September 13, 1972. Dr. Hayne disclosed that he performed surgery on claimant's neck in the form of the removal of a herniated intervertebral disc between the fifth and sixth cervical segments followed by a fusion. Dr. Hayne again saw claimant on April 29, 1981 because of neck problems which claimant related to his work. Dr. Hayne stated he hospitalized claimant from May 11, 1981 to May 14, 1981 for a myelographic study. Dr. Hayne released claimant to return to work on May 15, 1981 with a restriction of lifting 40 pounds.

Dr. Hayne next saw claimant on July 3, 1981 and advised claimant to curtail heavy work but did not advise him not to work.

Dr. Hayne last saw claimant on June 28, 1982 and told claimant he thought claimant was a candidate for sugical treatment. Dr. Hayne causally connected claimant's injury with his work and opined that if surgery was not done claimant would have a permanent partial impairment of eight to ten percent of total. In his report of December 16, 1982 Dr. Hayne stated:

> I first saw N.S. Todd for examination on September of 1972. At that time he had a history dating back to July 31, 1972, at which time while working for the State of Iowa, he lifted a weight from a position in front of him to a position over his head and he experienced pain in the back of his neck and upper dorsal spine region. The pain persisted but he continued working. He was admitted

to Iowa Methodist Medical Center on September of 1972, and was subjected to surgery on September 22, 1972, for treatment of a herniated disc at the interspace between the C5-6 level on the left side.

He was not seen during the interium [sic] from November of 1972, until April 29, 1981. At that time he stated in November of 1980, he began having pain in the back of his neck. This continued to bother him. He stated he had been doing alot of cement work in November of 1980. He stated he felt he strained his neck doing this activity. He was admitted to the hospital on May 11, 1981, and at that time a cervical myelogram was carried out which showed a defect on the right side at the interspace between the 4th and 5th cervical segments. I will enclose a copy of the discharge summary for your records.

He was seen by me for examination on July 3, 1981. At that time he stated he was working steadily doing cement work and there had been no improvement in his symptoms. I recommended he obtain lighter work.

He was seen again on June 28, 1982. He stated in March of 1982, he had a benign tumor on the lung removed. He was still having pain in his neck with more pain over the back of his right shoulder in the region of the right scapula. He stated that if "he does take it easy", he gets along fairly well. The neurological examination showed good strength and coordination of the upper and lower extremities. The deep reflexes were equal throughout. Sensation was normal. There was no evidence of muscular atrophy. The examination was essentially within normal limits.

I feel he has a herniated disc at the 4th cervical segment on the right side. I told him that if his symptoms persist with sufficient severity, he would be a candidate for surgery. At that time, the major portion of the intervertebral disc between the 4th and 5th cervical segments would be removed and a bone plug would be taken from his hip area to fuse this segment.

I feel there is a causal relationship between his new problem at the 4th cervical segment and his work. The surgery would require him to be hospitalized seven to ten days for the operative procedure. I feel his disability at this time without surgical treatment would be in the vicinity of 12-16% of body total, plus the disability from his previous injury. If he were to have this surgery, his disability should be lowered to approximately 8-10% body total plus his previous disability.

In another letter dated December 16, 1982 Dr. Hayne stated:

I am enclosing a copy of a letter written to Mr. Hansen regarding the care and treatment of N.S. Todd. I feel that Mr. Todd should not be doing heavy cement work. I feel that he is capable of doing light duty type work and should be restricted in lifting of weights over forty to fifty pounds. He should not be required to do activity that requires hyperextension, hyperflexion, and extreme rotation of the neck. I have not seen Mr. Todd for examination since my examination on June 18, 1981.

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 he received an injury on December 17, 1980 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The claimant also has the burden of proving by a preponderance of the evidence that the injury of December 17, 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 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.

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. * * * *

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. See Birmingham v. Firestone Tire & Rubber Company, II Iowa Industrial Commissioner Report 39 (1981); Enstrom v. Iowa Public Services Company, II Iowa Industrial Commissioner Report 142 (1981; Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981).

ANALYSIS

Claimant has met his burden in proving he received an injury arising out of and in the course of his employment on or prior to December 17, 1980. The claimant's testimony is supported by the greater weight of evidence in this regard. The undersigned must point out that Jim Campbell appeared to be less than candid at the time of hearing and no weight was given to his testimony.

The greater weight of evidence also indicates that claimant gave defendants notice of his injury as required by section 85.23. Claimant's supervisor disclosed that he had actual knowledge of claimant's complaints.

The greater weight of evidence indicates a causal connection between dclaimant's complaints and his work for defendant. Such a conclusion is based not only on the testimony of Dr. Hayne but on the lay testimony as well. In his deposition Dr. Hayne opined that claimant has a permanent impairment of eight to ten percent of total. Functional impairment is only one of the factors in determining industrial disability.

Claimant is 59 years old and has an eighth grade education. Claimant's work life has been spent as a carpenter. As a result of his neck injury claimant has some restrictions. None of claimant's prior neck problems resulted in permanent impairment. Claimant also has other medical problems unrelated to this neck injury which may affect the length of time claimant will be able to work. The greater weight of evidence reveals tht claimant has returned to the same job he had at the time of his injury, but his employer has allowed claimant to ease up on the work he performs and has limited his heavy work. This injury has not appeared to have affected claimant's ability to keep the job he presently has. Therefore, his actual earnings may not be reduced in proportion to his injury. On the other hand claimant would not find other new employers so gracious with his restrictions. Based on all the evidence presented it is determined that claimant has an industrial disablity of fifteen percent as a result of his injury of December 17, 1980.

Claimant has also met his burden in proving he is entitled to nineteen days of healing period benefits as a result of his injury on December 17, 1980. This period of healing period runs from April 29 until May 17, 1981. Claimant may argue that he is entitled to more healing period benefits, but based on the evidence presented it would be mere speculation to award any additional healing period benefits. Claimant did not keep track of the time he lost because of his neck nor did he tell anyone else that this time was missed because of neck complaints. From claimant's own statements it appears he was only guessing as to

the amount of time he missed because of his neck problems.

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 or prior to December 17, 1980 claimant was injured while pouring cement for defendant.

CONCLUSION A. Claimant met his burden in proving he received an injury arising out of and in the course of his employment on or prior to December 17, 1980.

FINDING 2. Claimant told his supervisor of his injury.

FINDING 3. Claimant's supervisor had actual knowledge of claimant's injury.

CONCLUSION B. The requirements of section 85.23, The Code, were met by claimant.

FINDING 4. As a result of his injury claimant has permanent impairment of 8-10%.

FINDING 5. Claimant is 59 years old and has an eighth grade education.

FINDING 6. Claimant's work life has been spent as a carpenter.

FINDING 7. As a result of his injury claimant has some restrictions.

FINDING 8. The restrictions on claimant have not stopped claimant from returning to his former position with defendant.

FINDING 9. Claimant has unrelated medical problems.

CONCLUSION C. Claimant has an industrial disability of fifteen percent (15%) as a result of his injury on December 17, 1980.

FINDING 10. Claimant missed work from April 29, 1981 until May 7, 1981 as a result of his injury.

CONCLUSION D. Claimant is entitled to two and five-sevenths (2 5/7) weeks of healing period benefits.

ORDER

THEREFORE, Defendants are to pay claimant two and five-sevenths (2 5/7) weeks of healing period benefits at a rate of one hundred forty-one and 06/100 dollars ($141.06) per week and seventy-five (75) weeks of permanent partial disability benefits at a rate of one hundred forty-one and 06/100 dollars ($141.06) per week.

Defendants are to reimburse claimant for the following medical expenses:

Robert A. Hayne, M.D.	$180.00
Iowa Methodist Hospital	823.00

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 to be given credit for any payments previously paid.

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 3rd day of January, 1983.

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JERRY L. TURNER, Claimant,	:	
vs.	:	File No. 507288
AMF LAWN & GARDEN DIVISION, Employer,	:	A P P E A L
and	:	D E C I S I O N
FIREMAN'S FUND INSURANCE COMPANY, Insurance Carrier, Defendants.	:	

By order of the industrial commissioner dated July 21, 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 review-reopening decision.

On appeal the record consists of the transcript; claimant's exhibit 1 which was the deposition of Douglas Stephen Reagan, M.D.; defendants' exhibits A, B, C, D, E, F and G; and the deposition of John T. Bakody, 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.

REVIEW OF THE RECORD

Claimant first had complaints in her right arm, and, as a result thereof, defendants filed a memorandum of agreement on May 30, 1978 for an injury of February 1, 1978. Claimant had a carpal tunnel release on the right on June 7, 1978 and on the left on January 10, 1979.

She developed a winged scapula (also called a winging scapula), a condition wherein the muscle which holds the scapula (shoulder blade) is weakened or paralyzed and fails to hold the scapula flat against the back wall of the chest. On the question of whether or not the winged scapula resulted from either the injury or treatment therefor, John T. Bakody, M.D., a qualified neurosurgeon, testified basically that, since his notes of treatment through August 27, 1979 had no notation of the condition, that there was no causal relationship established. (Bakody dep., 10 and the following) The notes of Douglas Stephen Reagan, M.D., a qualified orthopedic surgeon, who first saw claimant on September 12, 1979, stated on the one hand there is "not really...any cause of her winging scapula" (notes January 10, 1980) and, contrariwise, that there was a causal relationship between the condition and either claimant's work or from positioning during her surgery. (Reagan dep., p. 30).

ISSUES

The hearing deputy held that claimant had already been adequately compensated when she was paid for 52 percent of a hand; the hearing deputy denied further recovery.

Claimant states the issues:

1. As a matter of law and fact, did Jerry establish that the winging scapula arose out of and in the course of employment or resulted from Dr. Bakody's treatment?

   a. Is Dr. Reagan's opinion, as a matter of law, uncontroverted in the context of Sondag v. Perris Hardware, 220 N.W.2d 903 (Iowa 1974)?

   b. If uncontroverted, is there sufficient grounds, as a matter of law, for the Commissioner to disregard it and give it no weight?

   c. Even if not established as a matter of law or if uncontroverted, is Dr. Reagan's opinion established as a matter of fact?

2. What is Jerry's percentage disability rating and to what benefits is she entitled?

APPLICABLE LAW

The review-reopening decision adequately states the law. The proposition advanced with respect to the Sondag case will be discussed briefly below.

ANALYSIS

Claimant argues in a well-written brief that the uncontroverted medical evidence shows claimant should recover. Under the Sondag (pp. 907-908) case, it is clear that the industrial commissioner must show a reason for disregarding uncontroverted medical testimony. The plain fact here is that the medical evidence is controverted. Dr. Bakody's testimony may be taken generally to establish that there is no causal relationship between the injury or surgery and the condition. Dr. Reagan's evidence is simply equivocal: His notes indicate a lack of causal relationship, but his testimony establishes that relationship. Such a state of the evidence does not inspire confidence in his opinion because one does not know which opinion to believe.

These questions of causal relationship are difficult and often involve interpreting contradictary evidence. Here, the hearing deputy took the testimony of Dr. Bakody over that of Dr. Reagan because of Dr. Bakody's expertise and experience and the fact that he was the initial treating physician. Dr. Reagan's testimony was rejected because it was equivocal, because he has less experience, and because he had less information. One must agree with the reasoning of the hearing deputy and conclude that there was no causal relationship established between the injury or surgery and the winged scapula.

The findings of fact, conclusions of law and order of the review-reopening decision are adopted below:

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant was 46 years of age at the time of the hearing.

That claimant has a GED and some college credits.

That claimant has worked as a bartender, waitress, agriculture worker, nurse's aide, private duty nurse and factory worker.

That claimant is left handed.

That claimant developed complaints in her right arm.

That claimant frequently missed work.

That claimant has had many ailments and injuries which are not related to employment.

That in 1973 claimant was struck in the back at work.

That claimant filed a civil rights complaint.

That claimant was treated on February 16, 1978 for bilateral carpal tunnel syndrome.

That claimant was hospitalized on June 6, 1978 and underwent a right median neurolysis with sectioning of the transverse carpal ligament.

That claimant was seen in the emergency room on August 10, 1978 at which time she was treated for a contusion of her left upper arm and a tender area in the right wrist.

That claimant was hospitalized on January 9, 1979 for left median neurolysis with sectioning of the transverse carpal ligament.

That electromyography and nerve conduction studies on August 17, 1979 were normal.

That claimant was released to return to work by Dr. Bakody on September 4, 1979 with instructions to avoid excessive stress of her left wrist and to use her wrist support.

That claimant has been paid medical expenses, healing period and permanent partial disability benefits resulting from bilateral carpal tunnel syndrome.

That on January 24, 1980 Dr. Hurd did nerve conduction studies which were normal and an electromyography which showed abnormal irritability and reduced motor recruitment in the left serratus anterior.

That claimant has a winged scapula which interferes with pushing, strength and abduction.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has failed to establish by a preponderance of the evidence that her winged scapula arose out of and in the course of her employment or was in any way connected with her compensable bilateral carpal tunnel syndrome.

That claimant has established a permanent impairment to her left hand attributable to carpal tunnel syndrome which arose out of and in the course of her employment.

That claimant has failed to establish entitlment to additional permanent partial disability benefits.

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 at Des Moines, Iowa this 20thday of September, 1983.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LOVENA VAN HAAFTEN, Claimant, vs. PELLA COMMUNITY HOSPITAL, Employer, and ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Insurance Carrier, Defendants.	:	FILE NO. 722200 & 692319 D E C I S I O N O N 85.27 B E N E F I T S

This is a proceeding wherein claimant requests this agency to require her employer and their insurance carrier to provide continuing medical care as contemplated by section 85.27, Code 1980, as well as a request for healing period. Claimant alleges two dates of industrial injury; to wit: August 29, 1980 and December 21, 1981. This matter was heard in Des Moines, Iowa on February 11, 1983 and considered as fully submitted at the conclusion of the hearing.

The primary issue herein is whether or not claimant has established her need for additional substitute medical care by a preponderance of the evidence.

This record, based upon the undersigned's notes since no transcript of the proceedings has been provided, consists of the oral testimony of the claimant, her spouse, Steve Rodgers and Nancy DeHaan; the evidentiary depositions of Larry D. Hirschy, D.C. and Donald Berg, M.D.; the discovery deposition of the claimant together with her exhibits 1 through 6; defendants' exhibits A through G; as well as all interrogatories and answers thereto.

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

Claimant age 32, married with one dependent child and holder of a registered nurse certificate issued by the Iowa State Board of Nursing, began part-time duties as an R.N. with the defendant employer in the spring of 1980. Claimant is still employed by this defendant employer part-time.

Claimant has a spinal curvature due to a leg fracture as a child which left claimant with a shorter left leg and began regular chiropractic treatments, therefore, beginning in 1964 on a monthly basis. (Deposition, page 18, line 5) At the time of hearing claimant was receiving treatments three times per week.

Claimant was seen by the Van Wyk Clinic 25 to 28 times in 1968, 40 times in 1969, 25 times in 1970, 35 times in 1971 and 1972, 80 times in 1973, 50 times in 1974 and 1975, 20 times in 1976, 65 times in 1977, 80 times in 1978, 95 times in 1979 and 60 visits in 1980 prior to claimant's work incident of August 29, 1980. (Dep., pp. 18 to 29) Claimant had been in a motor vehicle accident in 1979 and had fallen 8 times in 1977.

Claimant testified that she slipped and fell on a wet floor at work on August 29, 1980 injuring her right shoulder and hip. Claimant continued working part-time; however, she saw Dr. Hirschy 64 times between August 30, 1980 and March of 1981. On November 10, 1980 claimant fell while rollerskating and re-irritated her right arm at that time. (Dep., p. 50, l. 15) On January 2, 1981 claimant fell in the hospital parking lot with no apparent increase in symptoms. (Dep., p. 51, l. 16) On December 21, 1981 claimant sustained a second injury while attempting to lift a patient. This effort caused neck and shoulder pain, numbness in both hands together with painful tingling in both arms. Claimant was seen by Dr. Hirschy 80 times following her second incident.

Claimant further states that she recovered for insurance purposes from her first fall in March, 1981 (Dep., p. 26, l. 14)

Dr. Hirschy concluded that based upon his examinations and many tests that as of May 8, 1982 the claimant's physical condition was as follows: (Dep., exhibit 2)

> The grip strength was diminished on the right hand. Right Patellar reflex was diminished, Kemps test was positive on the right and a positive Spurlings was found on the right. Hamstring test was weak on the right. Fabere Patrick test was positive on the right. Paresthesias were noted on the right thigh posterior and lateral aspects, right forearm medially, and palmar surfaces of the hand on the ulnar side. The Mankopf, orange peel, and match stick tests were positive for supportive objective proof of subjective pain.
>
> The following impairment rating was given for the conditions Mrs. Van Haaften presented at my office for the 8-30-80 and 12-21-81 injuries. In my opinion these conditions have reached maximum medical improvement and are permanent physical impairments.
>
> Impairment Rating:
>
> MIR- Median Nerve — 9% Upper extermity [sic]
> SIR- Ulnar Nerve — 5% Upper extremity
> 14% Upper extremity — 8% Whole
>
> MIR-Sciatic Nerve above hamstring — 6% Lower extremity

SIR-Lateral femoral cutaneous 5% 8% lower extremity
Posterior femoral cutaneous 2.5%

14% Lower extremity 6% Whole Man
Total 14% Whole Man

Since claimant's December 21, 1981 lifting incident she has seen Dr. Hirschy 131 times. (Dep., p. 60, l. 15)

Claimant appears to have been a competitive rollerskater prior to August 29, 1980 and has ended such activity currently.

Donald D. Berg, M.D., a board certified orthopedic surgeon, examined the claimant on January 27, 1982, and on July 30, 1982 Dr. Berg, whose medical opinion is given the greater weight in this decision based upon the witnesses expertise and education concluded, in part, as follows: (Defendants dep. exhibit 2)

Upon physical examination she had point tenderness overr [sic] the biceps tendon on the right shoulder. She has evidence lumbrosacral strain and tightness in the perispinous [sic] muscles. She has a leg length discrepency from childhood fracture of her left femur at the age of eight. Her left leg is about two inches shorter on the right. She also has scoliosis in her back secondary to this leg length inequality. X-rays of the shoulder area were normal.

Clinical impression is that the patient is suffering from mild lumbrosacral strain and bicipital tendonitis of her right shoulder. She was placed on Butazolidin and an anti-inflammatory medication. She was returned and seen here in the office on July 30, 1982. Follow up exam concerning her back injury she stated her back had improved and she was having no back pain or right shoulder pain but was having numbness and tingling in the right forearm with pain in the right forearm. She has evidence of lateral epiconydlitis [sic] of the right elbow and recommended ice pack treatments for this and the use of Naprosyn. I do not feel she has any permanent physical impairment from her injury at work. Her back is healing and her right shoulder is free from pain. The new problem of the right forearm is unrelated to the fall.

The claimant has the burden of proving by a preponderance of the evidence that the injuries 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).

In applying the foregoing legal principles to the case at hand, it is clear that the claimant has not borne her burden of proof by failing to provide credible medical evidence in support of her claim.

This 32 year old claimant has been under the constant care of the chiropractic clinic in Pella, Iowa since 1968. Given the results of her childhood injury which left her with a shortened leg, her conduct in seeking relief does not seem as bizarre as it would at first blush. After having seen and heard the witnesses it is the undersigned's opinion that claimant's habit in seeking what appears to be excessive medical care plays an important role. Claimant's continuous employment activity belies her claim she has any functional impairment. Claimant's testimony regarding her many subjective complaints of pain is given little weight in this decision. Dr. Berg's medical opinion as regards an absence of impairment at the time of his July 30, 1982 examination is a significant factor operating against the claimant.

THEREFORE, 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 this agency has jurisdiction of the subject matter and the parties thereto.

2. That the claimant sustained a series of non-work related accidents in the form of falls and an auto accident prior to August 29, 1980.

3. That the claimant fell on August 29, 1980 resulting in right shoulder injury, which injury did arise out of and in the course of claimant's employment for this defendant employer.

4. That the defendants authorized the treatment of Dr. Hirschy until April 1, 1981 when such support of continuing chiropractic care was withdrawn.

5. That Dr. Hirschy's bill for services of $1,693.00 is chargeable to the defendants.

6. That the costs incurred by the claimant during December 1981 are payable by the defendants who beginning in January 1982 offered reasonable substitute medical care.

7. That the claimant has not established a claim for temporary total disability as contemplated by section 85.33 Code 1980).

8. That the claimant has not established a claim for permanent partial disability as contemplated by section 85.34(2)(u) Code 1980).

THEREFORE, it is ordered that the claimant take nothing further as a result of this proceeding except that the defendants are ordered to pay the claimant chiropractic expenses incurred between August 29, 1980 and March 30, 1981 in the sum of one thousand six hundred ninety-three and no/100 dollars ($1,693.00).

If is further ordered that defendants pay the claimant the expenses she has incurred for chiropractic treatment during the month of December 1981 in a lump sum.

Costs as set forth in Rule 500-4.33 are chargeable to the defendants and shall include an expert witness fee in the sum of one hundred fifty and no/100 dollars ($150.00) payable to Larry D. Hirschy, D.C.

Defendants are to file an activity sheet within twenty (20) days from the date below.

Signed and filed this 14th day of September, 1983.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONAL L. VER STEEGH, Claimant, vs. ROLSCREEN COMPANY, Employer, and EMPLOYERS MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	FILE NO. 713154 REVIEW - REOPENING DECISION

INTRODUCTION

This is a proceeding in review-reopening brought by Ronal L. Ver Steegh, claimant, against Rolscreen Company, employer, and Employer's Mutual Insurance Company, insurance carrier.

Claimant seeks further benefits as a result of the injury which occurred on February 9, 1982.

The record in this proceeding consists of the testimony of claimant, Richard Baughman and Kurt Langdel. Also part of the record are claimant's exhibits 1 through 9 and defendants' exhibits 1 through 4.

ISSUE

The only issue presented by the parties at the time of the hearing is a determination of the nature and extent of claimant's disability. It was stipulated by the parties that the correct rate of weekly compensation in the event of an award is $207.39. The parties stipulated that the correct date for conversion from healing period to permanent partial disability compensation is April 15, 1983. It was also stipulated by the parties that all healing period compensation has been paid in full and that claimant has been paid compensation equal to five percent permanent partial disability of the body as a whole.

REVIEW OF EVIDENCE

Claimant testified that he is presently 41 years of age, married and has minor children residing with him.

Claimant testified that following his graduation from high school in 1960 he proceeded through a series of employment which involved approximately 27 different incidents of employment before commencing work with Rolscreen Company approximately eight years ago. His prior work experience has involved sales of tires, lawnmowers, household appliances, furniture, tools, hardware, all products in an Earl May store, parts in a John Deere implement store, accident and life insurance, oil additives and mobile homes. His sales experience includes door-to-door sales, counter sales and sales from a display lot.

Claimant related business management experience from his work as assistant manager at an Earl May store, assistant parts manager at John Deere Implement Dealership, assistant store manager of a B. F. Goodrich Tire store, as service manager for a mobile home service dealer managing an apartment house and operation of his own mobile home repair and service business.

Claimant has also previously performed work which has generally been in the nature of semiskilled or unskilled manual labor which positions have included repair and changing of car and truck tires, removing brick from ovens in a clay product factory, foundry work including grinding, buffing and scooping sand, assembling farm implements, welding, truck driving, farm work, working with horses, route delivery of bottlegas tanks, painting trucks, warehouse and dock work in a grocery warehouse, and pushing and lugging beef quarters in a packinghouse.

Claimant related having no formal education beyond the high school level except for attending a few seminars which had been related to his previous positions.

Claimant testified that he began working for Rolscreen Company approximately eight years ago. He stated that he took a

physical and started on a line assembling windows and that his job was to repair nail splits. He stated that he started as a class three worker at the lowest pay level. He related that within four months he was on a class six job and that his duties were construction maintenance which included moving electrical and plumbing lines and installing new equipment. He stated that it involved constant manual labor.

Claimant stated that on February 9, 1982 that he was engaged in work of setting up a new line. In doing so, it was necessary to open a window clamp, and that while pushing to open it, he felt something pop in his back. He stated that he kept working but then shortly went to see the company nurse at the first-aid department. He related that she made a note of what had happened, gave him some Tylenol and sent him back to work. He stated that his pain was not great at that time and that going to the nurse was a precautionary measure.

Claimant stated that the pain kept getting worse but that he kept working and got more Tylenol and that over the next few days he saw the nurse on several occasions until he was sent to Alvin E. Evers, M.D., on February 18, 1982. He stated that Dr. Evers diagnosed his condition as an acute lumbosacral strain, gave him medication, fitted him with a brace and released him to return to light duty. When claimant returned to work he was sent into the stock room performing inventory of parts. He stated that he saw Dr. Evers on several occasions and was eventually transferred into the welding shop. He stated that he required help to do lifting in the shop and that he was hurting very bad and enduring a lot of mental trauma and pain.

Claimant testified that Jerome Skogdill was his foreman at that time and that they discussed his problems. He stated that he was sent to the nurse who in turn referred him to Sinesio Misol, M.D., whom he saw on 10 or 12 occasions.

Claimant testified that in the summer of 1982 he was released by Dr. Misol and returned to work in the welding shop. He stated that the doctor had informed him that he should not work if he hurt but that when he called the personnel department he was advised to either come to work or quit. He stated that he missed work when his back hurt too much. Claimant stated that at some point in 1982 he was transferred into area one where he remained until around the first part of 1983 when he was returned to the welding shop. Claimant stated that he continued to receive class six pay at all times he was working until August, 1983 when his job was changed and he was reduced from class six pay as indicated by claimant's exhibit 9. He stated that he was reduced to class three where he earned approximately $240.00 per month less than he had earned while working at class six rates. He also stated that he experienced an additional annual loss in profit sharing and bonus benefits since they are based upon lifetime earnings with the company. Claimant stated that he now operates a mill and sometimes a chopsaw or drills. He stated that he met his 1983 work quota but that he has been unable to meet the increased quota for 1984 which was placed upon him.

Claimant stated that he has been in pain constantly since the injury and that when working during 1983 he took frequent breaks in order to deal with the pain but that he did meet his work quota. He stated that he received a warning from his supervisor for wasting time. Claimant testified that he has also received warnings for missing work and that he feels that these warnings have been unwarranted and are actually in the nature of harassment. He stated that three written class three warnings for the same violation can result in termination of employment and that five warnings of the same class but consisting of different violations can also result in termination. He stated that the warnings do not affect pay directly but can result in lower evalution reports. Claimant stated that he has also received a warning for breaking a broom, and that at the time of the last evaluation, he received a pay decrease of three cents per hour due to an unfavorable evaluation.

Claimant testified that he has unsuccessfully attempted to bid other jobs. He showed exhibit 7 as one instance where he did not receive the position.

Claimant stated that he still has pain and that the problem is the same now as it was in the beginning. He stated that his legs and feet hurt and that he feels that such arises from the standing which he does at his employment. He stated that his pain is worse now at times than it was when he first started seeing Dr. Misol. He confirmed that this was his own evaluation and had not been medically confirmed. He stated that Dr. Misol does not listen to him and that what he tells him in person is not the same as what is written in the medical reports. Claimant stated that he can no longer do his prior maintenance job because it hurts him and he stated that his present job also hurts him. He related that the problem is the twisting, turning and bending which he performs and that it is not related to lifting. He stated that he copes by going to the restroom frequently and taking a number of short breaks. He feels that he does not waste time. He presently has no restrictions but is taking medication.

Claimant stated that he feels he is mentally over qualified for his present job and that he could perform as a cost center manager or a quality control inspector. He referred to exhibit 6 and stated that he does not know where he ranked among the other persons who took the test.

Claimant stated that he had not attended any further education or classes which had been made available to him through his employment prior to the injury because he was happy with his former position and that he is not now physically able to attend classes.

Claimant stated that he was counseled concerning absenteeism and admitted that between June 6, 1983 and January 9, 1984 he was absent on 12 occasions, seven of which were on Mondays. He stated that he could not recall the exact dates of absences but that they had nothing to do with his off-work activities. He stated that he pushes himself so hard at work during the week that he cannot recover over a normal weekend and occasionally missed on a Monday. He stated that he has not been absent from work since receiving the last warning on January 10, 1984.

Claimant stated that he has sought alternative employment, has gone through a two week rehabilitation evaluation process and was interviewed by G. Brian Paprocki. He stated that he and his wife have converted their garage into a store where they now sell horse tack, gifts and tools. He stated that the shop opened Thanksgiving Day, 1983 and that he works as a salesman and manages the store while his wife and son do the lifting and stocking. He stated that the store was initially open seven days per week, eleven and one-half hours per day but that it is now open less. It is closed when his wife drives a school bus and when they go to sales to obtain merchandise. He admitted advertising in a newspaper. Claimant stated that he also buys and sells horses which he keeps on his father's farm. He stated that this involves care and feeding and that he rides horses occasionally, with the last occasion being the day prior to this hearing. Claimant stated that he is unable to tie his shoes and that his wife does it for him. He stated that he advised Dr. Misol of this situation.

Claimant stated that he gets along well with his present supervisor except for when he is called into the office for harassment. He stated that the harassment has been over the warnings concerning absenteeism and wasting time and also over the loss of pay, all of which he feels are unjustified. Claimant admitted that he did not like his previous supervisor who he felt was moody and told lies. He denied having trouble in general with prior supervisors in his other occupations. Claimant admitted that he was fired from the farm work position that he previously held and stated that he was asked to leave his position at the B. F. Goodrich store. He stated that his other job changes were due to marital problems and in order to take jobs which he felt were better than what he had at the time.

Claimant admitted that he has drawn weekly compensation benefits whenever he was off work, that he has been paid mileage for his travels in regard to obtaining medical treatment, that his medical and drug bills have all been paid by the employer and that he has been allowed to go to first aid at work whenever he has felt the need to do so. He also stated that in May, 1983 he was invited by other Rolscreen employees to the Moose Lodge where he danced with his wife in what he described as a close, slow polka. He stated that it is the only time he had been to the Lodge in the past two years and that the dancing did not increase his pain.

Richard Baughman testified that he became claimant's supervisor in June, 1983. He stated that claimant's job had remained unchanged until the last two or three weeks and that claimant now runs a horizontal mill. Previously, he had also operated a chopsaw and a handle bracket drill. He stated that claimant's work is generally performed from a standing position. He stated that it requires turning which can be performed either by moving his feet or by twisting his body. He stated that the only bending is reaching to a height which is approximately 30 or 36 inches from the floor. He stated that the lifting is in the range of two pounds and that there is no bending to the floor or on a repetitive basis. He stated that claimant's work area is on a wooden floor and that claimant has been given rubber mats on which to stand. He stated that the drilling machine was previously activated by the operator's foot but, at claimant's request, it was redesigned to operate by hand. He stated that the job can be done either by sitting or standing at the option of the operator. He stated that he has arranged to have someone else lift the pans of parts whenever such is needed in relation to the parts which involve claimant's work.

Baughman stated that nine of claimant's 12 absences from work during the period of June 6, 1983 to January 9, 1984 were on a day which had been preceded by a day when claimant was not at work. He stated that claimant has been counseled on two occasions regarding absenteeism. He stated that the situation seems to have been corrected.

He stated that on one occasion claimant was observed during a nine hour shift and that claimant's unauthorized absence from his machine totaled one and one-quarter hours. He stated that this did not include the normal scheduled breaks which are given to all employees. He stated that since counseling the problem has been greatly minimized.

Baughman testified that Ron's job was performed on a "fill in" basis before Ron was assigned to it. He stated that there was no preexisting quota and that the 1983 quota was not particularly meaningful. He stated that the 1984 quota was determined by what claimant's production would be if the unauthorized break time away from the machine were spent working.

He stated that claimant's last evaluation occurred approximately February 1, 1984 at the time of the merit raise. He stated that every hourly employee is evaluated and a great deal of consideration was given to absenteeism. He stated that he performed claimant's evaluation strictly by the book. He stated that claimant received an adverse rating on the basis of absenteeism as did two other employees in claimant's work area. He stated that two or three additional employees were given until June to improve their rating or that they would lose the merit raise which they received. He stated that if claimant had received a favorable evaluation, the merit raise would have been in the range of 17 to 19 cents per hour. Baughman stated that he had evaluated claimant in August of 1983 and that claimant, at that time, received a bad mark on the basis of absenteeism but that he did not go by the book on that evaluation and gave claimant the benefit of the doubt which resulted in claimant receiving a higher rating than he would have otherwise received.

Baughman denied that claimant was harassed and stated that other employees have been written up for the same violations.

Baughman stated that the chopsaw makes small components out of pieces which are initially eight feet long and one-half inch by one and one-half inches in dimension. He stated that the handle bracket drill involves handling of small parts only.

Baughman stated that consideration was given to claimant's impairment rating in his evaluations and also to the fact that the impairment rating was made strictly on a symptomatic basis without any supportive clinical findings.

Kurt Langdel testified that he is the personnel assistant in the human resources department of Rolscreen Company and that, as such, he is in charge of employee relations and communications. He stated that he is acquainted with claimant and that there are four rate ranges in each of classes one through nine. He stated that every newly hired employee starts in class one and that after completing a 90 day probation, they are moved into class three. He stated that claimant can presently bid on class three jobs if he desires to do so and that the periodic cost of living pay increases are not related to merit or job evaluations. Langdel testified that he had met with claimant and Carlos Chase in January of 1984 and has had an individual conference with Chase since then concerning claimant. He stated that he had taken a part in changing the activating method of the machine and in obtaining the rubber mats which claimant uses. He stated that he has tried to make claimant's work situation consistent with the restrictions which previously had been imposed by Dr. Misol and that he is aware that currently no restrictions exist. He stated that he has communicated with Dr. Misol in regard to claimant's restrictions in writing and also by telephone.

Langdel denied that claimant was being harassed or singled out in any manner for adverse treatment.

Claimant's exhibit 1 consists of the notice of intent filed by claimant in this proceeding together with the reports and records identified in the notice. The same relate that Dr. Vers diagnosed claimant's condition as an acute lumbosacral strain for which claimant was given a support, medication and restricted claimant's work activities. A report dated May 27, 1982 released claimant for full duty and stated that claimant must wear the support indefinitely. The exhibits also contain reports from Dr. Misol which on September 22, 1982 restrict claimant from heavy lifting and suggest a supervisory position only. In a letter dated November 10, 1982 Dr. Misol makes a diagnosis of degenerative back disease which was aggravated on February 9, 1982 while at work for Rolscreen Company while claimant was trying to push open a clapping frame for a window maker. A work release slip dated December 1, 1982 released claimant to return to regular work duties on December 6, 1982. A similar statement dated January 7, 1983 indicates that claimant is to continue the same restrictions with a formal letter to follow.

A letter from Dr. Misol dated May 9, 1983 states:

> ...I am a little suspicious of the patient's last move, that is, his going back to work on 4/25/83. I did tend to believe that this has been suggested by his legal counsel. You are familiar with his history and the repetitious complaints of back pain that follow the type of work where a little bending and any lifting is involved. I am pretty sure that the symptoms are going to recur. I did try to solve the problem for Rolscreen and you and of course, for the patient, by stating that in my opinion he has a permanent partial physical impairment of 5% of the spine. If he is willing to work I do not see that there has to be any weight limit restriction, but I am pretty confident that pretty soon he will be stopping again because of back aches. I would be very happy if I am wrong on this prediction.

The progress notes are generally consistent with the diagnosis of degenerative disc disease which was aggravated by the incident at work and the absence of other objective clinical findings. The notes contain a recommendation that claimant be placed in a supervisory position and indicate that claimant was very dissatisfied when such did not occur. The notes also indicate that claimant communicated the existence of a disagreement with his foremen. A note dated December 1, 1982 states, "He states that he has not been riding horses as had been claimed in one of the reports and that he has never ridden a bronco in his life at least that he recalls in the last few years." In that same note claimant denies having any pain at the end of the sacrum but states that he has some discomfort in the sacroliliac joints. In the note Dr. Misol estimates that claimant's total impairment is in the neighborhood of 10 percent and that he would estimate that it is equally related to the underlying degenerative changes and the strain at work. The note dated February 16, 1983 states, "He walks without a list or deformity when he is undressed. While wearing his cowboy boots and on tip toes lists a little bit to the right and then walking on the heels he lists to the left." The note dated March 18, 1983 contains the following statement, "It is also my belief that this man who has worn cowboy boots all his life is not going to change much regarding the backache if we force him to step down from those heels."

The note dated March 29, 1983 states, "This patient who was supposed to be at work yesterday and today has not been able to do so. He states this is because of exacerbation of his back pain. He states that the pain was aggravated over the weekend and this is why he did not report to his job."

The note dated April 12, 1983 reads as follows:

> On past examinations he stands without list or deformity. His range of motion of the lumbosacral spine is 0 to about 60. Lateral bending to the right and left is 10 to 15. Normal rotation. No weakness on dorsi or plantar flexors of the foot. No atrophy in the legs. Normal reflexes and has actually normal straight leg raising.
>
> X-rays obtained in the past of the lumbosacral spine have been within normal with minor degenerative changes consistent with his age. Because of the persistency of his symptomatology I did arrange for this man to have a CAT scan of his lumbar spine. This was done at Mercy Hospital on 4/11/83. A report on this scan states that it is entirely normal with nor [sic] evidence of disc protrusion with no sign of narrowing of the spinal canal or impingement of the nerves.
>
> I have been asked by Employers Mutual to try to give an idea of the percentage of permanent partial physical impairment that this man has so they can go ahead and start to pay him "permanency benefits" so he can go to school.
>
> It is my opinion that as an orthopedic surgeon and as a man who has examined Mr. Ver Steegh on numerous occasions, that this man seems to have a physical impairment that would rate in the neighborhood of 5% of his body. This percentage is mostly given based on his symptomatology with lack of objective or radiographical abnormalities.

Claimant's exhibit 2 is the deposition of G. Brian Paprocki taken November 18, 1983. It includes deposition exhibits 1 and 2 which are his resume and his written report, respectively.

The deposition is consistent with the written report. The report is entitled "INDUSTRIAL DISABILITY APPRAISAL" and is divided into indentified sections. The first three sections are entitled "General Background, Educational Attainment and Current Academic Functioning, and Work History Analysis". These summarize what is otherwise in the record of this case on those matters without any substantial material variation.

The fourth division is entitled "Medical Diagnosis and Restrictions/Limitations". This also is a fair summarization of the medical evidence in the record of this case except for the first sentence of the last paragraph which contains Mr. Paprocki's own impressions of those records. That sentence reads "In summary, though there is no exact consensus between the physicians on work restrictions, it appears neither feels factory work is suitable employment for this man."

The next section is entitled "Claimant Stated Physical Problems and Subjective Limitations". This is again consistent with claimant's testimony at hearing. It contains an observation of Mr. Paprocki in relation to observing claimant to appear stiff upon arising followed by momentary instability and initial slow gait.

The final section of the report is entitled "Opinion of Industrial Disability". Mr. Paprocki opines that claimant has sustained an industrial disability of approximately 50 percent and in doing so states:

> ...This opinion is principally predicated on the following factors: the claimant's inability to perform his former job as a construction maintenance man at Rolscreen Co. with a subsequent reduction in labor classification and an attendant scheduled substantial reduction in hourly wage; medical opinion that present work assignments are both inappropriate relative to his back condition and will probably result in excessive future absenteeism; medical suggestion for work of the light, non-strenuous variety.
>
> Positively, Mr. Ver Steegh has experience in a wide variety of employments beyond factory labor and probable potential for many types of training. Frankly, purely from a skill standpoint he is most definitely underemployed at present, his current job basically requiring only efficient dexterity and eye-hand coordination. Unfortunately, job skill requirements are seldom equitable with wage remuneration, and Rolscreen Co. does pay quite well for what minimal skills are required by factory production activities. A reduction in earnings is quite probable in making a career change at this time. Too, specialized skill training may be required to move into another field of endeavor, during which time income may be low or non-existant [sic]. In the final result however, the claimant is certain he cannot stay with Rolscreen Co. in the types of work he is presently performing and has already applied for Iowa Vocational Rehabilitation services in choosing a logical career alternative.

At page 11 of the deposition Mr. Paprocki states that in assessing claimant's industrial disability he computed claimant's pre-injury earnings at $10.14 per hour and the post-injury earnings as being $1.30 per hour less, approximately $8.84 per hour in the class three position. He also stated that his assessment included a comparison of what claimant would be capable of earning if he did not work at Rolscreen but had to locate some alternate work.

Paprocki indicated that claimant's academic capability and intelligence were not a limiting factor. In discussing the same, the following conversation occurred:

> Q. Well, you don't know if he has the capability of attaining a college education or do you think that he does?
>
> A. I'd say there's a good possibility he does. I really don't see him as limited for entry into any employment, as I indicated, that doesn't require specific previous training or experience; and I really don't see him as limited in terms of attaining a college education. Again, he impresses me as an intelligent individual who by his past work experience indicates that he is capable of adapting to a variety of employment situations.
>
> Q. So he has the potential of being a vocational consultant specializing in industrial disability appraisal?
>
> A. I would say so. I don't see any factor that would particularly limit him, other than maybe interest.
>
> Q. And as far as earning capacity in that particular position, I assume that it has the potential of earning more than eight or nine

dollars an hour, doesn't it?

A. I'd say it definitely would.

Paprocki also discussed his interpretation of Dr. Misol's restrictions and recommendations and their effect upon the accuracy of his determination of disability as follows:

Q. Okay. So you are ignoring Dr. Misol's last notation when he saw him that if he is willing to work, I could not see that there has to be any weight restriction; is that correct?

A. Well, that's only half the statement that the doctor indicated, if memory serves correctly here. Looking at my report, I think he -- I think he goes on to say that: but I am pretty confident that pretty soon he will be stopping again because of backaches.

I took that to mean -- the entire statement to mean that regardless of what weight restriction he placed on the Claimant, that he probably would experience backaches again and not be able to continue the job. In other words, he can try to work, but he probably will have recurrent problems.

...

Q. In your opinion, you indicated medical opinion that present work assignments are both inappropriate relative to his back condition and will probably result in excessive future absenteeism. What medical opinion is that?

A. I believe I was referring to Dr. Misol's report that we talked about previously, where he didn't see any reason for a weight restriction, though he was confident, pretty confident that he would be stopping work again because of his backaches.

Q. If Dr. Misol has stated that Mr. Ver Steegh is not precluded from factory work at Rolscreen as a result of any residual impairment from the injury to his back on February 9 of 1982, would that change your opinion at all in this case as far as disability?

A. I would say it would have to. If he is not precluded from doing factory work, he could continue doing the job that he's doing without any -- without any fear of worsening his condition or probably losing time from the job because of recurrent backaches.

Concerning Paprocki's qualifications and ability to evaluate industrial disability the questioning went as follows:

Q. Mr. Paprocki, is it correct that you're holding yourself out to be an expert in industrial disability?

A. Yes.

Q. And as an expert in industrial disability, are you holding yourself out in the State of Iowa to be an expert in that field?

A. Yes.

Q. And are you holding yourself out to be an expert in assessing industrial disability in worker's compensation --

A. Yes, I am.

Q. -- in Iowa?

A. Yes, I am.

Q. And what is your understanding of industrial disability in Iowa?

A. Industrial disability equates directly to the loss of future earning potential of an individual.

Q. And what factors are considered?

A. An individual's age, his education, both in terms of his grade attainment and his current academic functioning, his work background with reference to the skills that he may have developed in previous employment which would be transferable to alternate work, of course the salary he was earning at the time he was injured and what that job is currently paying, what the job market holds for an individual with his particular education at his age and with his transferable skills. Those are essentially the factors, I would say. Motivation, as well, would play a factor in my evaluation.

Q. Do you know if those factors are consistent with industrial disability as defined by the Supreme Court in Iowa?

A. I believe they are.

Q. And are you a lawyer?

A. No, I'm not.

Q. And have you reviewed the Supreme Court cases concerning industrial disability?

A. Yes, I have.

Q. And what are those cases?

A. Offhand, I couldn't quote them.

Q. And how did you review those? Were those provided to you by someone?

A. Yes, by attorneys I work with. Mr. Heslinga, I believe, supplied at least some of the information I have regarding what the definition and what the requirements are of evaluation for workman's [sic] comp in Iowa.

Q. And by reading those cases, then, you have become an expert in industrial disability in Iowa?

A. In the definition of what it means, yes.

Claimant's exhibit 3 consists of a request made by claimant for evaluation at the Iowa State Vocational Rehabilitation facility and two letters scheduling appointments with Carlos Chase, a representative of that facility.

Claimant's exhibit 4 shows the cost of obtaining a transcript of Paprocki's deposition to have been $105.70.

Claimant's exhibit 5 consists of the warnings which were testified to by claimant concerning absenteeism, wasting time and also for breaking a broom. The exhibit also contains a notification of noise exposure as well as claimant's responses to those warnings. The exhibit is cumulative of claimant's testimony at hearing and also the testimony of Richard Baughman.

Claimant's exhibit 6 consists of a job bid form made by claimant together with test scores and a notification claimant was not selected for the position of quality control receiving inspector for which he had been under consideration.

Exhibit 7 is a written communication to claimant which indicates that he has not been selected for interview for the tool room planner/scheduler position.

Claimant's exhibit 8 is a copy of claimant's evaluation completed August 5, 1983 which shows unsatisfactory ratings in the areas of attendance and attitude.

Claimant's exhibit 9 is a copy of the notification that he was being reduced to a lower class job in August, 1983.

Defendants' exhibit 1 is a copy of claimant's warning for absenteeism and the second page thereof reflects 11 absences, six of which are on a Monday and two of which are on a Tuesday which followed a Monday when claimant was absent.

Defendants' exhibit 2 is a report from Dr. Misol dated December 20, 1983 which makes reference to an incident of lumbosacral pain worsening on December 14, 1983 without any specific precipitating event. The examination performed shows no abnormal findings.

Defendants' exhibit 3 is a letter from Kurt Langdel to Dr. Misol dated February 24, 1983 explaining company policy and particular information concerning claimant.

Defendants' exhibit 4 is a copy of a newspaper ad for claimant's business consistent with what was identified in his testimony at hearing.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 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).

The supreme court of Iowa in Almquist v. Shenandoah Nurseries, 218 Iowa 724, 731-32, 254 N.W. 35, 38 (1934), discussed the definition of personal injury in workers' compensation cases as follows:

> While a personal injury does not include an occupational disease under the Workmen's Compensation Act, yet an injury to the health may be a personal injury. [Citations omitted.] Likewise a personal injury includes a disease resulting from an injury.... The result of changes in the human body incident to the general processes of nature do not amount to a personal injury. This must follow, even though such natural change may come about because the life has been devoted to labor and hard work. Such result of those natural changes does not constitute a personal injury even though the same brings about impairment of health or the total or partial incapacity of the functions of the human body.
>
> ....
>
> A personal injury, contemplated by the Workmen's Compensation Law, obviously means an injury to the body, the impairment of health, or a disease, not excluded by the act, which comes about, not through the natural building up and tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee. [Citations omitted.] The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body.

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).

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, 760-761 (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, 815 (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 & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); 100 C.J.S. Workmen's Compensation §555(17)a.

The opinion of the supreme court in Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963) 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, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (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.

ANALYSIS

Dr. Misol found claimant to have a permanent partial impairment of five percent resulting from the work related incident. He found claimant's total impairment to be in the range of 10 percent with the other five percent attributable to underlying degenerative arthritis. Dr. Misol's rating was based upon claimant's subjective complaints of pain and discomfort. His opinion is not contradicted by other competent medical evidence. The opinion seems reasonable in light of the claimant's general condition and the same is adopted.

The incident from which the injury arose is one which did not involve a severe trauma and would not normally be expected to result in a high degree of impairment. Claimant related that he has good days and bad days and such seems consistent with the evidence in the record relating to his other activities such as dancing and horseback riding. The record shows that he has missed work on several Mondays when he had been off work over the previous weekend and Dr. Misol's notes of March 29, 1983 indicate that claimant had stated that on that occasion the pain was aggravated over the weekend. It would be very unusual, indeed, if the only activities which caused claimant discomfort were those which occurred at his employment. The underlying degenerative condition in his back will certainly cause him discomfort from time to time without any identifiable precipitating event or incident.

The only direct evidence in this case concerning the economic loss which claimant has suffered as a result of his change from class six to class three is found from Mr. Paprocki and it indicates that his change in hourly rate has gone from approximately $10.14 per hour to $8.84 per hour. It is not clear from the record if those amounts are exact or precise. Claimant testified that he now earned approximately $240.00 per month less than what he had earned in his previous job classification. This would seem to indicate a loss more in the range of $1.40 per hour. Claimant is entitled to bid on jobs of a higher pay class than the class three in which he is presently working. He has done so in the past without success but it cannot be concluded that all opportunity for moving into a higher class has been lost.

Claimant's age, education, work experience and demonstrated intelligence level is such that he could move into a different occupation if he were so motivated. Claimant has now engaged upon a second occupation through the store which is operated out of his garage. The work history he described at hearing related several occasions where he held two positions at the same time. His physical limitations are not severe and cannot be expected to have a major impact on managerial types of positions. Claimant's age is such that it would be feasible for him to move into a new field, even if such required a significant amount of training. He has many years before he reaches what is normally thought of as retirement age.

Claimant seems to be functioning adequately at his present position and the employer has shown a willingness to adapt a position to suit his needs. Even though a change of occupations appears feasible such is not necessary for claimant to be gainfully employed.

The record of this case contains a report and testimony from G. Brian Paprocki, M.S., V.E. His letterhead identifies him as a vocational consultant specializing in industrial disability appraisal. No weight is given to the opinion concering industrial disability which was expressed by Paprocki in his report and deposition. The matter of industrial disability is a mixed question of law and fact and, as such, it is not a proper subject of expert testimony. Dougherty v. Boyken, 261 Iowa 602, 607, 155 N.W.2d 488, 491 (1968). The expression of an opinion upon the issue of industrial disability invades the province of the industrial commissioner and his deputies who have been assigned that duty through chapters 85 and 86 of the Code of Iowa. A review of Paprocki's resume does not show him to be qualified to express an opinion upon the issue of industrial disability even if such were a proper matter of expert testimony in this proceeding. Accordingly, the costs subsequently assessed in this proceeding will not include a fee for his testimony.

It is concluded that claimant's industrial disability arising from the injury of February 9, 1982 is 10 percent.

By stipulation of the parties it appears that all claimant's related medical expenses, including cost of transportation, have been paid by defendants and no evidence to the contrary appears in the record of this case.

FINDINGS OF FACT

1. Claimant is a 41 year old married male with dependents.

2. On February 9, 1982 claimant sustained an injury to his back while pushing on a window clamp at the Rolscreen Company where he was employed.

3. As a result of such injury claimant sustained a permanent functional impairment of five percent of the body as a whole.

4. Claimant's formal education is limited to completion of high school.

5. Claimant has a very diverse and varied history of employment which includes small business management as well as physical labor.

6. Claimant suffers from pain as a result of the injury, the severity of which varies from time to time.

7. Claimant was reclassified based upon the medical restrictions.

8. The reclassification has caused claimant a loss of earnings in the range of approximately $1.40 per hour.

9. A possibility exists that claimant can move to a higher pay class.

10. Claimant has the potential to move into a sedentary position with a rate of earnings in excess of what he earns at his present position.

11. Claimant has the ability to perform adequately in his present position.

12. Medical restrictions do not prevent claimant from indefinitely performing factory work which is similar in nature to that of his present employment.

13. Defendants have paid all healing period compensation, expenses of obtaining medical care and treatment and five percent permanent partial disability.

14. G. Brian Paprocki does not have the legal background to qualify as an expert in evaluation of industrial disability.

CONCLUSIONS OF LAW

Claimant sustained an industrial disability of 10 percent of the body as a whole as a result of the injury he sustained in the course of his employment on February 9, 1982.

It is further concluded that the ultimate determination of an individual's industrial disability is not a proper subject of expert testimony in proceedings before the industrial commissioner or his deputies.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant twenty-five (25) weeks of compensation for permanent partial disability at the rate of two hundred seven and 39/100 dollars ($207.39) per week commencing October 7, 1983. All such payments have now come due and defendants shall pay the amount due and owing in a lump sum. This order recognizes that compensation for five percent (5%) permanent partial disability has previously been paid by defendants.

IT IS FURTHER ORDERED that defendants pay interest pursuant to Iowa Code section 85.30.

IT IS FURTHER ORDERED that defendants pay the costs of this action which are related to the cost of serving notice upon defendants. The fees charged by Bridget A. Swanstrom in the amount of one hundred five and 70/100 dollars ($105.70) are assessed against defendants. No expert witness fee is allowed for the testimony of G. Brian Paprocki.

Defendants shall file a final report within twenty (20) days

from the date of this decision.

Signed and filed this 30th day of May, 1984.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CRAIG R. WALBY, Claimant, vs. RICHARD BOOTH, Employer, and LE MARS MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File No. 651031 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 Craig R. Walby, claimant, against Richard Booth, employer, and Le Mars Mutual Insurance Co., insurance carrier, defendants, to recover additional benefits under the Iowa Workers' Compensation Act for an injury arising out of and in the course of his employment on October 2, 1980. It came on for hearing on February 23, 1984 at the Black Hawk County Courthouse in Waterloo, Iowa. It was considered fully submitted at that time.

The industrial commissioner's file shows a first report of injury received October 24, 1980. A final report received October 27, 1981 indicates the payment of healing period benefits, medical expenses, and permanent partial disability payments for fifteen percent of a foot or 22 1/2 weeks. Permanent partial disability payments terminated on October 23, 1981.

At the time of hearing the parties stipulated to a rate in the event of an award of $185.33.

The record in this matter consists of the testimony of claimant; claimant's exhibit 1, a deposition of Randall J. Gall, M.D.; claimant's exhibit 2, a letter from Dr. Gall dated March 11, 1983; claimant's exhibit 3, a letter from Dr. Gall dated April 30, 1983; claimant's exhibit 4, a letter from Dr. Gall dated June 17, 1983; defendants' exhibit A, a letter from Dale G. Phelps, M.D., dated October 21, 1980; defendants' exhibit B, a letter from Donald C. Campbell, II, M.D., dated October 11, 1983; and defendants' exhibit C, a letter from Dr. Campbell dated November 9, 1982.

ISSUES

The issues in this matter are whether or not there is a causal relationship between claimant's injury and any disability he now may suffer and whether or not claimant is entitled to further permanent partial disability benefits.

STATEMENT OF THE CASE

Twenty-seven year old claimant testified to having been employed by defendant employer in early February of 1980 as a hog manager in a 150 sow farrow to finish hog operation. When he was not busy with the pigs, he was working in the grain aspect of the business.

He recalled the events surrounding his October 2, 1980 injury: He fell from a ladder on the side of the grain bin and broke his heel. He saw Dr. Phelps the following day and was instructed to stay off his heel. He was paid compensation. He kept his foot elevated for a couple weeks and then was on crutches for several months. After being off the job for about six months, he tried to return in March; but his foot was too painful. He continued to try to work, and he went back full-time in June for a different employer. He was still having pain at that time.

Claimant stated that he went to Dr. Gall at the request of the insurance company because of pain in his foot and because of his concern about whether or not he should have surgery. At first Dr. Gall did not find surgery appropriate. Then, according to claimant, the insurance carrier wished him to go either to the Mayo Clinic or to Iowa City. He believed that his foot was getting worse as any movement either up or down or from side to side produced pain.

As to his current condition, claimant reported foot and ankle pain. The pain in the area where his heel was broken is gone. He is engaged in farming, but he cannot run to chase livestock nor can he jump on his left foot. He agreed that he has had these problems since 1981. He protects his foot as he sleeps by sticking it over the end of the bed.

He denied any injury since his fall on October 2, 1980. He indicated that he understands impairment ratings and that he knew those given by Drs. Campbell and Gall. Claimant testified that Dr. Gall's examination included use of a special instrument to measure range of motion. Dr. Campbell did not use such an instrument.

Claimant stated that he remains unsure about whether or not he wishes surgery. He would like another opinion regarding any operation.

Dale G. Phelps, M.D., orthopedic surgeon, wrote that he saw claimant on October 13, 1981 and found limitation of motion in claimant's left foot which he rated at fifteen percent of the left foot, eleven percent of the lower left leg or four percent of the body.

Donald C. Campbell, II, M.D., orthopedic surgeon who specializes in reconstructive surgery, took a history from claimant of a calcaneal fracture on the left. X-rays showed abnormality in the left subtalar joint. In a letter dated November 9, 1982 Dr. Campbell rated claimant's impairment at fifteen percent of the left foot. He noted potential for deterioration and for surgery in the future.

Claimant saw Dr. Campbell on September 15, 1983. The surgeon noted an increase in valgus deformity since his prior examination. He recommended a fusion and increased the impairment rating to seventeen percent.

Randall J. Gall, M.D., orthopedic surgeon, testified to first examining claimant on April 26, 1982. He noted that claimant walked with a slight antalgic limp on the left side. He was able to walk on his heels, but not his toes. He was unable to hop on his left foot. There was ten degrees of valgus to the left heel. There was a good dorsal vagus pulse. The left foot had 15 degrees of dorsal flexion, moving the foot up; the right, 20 degrees. The left foot had 20 degrees plantar flexion, moving the foot down; the right, 30 degrees. There were five degrees of inversion, turning the ankle inward, on the left compared to 30 on the right. There were five degrees of eversion, turning the ankle outward, on the left and ten degrees on the right. The doctor explained that eversion is controlled by the subtalar joint whereas dorsiflexion and plantar flexion are controlled by the tibial-talar joint.

X-rays from the clinic taken on April 26, 1982 were interpreted as showing sclerotic areas in the posterior subtalar joint area. A stasis process was present. The posterior subtalar joint looked sporadic and irregular. There was no longer evidence of a break in the heel bone.

Claimant gave the doctor a history of a twenty foot fall off a grain bin landing on his left heel. The heel was wrapped for swelling. He was placed on crutches with no weight bearing for two months. He returned to work in March of 1981. In February of 1982 claimant noticed an increase in stiffness and pain.

The claimant's complaints at the time of examination were of pain in the left foot and heel which worsens when he is off his feet. Claimant reported difficulty walking on uneven ground. Claimant told the doctor that aspirin provided him with mild relief.

Dr. Gall's diagnosis was post left os calcis fracture. The injury was, according to the expert, limited to the foot. Dr. Gall recommended an anti-inflammatory, physical therapy and possibly cortisone injections. Claimant was advised to use aspirins, soaks and high top boots. Based on the combination of physical examination and history and using both the AMA and Orthopedic Guides, he reached an impairment rating of 20 to 30 percent.

Claimant was next seen January 28, 1983. He walked with about ten degrees of valgus to the left heel. He was able to walk on his heel, but not his tiptoes. The ankle had two degrees dorsiflexion, 20 degrees plantar flexion, three degrees inversion and three degrees eversion. The doctor found that subjectively claimant appeared to be in pain.

Claimant returned on March 26, 1983. Ranges of motion were: five degrees dorsiflexion, 20 degrees plantar flexion, three degrees inversion and zero degrees eversion. Claimant had "a little bit of pes planus (flat foot)." There was effusion. Subjectively claimant continued to have pain. Cortisone injections were tried.

On June 13, 1983 claimant's ranges of motion were 35 degrees plantar flexion, 15 degrees dorsiflexion, zero degrees eversion and two degrees inversion. The surgeon recommended at that time proceeding with a posterior subtalar arthrodesis to eliminate the painful subtalar joint where claimant had probably developed degenerative changes. Dr. Gall discussed degenerative arthritis which claimant has in the subtalar joint.

> Degenerative arthritis involves the subtalar joint. That is between the calcaneus and the talus. It is half of the ankle joint. And what degenerative means is a wearing out for one reason or another. In this case it is probably trauma. Arthritis means the joint surfaces are no longer smooth. That they are irregular and that they are painful. So you have a wearing out resulting in painful irregular surfaces of the joint between the calcaneus, the heel bone, and the talus, the bone just above it. The two together comprising the subtalar joint. (Gall dep., p. 46 ll. 23-25, P. 47 ll. 1-6).

He explained how surgery would eliminate the source of claimant's pain and impairment. The doctor attributed his change in opinion as to whether or not claimant should have surgery to claimant's favorable response to Cortisone injections. He said that claimant could not continue to have those injections because of the risk of infection and because Cotisone itself can

cause degeneration of the joint.

On June 17, 1983 and based on his various observations of claimant, he assigned an impairment rating of 33 percent "ascribed to the ankle joint, essentially encompassing the foot." The expert looked at the range of motion and the subjective complaints based on history and used a combination of the AMA and Orthopedic Guides.

Dr. Gall testified that claimant's injury would decrease his ability to stand, walk and maneuver. He commented:

> He has limitation of eversion and inversion, which means his foot will not tolerate side to side motion very well. If he walks on uneven ground, gravel, side hills, his foot will not tolerate it and it will become painful. If he has to move from side to side quickly, again, he would not be able to tolerate the quick shifts side to side. To some extent even climbing ladders or stairs with the up and down motion may be a little bit painful for him. Standing. Any time he is weight bearing on a degenerative joint it will cause some pain eventually. He can tolerate standing for short periods of time, but not for prolonged periods of time. (Gall dep., p. 20 ll. 8-18.)

Dr. Gall causally connected claimant's foot and ankle pain to his injury. He discussed the fracture of the heel bone causing problems in the subtalar joint:

> The fracture through the body of the heel bone will go up to its dorsal or top surface. The top surface is one half of the subtalar joint. The other half of that joint is the bottom of the talus or the bottom of the ankle bone proper. Okay. So that the fracture through the heel bone that goes up to its top surface will go into the half of the subtalar joint that is on the heel bone itself and therefore it gets into the subtalar joint. (Gall dep., p. 30 ll. 11-18.)

He continued:

> The joint can be, theoretically as the heel bone is crushed or as a load of the body comes down onto the heel, the top surface of the heel bone, will be loaded. In other words there will be body weight plus the weight of the fall coming down onto the heel bone, which will then get transmitted through the heel bone itself. Now that weight gets applied to the top of the heel bone and the top of the heel bone of course is half of the subtalar joint. So that articular surface or that lining on top will get crushed as that force comes down through into the heel bone, and eventually into the ground itself. (Gall dep., p. 31 ll. 2-14.)

Dr. Gall said that he thought claimant could continue to have pain based on his particular kind of injury. As other reasons for pain, he listed psychological, spinal cord tumor, brain tumor, malingering or compensation neurosis.

Dr. Gall expressed the opinion that the leg stops at the end of the tibia. He called the ankle the "hindfoot" and made it a part of the foot. More specifically the hindfoot is the area from the calcaneonavicular joint and the calcaneocuboid joint posteriorally. The doctor said that none of claimant's injuries radiated into his leg.

The valgus in claimant's heel suggested to the expert that probably some deformity existed underneath or in the bony structure that allowed the slant. The significance of this slant is that too great a slant can be a source of pain. Dr. Gall did not feel ten degrees is too much.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 2, 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 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).

That a worker sustaining one of the injuries for which specific compensation is provided under the statute might, because of such injury, be unable to resume employment and because of his lack of education or experience or physical strength or ability, might be unable to obtain other employment, does not entitle him to be classed as totally and permanently disabled. Id. at 278, 268 N.W. 598.

Where the result of an injury causes the loss of a foot, or eye, etc., the loss, together with its ensuing natural results upon the body, is a permanent partial disability and is entitled only to the prescribed compensation. Barton v. Nevada Poultry Co., 253 Iowa 285, 290, 110 N.W.2d 660 (1961). The schedule fixed by the legislature includes compensation for resulting reduced capacity to labor and earning power. Schell v. Central Engineering Co., 232 Iowa 424, 425, 4 N.W.2d 339 (1942). The claimant has the burden of showing that his ailment extends beyond the scheduled loss. Kellogg v. Shute and Lewis Coal Co., 256 Iowa 1257, 130 N.W.2d 667 (1964).

The court in Schell cited Lente v. Luci, 275 Pa. 217, 222 119 A.132, 134 (1922) for the proposition that "there must be a destruction, derangement or deficiency in the organs or the other parts of the body'" when the claim is made that some other part of the body is affected by the injury to a member. A second Pennsylvania case cited with approval in Schell is Vanaskie v. Stevens Coal Co., 133 Pa. Super. 457, 460, 2 A. 2d 531, 532 (1938) which states:

> It is well settled that the statute fixes the amount to be paid for the loss of a foot without considering but including, all incapacity, whether such incapacity were total, partial or no incapacity at all, and that additional compensation may be allowed only where some other part of the body is affected, and it must definitely and positively appear that it is so affected, as a direct result of the injury.

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 relate to loss of earning capacity and not to physical injury as such." The theory, according to Larson, is unchanged with the only difference being that "the effect on earning capacity is a conclusively presumed one, instead of a specifically proved one based on the individual's actual wage-loss experience."

The Iowa Supreme Court recently has reaffirmed the concept of scheduled member injuries in Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

Defendants' brief argues that claimant must show a change of condition in this proceeding. This is not such a situation. A memorandum of agreement has been filed as well as a form 2A. Claimant has been paid fifteen percent of a foot.

In Freeman v. Luppes Transport Co., 227 N.W.2d 143 (Iowa 1975) a first report, a memorandum of agreement and report of settlement and payment made were filed. The court first recognized at 148 that "[u]nder our workmen's compensation act, a workman must establish three principal elements: (1) an employer-employee relationship at the time of the injury...(2) an injury arising out of and in the course of the employment...and (3) the disability (or death) proximately caused by the injury...."

The court reviewed its prior decisions beginning with Trenhaile v. Quaker Oats Co., 228 Iowa 711, 292 N.W. 799 (1940) in which it said that the memorandum of agreement determined an employer-employee relationship. Trenhaile was followed by Fickbohm v. Ryal Miller Chevrolet Co., 228 Iowa 919, 292 N.W. 801 (1940) in which the court stated the memorandum establishes an injury arising out of and in the course of the employment.

After examining the elements set out above, the court in Freeman observed at 150 that "since the compensation was not commuted, the third element, the disability, remains open in accordance with 'the condition of the employee' notwithstanding 'an award for payments or agreement,' by virtue of § 86.34 of the Code and the language in Tebbs v. Denmark Light & Telephone Corp...."

Claimant's benefits have not been commuted. There has not been a prior adjudication of claimant's permanent partial disability. No settlement papers are on file with the industrial commissioner. A memorandum of agreement has been filed, but that is a unilateral act. There is no need for claimant in this matter to show a change of condition because the extent of his disability has not been determined previously.

The question herein seems to be not so much whether or not there is a causal relationship between claimant's injury and any disability he now may suffer as it is whether claimant's impairment is confined to his foot or extends into his leg and claimant's entitlement to additional permanent partial disability in either event.

Although the pain in claimant's foot in the area of the broken heel is gone, claimant continues to have pain in his foot and has developed pain in his ankle.

Dr. Phelps gave a rating for the foot, lower extremity and body as a whole, but limitation of motion was noted in the foot only. Dr. Campbell observed abnormality on x-ray in claimant's left subtalar joint; i.e., the joint between the talus and calcaneus. He rated claimant's impairment at fifteen percent of the left foot which he later increased to 17 percent.

Dr. Gall also referred to changes in the subtalar joint. His initial rating was 20 to 30 percent. On subsequent examinations, claimant had decreased motion until his most recent visit. The doctor anticipated claimant's particular injury could continue to cause pain. His ultimate rating was 33 percent of the foot.

Dr. Campbell by finding limitation to claimant's foot and Dr. Gall by specific testimony confine claimant's impairment and resulting disability to the foot. Dr. Gall said that claimant's injury did not radiate to his leg.

Claimant indicated Dr. Gall used a goniometer to measure the motion in his foot. Dr. Gall has seen claimant on a number of occasions. Slightly greater weight will be given to his testimony. Claimant will be award 27.5 percent permanent partial disability to his foot entitling him to 41.25 weeks or an additional 18.75 weeks of weekly benefits.

Claimant asked that his benefits be commuted. No commutation is being done, but because all benefits are due and owing they will be ordered paid in a lump sum.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant was injured on October 2, 1980 when he fell from a ladder on the side of a grain bin at the place of his employment and broke his heel.

That claimant was off work for a period of time and received

healing period benefits.

That a memorandum of agreement was filed.

That claimant was paid permanent partial disability for 15 percent of the foot.

That claimant currently complains of foot and ankle pain.

That claimant's farming activities are restricted by his foot.

That claimant has had no subsequent injury to his foot.

That claimant has valgus in the left foot.

That claimant has degenerative arthritis in his subtalar joint.

That claimant's injury has decresed his ability to stand, walk, climb and maneuver.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has proved by a preponderance of the evidence that his injury of October 2, 1980 is a cause of the disability on which he now bases his claim.

That claimant has a twenty-seven and one-half percent (27 1/2) permanent partial disability to his foot which entitles him to an additional eighteen point seventy-five (18.75) weeks of benefits.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant eighteen point seventy-five (18.75) weeks of permanent partial disability benefits at a rate of one hundred eighty-five and 33/100 dollars ($185.33).

That defendants pay the amount of this award in a lump sum.

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

That defendants file a final report in sixty (60) days.

Signed and filed this 5th day of March, 1984.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BARBARA J. WALKER,	:	
Claimant,	:	
vs.	:	File No. 611972
UNITED PARCEL SERVICE,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
LIBERTY MUTUAL INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision wherein claimant was held not to have carried the burden of proving her disability was related to an injury of October 23, 1979. The deputy ordered that claimant take nothing further as a result of the proceeding.

The record on appeal consists of the hearing transcript which contains the testimony of claimant and Charles Walker; claimant's exhibits 1 through 3; defendants' exhibit A; the depositions of Edward A. Dykstra, M.D., and Martin F. Roach, M.D.; medical records filed by claimant on August 17, 1982 and September 17, 1982 pursuant to Rule 4.18; medical reports filed by defendants on August 6, 1982 pursuant to Rule 4.18; and the briefs and additional filings of all parties on appeal.

ISSUES

1. Whether claimant met the burden of proving that her disability was causally related to her injury of October 23, 1979.

2. Whether the deputy misconstrued the testimony of Dr. Dykstra.

REVIEW OF THE EVIDENCE

Claimant, who was 39 years old at the time of the hearing, became employed by United Parcel Service in 1977. Claimant's duties at UPS included driving a truck, delivering packages, and loading/unloading trucks. She testified that in the normal course of a day she would deliver approximately 500 packages with three-fourths of those packages weighing over 25 pounds. (Transcript, pp. 10-12)

On October 23, 1979 claimant was hit by a car as she crossed a street to deliver a package. Claimant was transported to a hospital emergency room where she was examined by Larry G. Rigler M.D. Claimant testified that she was most concerned at that time with injuries to her right leg and left arm, but that pain was also present in her back, groin, and left heel. She recalled that a pain medication was prescribed, as well as the use of heating pads on the sore areas of her body. (Tr., pp. 13-16)

Claimant testified that she did not return to work the following day and that she complained of back pain to family members. (Tr., pp. 16-17) On November 2, 1979 claimant gave a statement to an insurance representative of the driver who hit her on October 23, 1979. Claimant was questioned at that time as to the extent of her injuries:

> Q. Okay, can you tell me ah the extent of your injuries?
>
> A. Ah well I didn't have any broken bones ah my boss came and got me and took me to the hospital and they x-rayed my leg and my arm - it hurt my whole knee and then my ah left arm is hurt ah and at the time also, my left leg was not hit, but it hurts and at the hospital they examined it and my left groin was very sore and my back hurts - I guess from falling. (Claimant's Exhibit 3, p. 4)

Claimant testified that she was examined by Martin F. Roach, M.D., in December of 1979 at the request of Liberty Mutual Insurance. She stated that she had continued to have back problems and that she wasn't able to go up and down stairs or use her left arm. Claimant recalled that soon after the examination by Dr. Roach she received a call from UPS notifying her that the doctor had released her to return to work. She returned to work on December 24, 1979, where she resumed her regular delivery route. Claimant testified that one or two weeks after returning to work she was required to help load a semitrailer. She stated that she experienced a great deal of pain in her back and left arm while loading packages into the trailer, and that she complained of her ailments to co-workers. On the second day of loading the trailer the pain became "excruciating" to the point that she could not continue. Claimant visited V. G. Edwards M.D., who worked in the same office as her regular physician, Dr. Rigler, who was on vacation. Claimant was referred to Edward A. Dykstra, M.D., who examined her in February of 1980. She recalled that she was also examined by Warren N. Verdeck, M.D., prior to her return to work in May of 1980. Claimant testified that she was able to tolerate working through the summer of 1980 as long as she was given driving duty and other light work details. She testified that in September of 1980 she was working subject to a 35-40 pound lifting restriction imposed by Dr. Dykstra, but was ordered to a duty which required that she load boxes weighing in excess of 50 pounds on delivery trucks. While she was able to do the work, claimant testified that it took a longer period than normal to complete and that the stooping and lifting caused pain in her leg and back. Claimant quit her job with UPS in October of 1980 after being refused a leave of absence or a transfer to an office job. (Tr., pp. 19-34)

Claimant testified that prior to her accident of October 23, 1979 she was able to perform all duties required of her as an employee of UPS. She further testified that her back ailments began immediately after her accident, but became much worse upon her return to work. (Tr., pp. 35-38)

Defendants submitted a series of office records from Drs. V. Edwards, L. G. Rigler, and M. C. Ruffcorn, who maintain a joint practice. An October 23, 1979 emergency record prepared by Dr. Rigler, which identified himself and Dr. Edwards as claimant's family physicians, indicates that claimant suffered severe contusions to the right upper tibia and left forearm as a result of her accident. Office notes indicate that claimant visited either Dr. Edwards or Dr. Rigler on October 26, 1979 for nervousness. The office notes indicated that claimant was subsequently seen on the 1st, 7th, 15th, and 26th of November 1979; December 11, 1979; and January 1, 1980 concerning her right leg and left arm. An office note recorded January 7, 1980 noted that claimant was experiencing back pain, probably due to a low back strain. (See medical records submitted August 6, 1982 by defendants)

Martin F. Roach, M.D., who testified by deposition, stated that he examined claimant on December 18, 1979 at the request of Liberty Mutual Insurance. He testified that he recorded a history which included injuries to claimant's left arm and right leg, but that no mention was made of any back problems. Dr. Roach testified that his examination of claimant yielded no objective findings of disability. (Roach Deposition, pp. 3-7) Dr. Roach testified that he had reviewed the office records of Dr. Edwards and Dr. Rigler. The doctor was asked to comment on the relationship of claimant's back problems to the October 23, 1979 accident:

> Q. Doctor, do you have an opinion, based upon a reasonable medical certainty, as to whether or not the back condition of which she complained in January of 1980 for the first time -- if that is the first time she complained of it to anybody, including you -- when you saw her December 18th of '79 could be causally related to the accident of October 23, '79?
>
> (Objection)
>
> A. I would say that historically, the first time that she complained of pain was in January of 1980, and would think that if she had a severe enough problem, that she would have complained of pain in her back to me in December of 1979.
>
> Q. If her back pain which she apparently complained of January 7, 1980 to her family doctor were casually related to an accident the previous

October, would it be your opinion that it would have shown up prior to January ?

MR. MOEN: I object to that question as leading.

A. Yes. (Roach Dep. pp. 10-11)

Edward A. Dykstra, M.D., an orthopedic surgeon, also testified by deposition. Dr. Dykstra testified that he first examined claimant on February 7, 1980 on a referral from Dr. Edwards and Dr. Rigler. The history recorded by Dr. Dykstra indicated that claimant had been off work for two months and had complaints of severe back pain while lifting upon her return to work. Dr. Dykstra stated that the initial examination concerned claimant's back, with straight leg raising tests proving negative for disc rupture and nerve irritation, and little limitation of motion being evident. Claimant was fitted with a corset on February 12, 1980, and was switched to a girdle on March 14, 1980. Dr. Dykstra released claimant to return to work on March 25, 1980, but imposed a 25 pound lifting restriction due to tight back muscles. The lifting restriction was raised to 35 pounds on April 22, 1980 and lifted completely on May 20, 1980. Claimant returned to Dr. Dykstra on June 10, 1980 complaining of numbness and fallen arches. Dr. Dykstra testified that he next saw claimant on September 9, 1981 at which time she had complaints of back and knee pain. An arthroscopic examination of claimant's right knee was performed by J. J. Puhl, M.D., on October 9, 1980. Claimant was next seen by Dr. Dykstra in November of 1980 at which time he first noted a significant limitation of back flexion. Dr. Dykstra indicated that claimant's inability to bend the lumbar spine forward had been progressive, and was related by claimant back to the time of her accident on October 23, 1979. Dr. Dykstra estimated claimant to have a 20 percent permanent impairment based on pain and limitation on motion. (Dykstra Dep., pp. 3-16; Dykstra office records)

On cross-examination Dr. Dykstra admitted that he had not reviewed any of the statements, reports, or histories recorded by other doctors who had treated claimant, and that he had assumed that the symptoms related by claimant had persisted since her accident on October 23, 1977. Dr. Dykstra also admitted that the only objective findings following his complete neurological examination of claimant on February 7, 1980 were muscle spasms which could be characterized as tightness. Dr. Dykstra testified that the etiology of claimant's back pain was unclear because no disc herniation was apparent. He did indicate that in order to relate claimant's back pain to her accident it would have had to manifest itself within three or four days afterwards. (Dykstra Dep., pp. 19-26) At one point during cross-examination the following ensued:

Q. Were you informed that Mrs. Walker was referred to an orthopedic surgeon in December of '79, December 18th of '79?

A. No, I was not.

Q. If I showed you a report by a Doctor Martin Roach, who is a board certified orthopedic surgeon, -- you may be acquainted with Doctor Roach?

A. Yes, I know Doctor Roach.

Q. Who examined her on 12-18-79 and pointed out to you that on that date when she was referred by Liberty Mutual, she had been involved in an auto-pedestrian accident on the 23rd of October, '79, works for UPS, stepped out on the street and was struck by a speeding vehicle and knocked down. Was able to get up and limp. Was taken by her boss to a hospital where X-rays were taken and she was released. She said she had a lot of swelling and blue discoloration of the right knee and also developed pain subseuqnetly [sic] in the left forearm proximally with difficulty in strength. These symptoms have persisted to today.

The point being as of that date, which was approximately two months after the accident, there was no reference or no history of back pain. Would that cause you to question the relationship or the causal relation of her low back pain to this automobile accident?

A. If, in fact, she had no pain at that time, it certainly would, yes. (Dykstra Dep., pp. 26-27)

d later:

Q. Just so this is clear, you testified that if she did not have the back pain by five days and certainly by two months following the accident, that your opinion would change. Would your opinion, assuming that to be true, be that the back pain was not related to the automobile accident?

A. If she, in fact, had no pain in December of 1979 as far as her back, I would feel it was unlikely that pain that I saw her for in February of '79 [(sic) Claimant was first seen by Dr. Dykstra on February 7, 1980. (Dykstra Dep., p. 4)] was related to an accident. (Dykstra Dep., pp. 29-30)

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of evidence that the injury of October 23, 1979 is causally lated to the disability on which she now bases her claim. lish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). dahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A sibility is insufficient; a probability is necessary. Burt v. n Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 55). The question of causal connection is essentially within domain of expert testimony. Bradshaw v. Iowa Methodist pital, 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).

ANALYSIS

The first issue on appeal is whether claimant met the burden of proving that her disability was causally related to her accident of October 23, 1979. The testimony of claimant, taken along with the recorded statement which she gave on November 2, 1979, indicates that claimant did have some back problems during the initial days following her accident. The medical evidence taken as a whole, however, does not indicate that claimant's present disability due to her back problems is traceable to the October 23, 1979 accident.

The clinical records of claimant's regular physicians (Dr. Edwards and Dr. Rigler) first noted that claimant's was experiencing symptoms of back pain on January 7, 1980. It must be noted, however, that the same physicians' clinical notes from seven separate examinations of claimant between October 23, 1979 and January 7, 1980 did not even hint that claimant was having back difficulties of any nature. It seems inconceivable that claimant would not have mentioned to her own physicians symptoms of back pain relating back to the October 23, 1979 accident had it, in fact, continued to manifest itself after the initial days following the accident. Claimant also failed to mention the existence of back problems of any nature to Dr. Roach during the December 18, 1979 examination which claimant knew to have been arranged by the insurance carrier. The testimony of both Dr. Roach and Dr. Dykstra was to the effect that claimant's back pain most probably did not result from the October 23, 1979 accident if claimant had not exhibited continued symptoms since shortly after that date. Both doctors were in substantial agreement that if symptoms of back problems were not evident during the December 18, 1979 examination of claimant by Dr. Roach, then it would be difficult to causally relate her later disability to her back with the October 23, 1979 accident.

In light of testimony from Dr. Roach and Dr. Dykstra that claimant would have had significant complaints of back pain in December of 1979 had her back pain later complained of been causally related to the October 23, 1979 accident, and the absence of medical evidence indicating that such pain did exist in December of 1979, it is concluded that claimant's back problems are not causally related to her accident of October 23, 1979.

The second issue on appeal is whether the deputy misconstrued the testimony of Dr. Dykstra. The record reflects that Dr. Dykstra did not examine claimant until February 7, 1980 at which time she was exhibiting symptoms of back pain. Dr. Dykstra had not reviewed any of the records of other physicians who had examined claimant, and had simply assumed that claimant's symptoms of back pain had persisted since October 23, 1979. As was noted in the preceeding paragraph, however, serious doubt exists as to whether claimant's symptoms of back pain had, indeed, persisted since the accident. Because it has been concluded that claimant did not exhibit symptoms of back pain in December of 1979, and Dr. Dykstra testified to the unlikelihood that the back pain he saw claimant for on February 7, 1980 was related to the accident if she had not, in fact, exhibited similar symptoms in December of 1979, it is found that the testimony of Dr. Dykstra was not misconstrued in any manner by the deputy.

FINDINGS OF FACT

1. Claimant was an employee of United Parcel Service.

2. Claimant was involved in an accident arising out of and in the course of her employment on October 23, 1979, when she was struck by an automobile.

3. Claimant visited her regular physicians on seven occasions between October 23, 1979 and January 7, 1980 for complaints relating to her right leg and left arm which had been injured in October 23, 1979, but failed to relate symptoms of back pain during any of the visits.

4. Claimant submitted to an independent examination on December 18, 1979 at the request of the insurance carrier.

5. Claimant did not indicate any symptoms of back pain during the December 18, 1979 examination.

6. Claimant complained of back pain during a January 7, 1980 visit with her regular physician.

7. Claimant has complained of continuous back pain subsequent to January 7, 1980.

8. Claimant's back pain did not manifest itself continuously since the accident on October 23, 1979.

CONCLUSION OF LAW

Claimant has not met the burden of proving a causal relation between the accident of October 23, 1979 and her back problems.

WHEREFORE, the deputy's decision filed January 19, 1983 is affirmed.

THEREFORE, it is ordered:

That claimant take nothing further from these proceedings.

Costs of the review-reopening proceeding are charged to the defendants and the cost of the appeal are charged to claimant.

Signed and filed this 21st day of September, 1983.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

Appealed to District Court;
Pending

Mr. Mark B. Moen
Attorney at Law
22 East Court Street
Iowa City, Iowa 52240

Mr. Ralph W. Gearhart
Attorney at Law
P.O. Box 2107
Cedar Rapids, Iowa 52406

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ALLEN WARREN,	:	
	:	File No. 541845
Claimant,	:	
	:	A P P E A L
vs.	:	
	:	D E C I S I O N
JOHN DEERE WATERLOO TRACTOR WORKS,	:	
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

By order of the industrial commissioner filed May 12, 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 a review-reopening decision.

The record on appeal consists of the transcript; employer's exhibits A, B, C, D, E, F, G, H, I, J, K, L and M; claimant's exhibits 1, 2, 3, 4, 5, and 6; joint exhibit 1; and the depositions of James Eldon Crouse, Carl Campbell, William Bertram, Evelyn M. Barnhart, and Arnold E. Delbridge, 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.

Claimant raises two issues on appeal. The first issue concerns a question of causal connection which was more than adequately discussed in the review-reopening decision. Secondly, claimant states that the "[c]ompensation finding was erroneously based on functional and industrial disability as opposed to the true bases of loss of earning capacity." A reading of the analysis portion of the review-reopening decision, pages 34-35 shows that loss of earning capacity, or industrial disability, the terms are synonymous, shows that the hearing deputy considered all the factors of industrial disability but put the most emphasis on the permanent partial impairment. That reasoning seems in line with the rest of the decision and will be adopted herein.

The findings of fact, conclusions of law and order reached in the review-reopening decision will be adopted herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDING 1. Claimant experienced low back, left hip and groin pain and some lower left extremity numbness following a fall off a ladder at home in October of 1974. He underwent laminectomy, facetectomy, neurolysis of the nerve roots, removal of the fourth space disc and bone grafts on the right across the L4 space in April of 1975. Claimant returned to work for defendant in August of 1975. He was on light duty (30 pound limitation on lifting and restricted bending for four to six weeks and thereafter returned to setup assembly. Claimant wore a back brace continually for a few months and then as needed. Claimant continued to complain of some back pain. His supervisors attempted to limit his assignments accordingly.

FINDING 2. Claimant sustained a neck injury in a car accident in September of 1976 and underwent an anterior diskectomy and fusion of C-5 and 6. Claimant did not injure his thoracic or lumbar back in such incident.

FINDING 3. On November 22, 1977 claimant fell 10-12 feet (measured from head) from a rack upon which he had climbed to locate a certain size cardboard for masking items that would be run through defendant's paint line. Claimant suffered a concussion, left scalp laceration and fifty percent (50%) compression fracture of L1. Claimant was hospitalized for conservative treatment and was fitted with a body jacket. Claimant returned to work on March 20, 1978. He was on light duty (20 pound weight restriction and minimum flexion) for less than three weeks before returning to setup assembly at his request. A month later claimant sought a transfer to the lower paying position of industrial truck operator alleging that setup assembly bothered his back. The record indicates that except for certain relief work, assembly setup is as easy a job as forklift driving and that claimant preferred not to work under the general control of the lead supervisor for the setup assembly position.

FINDING 4. At the time of the November 22, 1977 injury the treating physician for the above back injuries indicated that the work injury entailed the lower dorsal and upper lumbar regions only and that serious consequences were not anticipated. He last treated the claimant for such condition on May 17, 1978.

FINDING 5. On July 22, 1979 the treating physician advised claimant's counsel that a compression fracture such as the claimant sustained was usually rated as ten percent (10%) impairment of the body as a whole.

FINDING 6. Claimant filed his application for review-reopening on August 10, 1979.

FINDING 7. On Labor Day 1979 claimant experienced a popping and burning sensation in his low back and down his right leg as he was waxing his car. Claimant worked until obtaining medical care on September 11, 1979. Claimant changed doctors as of September 21, 1979 and added thoracic discomfort to his complaints. Claimant's upper back symptoms were diagnosed as evidence of a recent strain in the area of the old compression fracture and the low back pain and hypesthesia were considered due to nerve root irritation in the low back area. Claimant was hospitalized on October 25, 1979 for conservative treatment and application of a TENS unit. Claimant was hospitalized in December 1979 for continued low back and leg complaints and underwent a decompression laminectomy, excision of scar tissue, facetectomies, foraminotomies and a fusion from L-3 through L-5.

FINDING 8. The 1977 work injury did not cause the September 1979 injury and ensuing disability--the September 1979 incident amounted to a material aggravation of the preexisting work-related compression fracture at L-1 and of the preexisting low back condition; healing period and permanent impairment incurred after the September 1979 incident are directly traceable to that injury and not to the November 22, 1977 work injury.

FINDING 9. The November 22, 1977 injury did result in claimant being off work until March 20, 1978 and in a permanent impairment to the body as a whole.

FINDING 10. Claimant received workers' compensation and weekly indemnity benefits for the period he was off work following the November 22, 1977 injury. Claimant has not received any permanent partial disability benefits.

CONCLUSION A. Claimant has sustained his burden of proving that he is entitled to additional benefits for industrial disability resulting from the November 22, 1977 injury, but not as aggravated by the September 1979 home injury; claimant has otherwise failed to sustain his burden of proving that his present disability and time loss after September 10, 1979 are causally related to the November 22, 1977 injury.

FINDING 11. Claimant had some degree of ongoing back complaints relative to the November 22, 1977 fifty percent (50%) compression fracture per se and wore a back brace as needed.

FINDING 12. Claimant's permanent functional impairment as a result of such degree of compression and ongoing symptoms is between 10 and 18 percent of the body as a whole.

FINDING 13. Claimant's transfer to a lower paying job after the November 22, 1977 injury and the early return to setup assembly (at his request) was mainly for personal reasons.

FINDING 14. Actual physical restrictions and limitations specifically referrable to the 1977 compression fracture were not clearly established.

FINDING 15. Except for being able to fast dance before the 1977 work injury but not after, claimant did not appear to lessen his non-work activities after the November 22, 1977 injury from what they had been before that date and after the 1975 surgery.

FINDING 16. Claimant was 43 years of age at the time of hearing, has a fifth grade education, cannot read or write, and has been employed as a farmhand, city grounds worker and cement trucker, and has worked in a packinghouse, for a burial vault company and for a bakery. Claimant's years with defendant entailed setup assembly and industrial truck operator.

FINDING 17. Claimant had good motivation prior to the September 1979 home injury.

CONCLUSION B. Claimant sustained a twenty percent (20%) loss of earning capacity as a result of the November 22, 1977 work injury.

CONCLUSION C. Pursuant to Code section 85.34(2), the permanent partial disability award shall commence as of March 20, 1978.

CONCLUSION D. Based on findings 4, 5 and 6 interest shall accrue as of August 10, 1979, the date the petition for review-reopening was filed.

ORDER

THEREFORE, it is ordered that the defendant pay the claimant one hundred (100) weeks of permanent partial disability at the rate of two hundred forty-seven dollars ($247) per week. Pursuant to Code section 85.34(2) permanent partial disability benefits shall begin as of March 20, 1978.

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

Interest shall run in accordance with section 85.30, Code of Iowa, 1983, and from August 10, 1979, the date the petition was filed.

Costs of the proceeding are taxed to the defendant. See Industrial Commissioner Rule 500-4.33.

A final report shall be filed by the defendant when this award is paid.

Signed and filed at Des Moines, Iowa this 21st day of September, 1983.

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

NALD WEBB, JR.,
Claimant,
VEJOY CONSTRUCTION COMPANY,
Employer,
TUMINOUS INSURANCE COMPANIES,
Insurance Carrier,
Defendants.

File No. 474988
A P P E A L
D E C I S I O N

By order of the industrial commissioner filed December 15, 83 the undersigned deputy industrial commissioner has been ointed under the provisions of §86.3, Code of Iowa, to issue final agency decision on appeal in this matter. Defendants peal from an adverse review-reopening decision.

The record on appeal consists of the transcript; claimant's ibits 1 through 8; and the deposition of Charles V. Burton, ., all of which evidence was considered in reaching this al agency decision.

The outcome of this appeal decision will be the same as that ched by the hearing deputy.

ISSUES

The review-reopening decision ordered defendants to provide ure medical care by Jerome G. Bashara, M.D., and to pay imant healing period benefits for an indeterminate period.

Defendants appeal both points of the order:

I. The Deputy Industrial Commissioner exceeded his statutory authority and erred as a matter of law in selecting a treating physician for the claimant when no such issue had been raised by the parties.

II. That the Deputy Commissioner's decision to make a running healing period award is contrary to the evidence and is arbitrary, capricious and contrary to the established standards of law and fact.

agreement under this second issue concerns causal relationship ween the injury and the disability, not the length of the ability.

STATEMENT OF THE CASE

There was prior litigation in this matter and by an appeal ision of October 20, 1981, claimant was awarded permanent tial benefits to the body as a whole for industrial purposes the amount of 25 percent. Claimant claimed that he continued have trouble with his low back, and defendants concede that y refused to authorize any treatment. According to claimant, is his desire to have certain treatment and tests suggested the physicians in this case. (Tr., 17) In letters of April 1982 and May 18, 1982 addressed to claimant's lawyer Jerome Bashara, M.D., a qualified orthopedic surgeon, suggests that imant would benefit from a CAT scan. Further, in a letter of ember 30, 1982 to claimant's lawyer, Dr. Bashara stated:

It was my opinion then and it continues to be my opinion that the exact diagnosis in this case has not been delineated. He has not reached a point of maximum medical improvement in my opinion and should continue to have conservative nonoperative measures at this time consisting of traction, physical therapy, and medication. This will continue into the foreseeable future.

With respect to the second issue, Dr. Bashara is ambilavent. a report of May 18, 1982, he states that the need for the CAT n is related to the injury, but, as shown above in the report November 30, 1982, he states that the exact diagnosis has not n delineated.

In a report of May 21, 1982, Michael T. O'Neil, M.D., an opedic surgeon stated: "His symptoms have been present ce 1977 and I suspect that he was in the early stages of his losing spondylitis when he fell and that the fall merely cavated his already pre-existing condition."

Further, Charles Burton, M.D., of the Institute for Low Back in Minneapolis, Minnesota, testified:

I think it's important to point out that the patient was asymptomatic prior to injury, and therefore, injury certainly made evident the underlying factors that were there. I don't think that this gentleman would be as subjectively impaired today were he not to have had the injury. But I think it's also important to point out that these changes that were seen, and most certainly are progressive, would have produced an impaired individual down the road, although one cannot predict exactly when. And I think it's fair to point out in this deposition that the exact nature of those influences can't be determined by anybody, but the trauma that this man sustained was significant. The underlying disease processes which were enhanced by trauma were also quite significant. This was not a normal person impaired by injury. By the same token, the patient's present clinical incapacitation does not simply reflect injury alone.

APPLICABLE LAW

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.

Claimant must show that the health impairment was probably caused by the 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) and Almquist v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 (1934). 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). "The incident or activity need not be the sole proximate cause, if the injury is directly traceable to it." Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (1974); Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971). "A cause is proximate if it is a substantial factor in bringing about the result." Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

ANALYSIS

Considering the question of causal relationship first, it is clear from the evidence that claimant had a serious preexisting condition, and it is likewise clear that claimant had a significant work injury in the nature of an aggravation of that condition. Also of importance, there is no suggestion in the record that claimant's present problems are unconnected to the injury. That is, the original trauma satisfies the requirement of an injury in the nature of an aggravation of a preexisting condition, and that aggravation has continued to be a problem to claimant.

With respect to the issue of choice of care, defendants argue that the hearing deputy went beyond his authority by ordering treatment by Dr. Bashara. It is true, of course, that the employer has the right to choose care; however, the above quoted statute also shows that the industrial commissioner may order other care. In this case, it is clear that defendants were refusing to provide care of any kind. There is certainly sufficient evidence to show that further tests would benefit claimant and that claimant's dissatisfaction with the lack of care offered can surely be a basis for the industrial commissioner to order such care pursuant to statute.

FINDINGS OF FACT

1. That the claimant hurt himself at work on August 18, 1977.

2. That on October 20, 1981 claimant was awarded 125 weeks of permanent partial disability beginning on September 29, 1979.

3. That on February 2, 1982 claimant commenced this review-reopening proceeding seeking medical care.

4. That the claimant has demonstrated the need for additional medical care and that such care is causally connected to claimant's industrial injury.

5. That beginning November 20, 1981 claimant's physical condition sufficiently worsened so as to render him unable to perform acts of gainful employment since that date.

CONCLUSIONS OF LAW

Claimant sustained an injury which arose out of and in the course of his employment on August 18, 1977 and which now necessitates further diagnostic procedures.

Claimant is entitled to a healing period beginning November 20, 1981.

ORDER

WHEREFORE IT IS ORDERED that the defendants provide future medical care to this claimant, and that it is in the best interests of the claimant that Jerome G. Bashara, M.D., should be and is ordered to be claimant's attending orthopedic surgeon.

IT IS FURTHER ORDERED that defendants pay the claimant a healing period beginning on November 20, 1981 and continuing until he has reached a maximum medical recovery. Claimant's rate of weekly compensation is two hundred thirty-two and 51/100 dollars ($232.51).

Accrued benefits are payable in a lump sum together with statutory interest from October 24, 1983.

Costs as provided for in Industrial Commissioner Rule 500-4.33 are charged to the defendants.

Signed and filed at Des Moines, Iowa this 12th day of March, 1984.

Appealed to District Court;
Affirmed
Appealed to Supreme Court;
Dismissed by claimant

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BELINDA A. WELDON, surviving spouse of CHARLES D. WELDON, deceased, Claimant, vs. W. R. GRACE, Employer, and CNA INSURANCE, Insurance Carrier, Defendants.	FILE NO. 691003 COMMUTATION DECISION

This is a proceeding in commutation brought by the claimant, Belinda A. Weldon, against W. R. Grace, her deceased husband's employer, and CNA Insurance, the insurance carrier, to recover commuted benefits under the Iowa Workers' Compensation Act by virtue of a fatal accident which occurred on October 13, 1981. This matter was heard in Cedar Rapids, Iowa on March 10, 1983 and considered fully submitted at the conclusion of the hearing. Based on the undersigned's notes, the record consists of the testimony of claimant and James J. Ingram, together with claimant's exhibits 1, 2, 3 and 4.

The single issue in this matter is whether or not the claimant is entitled to benefits as contemplated by Iowa Code section 85.45 as being in her best interests.

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

Claimant, age thirty-six, has one daughter, Tonya Lisa Weldon, birth date July 24, 1973. Claimant has been employed as a purchasing agent for a Davenport firm, but was on layoff at the time of the hearing. She claims to be the sole support of her daughter, although her fiance and his daughter are living with her in her home. She is currently receiving compensation benefits of $501.00 per week in payments every four weeks of $2,004.00.

Claimant produced her personal financial statement which shows she received as beneficiary of her husband's life insurance approximately $300,000.00 which has been invested in stocks and bonds, certificates of deposit and an annuity. In addition, her daughter, Tonya, was the beneficiary of approximately $16,000.00 which claimant, as her conservator, has invested. These investments have been made with the counseling of stockbroker Ingram and her attorney. Claimant's only major liability is a $67,000.00 mortgage on her home which she has chosen not to pay off.

Broker Ingram testified as to the successful investment program he has developed for the claimant as well as a proposed portfolio to invest an amount which claimant might receive as a lump sum.

Claimant testified she seeks the entire balance of her weekly entitlement so that she can invest the lump sum and make more than she is now receiving and so she can remarry and still have the money to support herself and her daughter.

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 interests of the person or persons entitled to compensation or that periodic 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. A reasonableness test was applied by the court in Diamond to determine whether a commutation would be in the best interests of the person or persons entitled to 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 it 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 standards 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, section 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.

Despite the rational reasoning in support of the more restrictive views on commutation of compensation benefits, the Diamond guidelines still prevail in Iowa. Using the criteria set forth in Diamond, this deputy reaches the conclusion that commutation in this case is not in this claimant's best interests.

Claimant has the responsibility for the support of her nine year old daughter for a considerable time into the future. Iowa Code section 85.31 provides that upon remarriage of her mother, Tonya would receive benefits until she reaches the age of eighteen and beyond eighteen to the age of twenty-five if actually dependent. 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 is a prima facie showing of actual dependency.

This deputy takes as a fact claimant's testimony as to her present intent to remarry to a specific person with only the date of the ceremony uncertain (but subsequent to this ruling). No provision equal to or better than those provided by the statute have been made to secure a college education for Tonya. Tonya is one of the persons entitled to receive benefits under the statute. It would serve her mother's best interests to provide adequately for her daughter's college education as well as it would serve Tonya's.

It is apparent that this petition for commutation was presented for the purpose of avoiding the termination of benefits to the widow upon remarriage. This deputy believes a commutation should not be used for this purpose which, in effect, thwarts the statute and the purposes of the Iowa Workers' Compensation Laws. But more important, claimant's past success in investments is no indication of continued success in the future. The probabili of dissipation of the funds exists in absence of the restraint placed on claimant by requiring her financial records and investment priorities to be examined in this hearing.

If a commutation were ordered, no one in the future will be reviewing claimant's investments for reasonableness. She would be free to ignore the advice of her lawyer and stockbroker. A few bad investments or miscalculations could destroy the assets which now appear to be substantial as well as dissipate any lump sum payment which she might obtain. The reliability of the weekly compensation benefits is an important factor in determining claimant's best interests.

THEREFORE, IT IS ORDERED that in light of the foregoing rationale, it is found that claimant's petition for a commutation of all remaining benefits be denied.

Costs of this action are taxed against defendants.

Signed and filed this 14th day of October, 1983.

HELMUT MUELLER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT D. WHEELER, Claimant, vs. ARION RESTAURANT, Employer, and OHIO CASUALTY CO., Insurance Carrier, Defendants.	FILE NO. 538961 REVIEW-REOPENING DECISION

INTRODUCTION

This is a proceeding in review-reopening brought by Robert D. Wheeler, the claimant, against Arion Restaurant, the employer, and Ohio Casualty Insurance Company, insurance carrier. Claimant seeks further benefits as a result of an injury which occurred on May 20, 1977.

A previous hearing was held in this case on September 25, 1979 and a decision was entered October 8, 1979 which awarded claimant 26 2/7 weeks of temporary total disability compensation at the rate of $103.69 per week. It was also determined that claimant had no permanent impairment arising from the work-related injury.

The hearing commenced March 8, 1984 in the Henry County Courthouse in Mount Pleasant, Iowa. Claimant appeared in person and defendants appeared by and through their attorney, Merry C. Ford. The case was heard and considered fully submitted upon conclusion of the hearing.

The record in this proceeding consists of the testimony of claimant given in person at the hearing; claimant's exhibit 1 and defendants' exhibits A through Z, AA, BB, CC and DD.

ISSUES

The issues presented by the parties at the time of hearing are the nature and extent of claimant's disability, if any; whether or not any existing disability is causally related to the work related injury of May 20, 1977; and the establishment of a conversion date for transforming healing period benefits into benefits for permanent partial disability, if any entitlement to such is found. It was stipulated by the parties that the proper rate of compensation is $103.69 per week in the event of an award.

REVIEW OF THE EVIDENCE

Claimant testified that he was born June 30, 1926, that he is unmarried and has no dependents.

Claimant testified that on May 20, 1977 he was moving things around in the cooler in the basement of the Arion Restaurant when he experienced pain and became sweaty. He testified that he left work, went home, saw Joseph D. Simmons, M.D., and was admitted to Monmouth Hospital.

Claimant testified that he had previously assumed his problem to be a muscle strain but that, as time has passed, his symptoms have remained the same. He related that he did not realize that he had a heart condition until he saw letters from William E. Anderson, Jr., M.D.

Claimant testified that he experiences pain when working for long periods of time. He takes medication on a daily basis.

Claimant stated that since September 25, 1979 he keeps having pain in the upper left portion of his chest. He says it is more at some times than at others and that it comes and goes. He states that the ailments are about the same now as in September of 1979 and that they are also the same as when he was originally injured.

Claimant testified that his medical expenses since the time of the decision in this case have been paid partially by himself, partially by the State of Illinois and that some of the expenses remain unpaid.

On cross-examination claimant testified that over the past few years he has worked at a number of restaurants. He has at times supervised as many as three employees. He has operated his own restaurant on two occasions. From his testimony it appears that he normally worked in the range of 48 to 50 hours per week and that he often worked six and sometimes seven days per week. He testified that he is presently unemployed and has not worked since 1981 or 1982. He admitted that his doctors have not told him to cease working.

Claimant testified concerning the medical care he has received which testimony was generally consistent with what is shown by the exhibits which were admitted into evidence. He admitted that he smoked for 30 years, as much as two and a-half or three packs a day but cut down about a year ago. He stated that both of his parents are deceased but he does not know their causes of death or if they had heart disease.

Claimant testified that he does not understand when and why his medical problems occurred. He stated that he wants to know whether his heart condition existed at the time of his injury on May 20, 1977.

All exhibits admitted into evidence have been fully read and evaluated by this deputy. Comments in this decision are directed, however, to those which are found to be most material to the issues of this case.

Exhibit B appears to be a report from Dr. Simmons. No date appears upon it; however, it appears to read, "Patient has been sick for almost two weeks with periods of gastric upset. He has enjoyed fair health, he comes to the hospital complains of pain in the chest in the heart area and under the sternum...Possible coronary occlusion."

Exhibits C through J are various medical reports which deal with the care claimant received during the period of May 20, 1977 through September 19, 1977. All test data in the exhibits show results within normal limits and the absence of any abnormality.

Exhibit K is a report from William E. Anderson, Jr., M.D., dated November 25, 1977 relating to an evaluation of the claimant done on November 24, 1977. Dr. Anderson states:

> I obtained the patients [sic] medical record from the above mentioned hospitalization and reviewed them extensively including copies of the electrocardiograms taken on 5-20-77, 5-23-77 and 7-18-77. They were all within normal limits. During this time Dr. Simmons did not get any cardiac enzyme levels to rule out heart muscle damage that may have not been picked up on routine electrocardiograms.
>
> The 9-13-77 EKG done at Monmouth Hospital revealed an incomplete right bundle branch block and some non specific ST segment elevation in leads V3 and V4. An EKG done in my office was the same inerpretation [sic] as the one done on 9-13-77.
>
> ...
>
> In retrospect, I feel that the likelihood of straining a muscle while lifting the 60 pound boxes was greather [sic] than him having a coronary artery disease as a precipitating factor that cuased [sic] him to develop chest pain and go homeaadd [sic] subsequently be admitted to the hospital. Furthermore the electrocardiograms do not support that he had an acute event with his heart occur at that time and this is further evidenced by the fact that he went to the hospital less than eight hours after he had his initial episode of pain in his chest.
>
> In Summary in examining the patient approximately 5 and 1/2 months aftetrthe [sic] episode of chest pain occurred, I feel that this may have been a job related injury such as a muscle strain rather than coronary artery disease....

Exhibit L is a report of Philip A. Habak, M.D., dated April 24, 1981. Dr. Habak states:

> The patient's electrocardiogram done yesterday in your office again showed a right bundle branch block with left anterior hemiblock. Widening of the QRS complexes was noted however with further widening of the QRS complexes in comparison with earlier tracings. The patient's chest discomfort is somewhat atypical. However there is definite evidence of coronary artery disease and a previous myocardial infarction.

A catheterization was performed under the direction of Dr. Habak April 30, 1981 as shown on exhibit M. The results show normal hemodynamics with mild generalized hypokinesis of the left ventricle. Seventy percent proximal stenosis of the diagonal branch of the left anterior descending coronary artery was identified together with mild plaques in the circumflex system without hemodynamically significant disease.

Exhibit N is a report from Dr. Anderson dated October 20, 1982 in which he states:

> His EKG from November, 1977 did reveal that he had anteroseptal myocardial infarction.
>
> With documented coronary artery disease by a coronary catheterization and some decreased motility of his left ventricle, I would have to say he has had a heart attack in the past. Indeed, if this was in November, 1977, then I am sure he had coronary artery disease prior to that time and the' heavy lifting, plus walking in and out of a walk-in box could have precipitated more anginal pectoris and [sic] his chest that I mentioned in my letter of September 26, 1979 probably being job-related with respect to heavy lifting rather than cardiac disease, could be related to both because the heavy lifting was a stress test within itself as well as walking in and out of the walk-in box and therefore, after he has had his coronary angiography performed and it does reveal coronary artery disease, I don't think the two can be separated. So I am saying there is a definite cause and effect from the patient [sic] work environment and heavy lifting and his chest wall pain and his angina and that the two cannot be completely separated.

Exhibits O, P, Q, R, S, T, U, V, W, X, and Y are reports from Galesburg Cottage Hospital covering the period of December 13, 1982 through May 20, 1983. Exhibits O through U relate to hospitalizations which occurred December 13, 1982 and February 13, 1983 and generally resulted in a diagnosis of angina. Exhibit Q contains results of an EKG which shows a complete right bundle branch block, left axis deviation, left anterior hemiblock and flat cardiac enzyme levels. Exhibits V, W and X deal with treatment and surgery for a gallbladder problem while exhibit Y is an exercise therapy progress note dated May 23, 1983 which relates claimant to have been in very poor physical condition but making slow progress in the program.

Exhibit R is a report from Martin D. McDermott, M.D., dated February 9, 1983. Dr. McDermott states:

> At present cardiac stress test does not show any evidence of ischemia although his fitness level is poor.
>
> It has been well established that the causes of coronary artery disease are manifold. These include family history, high blood pressure, diabetes, cigarette smoking, diet, etc. Given a patient with coronary artery disease the next question is whether or not strenuous physical exercise could cause a myocardial infarction. The answer to this question is yes.
>
> By the same token we know that heart attacks can occur without any exercise and there is no way to say for sure whether his incident in 1977 definitely caused a heart attack or not. At this point in Mr. Wheeler's life he still has a good heart that can be salvaged if he will heed appropriate medical advice.

Exhibit Z is the deposition of Dr. Anderson taken January 10, 1984. In it he relates that claimant suffers from coronary ischemia. He states that coronary ischemia frequently results from a build up of cholesterol and free fatty acids in the wall of a blood vessel which can cause a partial obstruction. He stated that underlying factors are things such as cigarette smoking, over weight, high triglyceride, high cholesterol, low thyroid functions and high blood pressure. He states that the overall cause of coronary ischemia is arterial atherosclerotic disease.

Dr. Anderson went on to state that the EKG done at Monmouth Hospital on September 13, 1977 revealed an incomplete right bundle branch block which had probably happened after the July 18, 1977 EKG was taken.

He interpreted the results of the catheterization procedure as follows:

> A. I would say, number one, he didn't have any significant muscle damage from a heart attack at that point and, therefore, the heart contracted and did everything it was supposed to do.
>
> Q. So, in other words, even though he had had this either constriction or blockage, it hadn't really caused major damage to his heart?
>
> A. That's what they're saying here, because under the description on the first page, description of cineangiograms, he says overall his left ventricular

function was normal, so in all of his-- and his mitral valve of his heart moved normally and no akinesis, meaning no movement, or hypokinesis, meaning movement but at a sluggish rate, were noted. That's significant in that he still had a relatively strong heart.

Q. And this was in 1981?

A. That's right.

When questioned concerning the effect of the lifting at employment which occurred May 20, 1977, the following discussion occurred:

Q. Dr. Anderson, is there any way that you feel that the May 20, 1977, lifting at his employment caused the myocardial infarction that happened, probably, in November, 1977?

A. I can't truthfully say because he put himself in the hospital, had relatively normal EKG's in Monmouth, but Simmons didn't get the enzymes on him, and that leaves me hanging. If it did, it couldn't have been super significant because we didn't have the incomplete right bundle branch block until the EKG in September was done and compared with those previous EKG's, which seemed to be relatively normal at that time.

When discussing the normal progressive effect of coronary ischemia, the following discussion occurred:

Q. Dr. Anderson, between the time that this incident occurred in May of 1977 and the infarction that we think occurred later, is it consistent, through smoking and perhaps his diet, et cetera, that his coronary ischemia would have progressed a sort of natural progression, based on those causes?

A. I would say it's possible. If he still had all the risk factors or was still in the same milieu to cause progression of it, I would say yes.

Q. Does the condition of coronary ischemia frequently progress-- the plaque on the arteries build up as time goes on?

A. Now, that goes back to a question [sic] was answered earlier. What I said was that we would have to follow the patient serially and measure his triglycerides and cholesterol, and the answer is yes, but you would have to follow him. One physician or group would have to have all his data. But I would say yes, you expect it to.

Exhibit AA is a transcript of the testimony of Dorothy J. Cooperman which was taken at the original hearing on this case September 27, 1979. In it she relates that on the morning of May 20, 1977 claimant advised her that he was feeling sick and that he had not felt well earlier in the morning and had considered not coming to work that day.

Exhibits BB and CC relate to the costs of obtaining a transcript and the deposition which are in the record as exhibits AA and Z in the total amount of $117.94. Exhibit DD is a transcript of claimant's deposition taken May 2, 1983. In his deposition claimant indicates that he may possibly still be married and that he has two children although he has been separated since 1959 and does not know the name of the younger child.

Claimant also related that the $6,000.00 in medical bills from Cottage Hospital in Galesburg are more related to the gallbladder than to anything else. He also stated that the $2,824.00 had nothing to do with the gallbladder and that the admission in February of 1983 was related to his heart.

In all other respects the deposition is largely cumulative of other evidence already in the record.

Claimant's exhibit 1 consists of medical expenses for care at Galesburg Cottage Hospital which all appear to be related to claimant's coronary care except for the charge in the amount of $6,645.62.

APPLICABLE LAW

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

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 20, 1977 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).

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, 595 (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

The record in this case makes it difficult to determine whether or not there has been a change in claimant's condition which would entitle him to other or additional benefits. At the hearing claimant testified that his condition and his symptoms are the same now as they were on May 20, 1977. Review of the medical evidence shows a change in condition regarding the right bundle branch block as detected by the EKG's. This block was apparently not present on May 20, 1977, May 23, 1977 or July 18, 1977. On September 13, 1977 an incomplete block was detected. According to exhibit 2 the block was complete when the EKG was done in December of 1982. A change in claimant's condition does appear to have occurred.

The record as a whole clearly shows that claimant does suffer from some coronary ailment. The block is definitely diagnosed as is the stenosis revealed by the catheterization. The testimony of Dr. Anderson clearly states that the stenosis would not have occurred as a result of an injury but that it is a condition which develops over a number of years and can become acute at any time. Dr. Anderson termed claimant's disease to be progressive in nature.

There is no medical opinion in the record of this case which clearly relates claimant's present physical condition to his work activities of May 20, 1977. In order to be compensable a possibility is not sufficient. It must appear from the record that it is more likely than not that the condition arose, at least in part, from the work related activity. The record as a whole does not contain information from which it could be concluded that a permanent injury occurred May 20, 1977.

The term ischemia which was originally diagnosed by Dr. Simmons, could easily result in a permanent impairment. The EKG's, however, do not confirm such and in fact indicate that the first permanent impairment claimant may have suffered occurred subsequent to July 18, 1977.

The medical doctors who have examined and treated claimant have been unable to arrive at a concensus as to any particular cause for his present symptoms. It appears more likely that his present symptoms and condition are a result of a number of the common factors which contribute to coronary artery disease than any particular identifiable incident. The progressive nature of his condition is such that, in all likelihood, it did exist to some extent prior to May 20, 1977. Claimant has had angina attacks subsequent to May 20, 1977 and it is possible that what occurred May 20, 1977 was also an angina attack. If it was, there is no showing that the attack caused any permanent impairment to claimant's heart. An angina attack is more properly considered to be a symptom of an underlining ailment than a cause of an underlining ailment.

With regard to claimant's medical expenses, there is no connection of the work related incident on May 20, 1977 to his present condition and accordingly the employer is not responsible for medical expenses which do not relate to a work related injury.

FINDINGS OF FACT

1. An arbitration award was entered October 8, 1979 which found claimant entitled to 26 2/7 weeks of temporary total disability payments and reimbursement for certain medical expenses all as specified in the decision.

2. That original arbitration decision found no permanent impairment to have resulted from the injury claimant sustained May 20, 1977.

3. Claimant suffers from atherosclerotic disease which causes coronary ischemia which is manifested by occurrences of angina pectoris.

4. At some point subsequent to July 18, 1977, but before September 13, 1977, claimant developed a right bundle branch block as a result of an anteroseptal myocardial infarction.

5. The causes of coronary artery disease are generally related to heredity, diet, smoking, high blood pressure, diabetes and others. Strenuous physical exercise can cause a myocardial infarction but such can also occur without being related to exercise.

6. It is more likely that claimant's myocardial infarction is a result of his underlying coronary artery disease than of any work activities performed on May 20, 1977.

7. The medical charges reflected in claimant's exhibit 1 are not related to any injury he sustained at work on May 20, 1977.

CONCLUSIONS OF LAW

Any impairment or lessening of claimant's earning capacity which has occurred since the date of the award in this case is not a proximate result of his original injury.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from this proceeding.

The costs of this proceeding are assessed against defendants pursuant to Industrial Commissioner Rule 500-4.33.

Signed and filed this 24th day of April, 1984.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VIOLA J. WHITE,

Claimant,

vs.

RALSTON PURINA COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 504102

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from a review-reopening decision wherein claimant was awarded healing period benefits, permanent partial disability benefits, and medical expenses.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Paul Sanden, and Leo Guoerfmont; claimant's exhibits 1 through 13, 17, 18, 18A, and 19; defendants' exhibits A through H; the depositions of William D. Reinwein, M.D., (also identified as claimant's exhibits 18 and 18A) and Frank Russo, M.D.; and the briefs and filings of all parties on appeal.

ISSUES

1. Whether the ruptured discs for which claimant received treatment from Dr. Reinwein were causally connected to her injury of May 23, 1978.

2. Whether claimant is entitled to any further temporary total disability/healing period benefits beyond July 17, 1979.

3. Whether the medical expenses that were ordered to be paid by defendants were authorized under section 85.27.

REVIEW OF THE EVIDENCE

At the time of the review-reopening hearing the parties stipulated that the applicable workers' compensation rate, in the event of an award, is $188.72 per week. The parties also stipulated that June 2, 1978 was the last day that claimant worked for Ralston Purina Company. (Transcript, pp. 3-4)

Claimant, who was 35 years old at the time of the review-reopening hearing, has an eighth grade education and has not received any vocational training. Claimant began working for Ralston in 1973 as an assembly line baler. Her job entailed standing at the machine which sacked five ten-pound bags of dog food into a large bale, shaking the bales to settle their contents, and running the end of the bales through a sewing machine. Claimant testified that her work required that she twist and turn her body continually as she manipulated the 50 pound bales. (Tr., pp. 10-22)

Claimant was working on May 23, 1978 when a 50 pound bale which she was handling began to tear open. Claimant intended to set the bale to her side before the next one came off the assembly line. She testified that as she straightened up after lifting the bale, she experienced sharp pain in her lower back and left side. Claimant was taken to the emergency room at Mercy Hospital in Davenport. (Tr., pp. 22-25) Records from Mercy's emergency room show that lateral and oblique views of the lumbar spine revealed no fracture. The interspaces were found to be normal, and no spondylolysis or hypertrophic change was apparent. (Claimant's Exhibit 5)

Claimant testified that she continued to work through June 2, 1978. Although she initially returned to her position at the baling machine, claimant was transferred first to a clean-up job and then to a warehouse where she stacked boxes. Claimant testified that the warehouse duty was not lighter work and she was unable to continue after June 2, 1978 due to pain in her back and left leg. Claimant again visited the emergency room at the end of her shift, and has not returned to work since June 2, 1978. (Tr., pp. 26-28)

Claimant admitted to injuring her back and both legs while working for Ralston in 1975 when she fell down a short flight of metal stairs. She testified that she was sore for one week, but recovered fully without missing any work. Claimant denies having had accidents of any nature after May 23, 1978, and specifically denies falling down stairs in 1978, 1979, or 1980. (Tr., pp. 28-31)

Claimant testified that she was treated by John F. Collins, M.D., and John H. Sunderbruch, M.D., for approximately one month following the May 23, 1978 incident. She was referred by Dr. Collins to Richard L. Kreiter, M.D., in September of 1978. (Tr., pp. 31-33) The examination notes of Dr. Kreiter from September 1, 1978, note claimant's mishap of falling down stairs at work in 1975, but that her present problem stated on May 23, 1978 when she lifted a 50 pound bale. Dr. Kreiter's notes indicate that claimant had complaints of low back pain since the time of that incident, with discomfort extending from the low back into the left buttock and at times to the foot and ankle. Dr. Kreiter noted that claimant had soreness in the lumbosacral area and in the sciatic notches bilaterally. Dr. Kreiter's recorded impression was chronic lumbosacral strain with no evidence of sciatica, mild depression, and exogenous obesity. Examination notes from October 3, 1978 state that claimant had not shown improvement and that back pain was present with all motion. Examination notes from November 13, 1978 indicate that claimant suffered pain with all range of motion of the back. (Cl. Ex. 6)

Claimant filed an arbitration action with regard to the May 23, 1978 incident. In an arbitration decision dated March 19, 1979 claimant was awarded temporary total disability benefits for the period from June 2, 1978 through October 11, 1978 (Arbitration Decision, File No. 504102).

Claimant testified that she had not done well since the arbitration hearing and has been unable to return to work due to continuous back pain. Claimant sought treatment from Frank Russo, M.D., on May 3, 1979. A history recorded on that date relates that claimant had suffered an injury approximately one year earlier while lifting some heavy boxes. Claimant was exhibiting symptoms of aching discomfort in the cervical area with pain in the lower thoracic and diffusely in the lumbar area. Claimant was also noted to have complained that pain radiated into the lower extremities, primarily into the anterior thighs. Dr. Russo's impression was that claimant suffered from musculigamentous injuries to the cervical and thoracolumbar spine with subsequent deconditioning of the musculature. (Defendants' Ex. D; Russo Deposition, pp. 7-8) Claimant was placed on a home exercise program. She was next seen by Dr. Russo on May 25, 1979 at which time she again complained of pain in her back and legs. Apparently unable to discover physical findings which correlated with claimant's symptoms, Dr. Russo carried out on EMG examination on June 22, 1979 to discover if claimant had suffered nerve damage. Dr. Russo testified that the EMG was basically normal and that no conclusive evidence of nerve root compression or a ruptured disc was discovered. The doctor believed that claimant's problems may have had a psychological component. Dr. Russo saw claimant July 17, 1979 at which time he believed that she had reached her optimum healing state from a physical standpoint. (Def. Ex. A & C; Russo Dep., pp. 8-13) Dr. Russo did not perform a myelogram on claimant, nor did he take x-rays during any of the examinations. (Russo Dep., p. 27)

Claimant was examined by Raymond W. Dasso, M.D., an orthopedic surgeon, on January 3, 1980 at the request of Disability Determination Services of Social Services. Dr. Dasso noted a history of claimant experiencing lower back pain which radiated into her left leg after lifting a 50 pound bale of dog food. Dr. Dasso's report stated:

> PHYSICAL FINDINGS: The Soto-Hall test or Kernigs test produces pain in the low back and is positive. The straight leg raising test is positive on the right at 90° and slightly positive on the left at 90°.
>
> The Lasegue's test is slightly positive bilaterally at 90°. The Patrick's test is negative bilaterally. The patient has normal sensation of the medial and lateral aspects of both feet and both lower legs and of the dorsum of both feet. The patient has normal muscle power of the tibialis anterior and posterior, the hamstrings, the quadriceps, and the gluteals bilaterally. The patient has peroneals but these muscles are weak on the left side. The Babinski reflexes are normal bilaterally. There is no ankle clonus of either ankle. The patellar and Achiles reflexes are normal bilaterally. The leg length was equal at 34 3/4 inches bilaterally. The calf circumference 13 3/4 inches on the right, 13 1/2 inches on the left. The thigh circumference was 21 inches on the right, 20 3/4 inches on the left. The patient has moderate to moderately severe spasm and tenderness of the lumbar muscles bilaterally. The range of motion of the lumbar spine was as follows:
>
> | Motion | Range |
> |---|---|
> | Flexion | 0° to 42° |
> | Extension | 0° to 12° |
> | Lateral Rotation | 0° to 20° to the right |
> | | 0° to 24° to the left |
> | Lateral Bending | 0° to 20° to the right |
> | | 0° to 20° to the left |
>
> The patient has normal heel and toe walking and standing bilaterally. The patient has fair balance on the right and fairly good balance on the left.
>
> X-RAYS: Dr. Krieters [sic] office 09-01-78 Lumbosacral Spine: AP, Laterals and Obliques revealed no fractures. No lytic or sclerotic lesions. The disc spaces were normal. There was no spondylolisis or spondylolisthesis and no real hypertorphic changes.
> Mercy Hospital 05-23-78 Lumbar Spine: AP, Laterals and Obliques revealed no fracture and normal interspaces. No spondylolisis or hypertrophic changes.
>
> DIAGNOSIS: 1. Possible protruding intervertbral disc, lower lumbar level, left side.
> 2. Lumbosacral myofacial strain, chronic.
> 3. Exogenous obesity.
>
> ....
>
> PROGNOSIS: Prognosis will depend on the results of a lumbar myelogram. I feel that this patient does have a possible protruding intervertebral disc. If this is confirmed by a myelogram the prognosis would most likely be poor unless a laminectomy was performed. At any rate the patient has had a persistent back pain for a year and a half which is aggravated at times by coughing and sneezing and activity. She is likely to have some degree of back pain in the future. (Cl. Ex. 8)

Claimant testified that she continued to experience back pain radiating into her left leg during 1980. She maintained that her complaints had persisted since her injury on May 23, 1978, and that she had not been without pain a single day since the injury occurred. In September of 1980 claimant contacted William D. Reinwein, M.D., after picking his name in the telephone book. (Tr., pp. 41-47) Dr. Reinwein, an orthopedic surgeon,

first examined claimant on September 5, 1980 at which time marked sciatic involvement was evident. Dr. Reinwein suspected a herniated disc at the L4-L5 level and arranged for claimant to be hospitalized on September 9, 1980. (Reinwein Dep., pp. 3-4) A myelographic study was ordered which was done by H. Burgee, M.D., on September 10, 1980. Dr. Burgee reported his findings as follows:

> Amipaque was injected via lumbar puncture and there was free flow of the material up and down the subarachnoid space. Selected spot films were made all the way from T 12 on down to the end of caudal sac. The upper nerve roots have a completely nomal [sic] appearance. The only area where I do see a definite pressure defect is at L4-5 level and this seems to affect the right side more than the left. There also is an area of slight indentation over the body of L4 on the right side. The indentation seems to be from above in both of these areas as we llook [sic] at the oblique views. On the lateral view there is a slight bulging of the disc space. All of the rest of the nerve roots fill out well. I feel that there is some compression of the nerve roots on the right side even though her pain is bilateral in location.
>
> IMPRESSION: I feel that there is an extradural defect at the L4 - 5 level as described above. It seems to be more on the right than the left. (Cl. Ex. 9)

A hospital history recorded by Dr. Reinwein on September 13, 1980 relates the onset of claimant's difficulties to an accident she had while lifting 100 pounds of dog food on May 23, 1978. The history also indicates that claimant had fallen down stairs in February of 1979 and had experienced further difficulties while lifting in September of 1980. Dr. Reinwein noted that claimant had pain and radiculopathy radiating down the lower left extremity for two years. (Cl. Ex. 9) Dr. Reinwein performed a laminectomy on claimant on September 13, 1980. The operation record recorded by Dr. Reinwein reads in part:

> The ligamentum flavum appeared markedly thick and invaginated into the spinal canal. This was carefully incised in the midline and carefully removed, incising caudally and then distally. Consequently the lamina of L4 was also removed, approximately 30% of the lamina being excised with Kerison ronguer. This allowed rather good visualization of the spinal canal at this point it was found to be mostely [sic] occupied by a large herniated midline disc. This was brought over further into view with retracting the dura more medially and consequently the nerve root more caudally, exposing this rather large disc in the axilla itself. This was brought into view and it was at this point found that this was partially protruded and some 4 mm. of protrusion was noted in the medial direction and underneath the dura. This was then further brought into view by incising the ligamentum flavum and allowing the disc to actually squirt under pressure in large amounts. This was then removed by means of pituitaries and consequently the decompression was obtained. Curetting of the intervertebral space was also carried out for removal of the disc. The procedure was carried almost entirely bloodless. The L5 - S1 disc was then approached through a lateral left approach, first the ligamentum flavum was incised and consequently the separation of the ligamentum was carried out from the proximal to the distal insertion. The lamina of L5 was removed only as far as the ledge of the lamina and this allowed good visualization using the lamina spreader. This disc was also found to be markedly bulging, herniated and protruding and it was then found to be obstructing the actual foramina of the first sacral nerve root. Then retraction of the first sacral nerve root was carried out properly and the disc exposed. It was found to have ruptured into the annulus, partially being contained by a rather thin posterior lontigudinal [sic] ligament. This was incised in the midline and consequently carried out more laterally and the large amount of disc was cleaned also from this level. The disc appeared rather gentlatenous, swollen and a considerable amount of disc material was found protruding at the level as well. This was curetted out properly and the entire area properly decompressed at L4 - 9 [sic] and L5 - S1. (Cl. Ex. 9)

Claimant remained hospitalized through September 24, 1980 and continued to be seen frequently by Dr. Reinwein after her release for physical therapy. Dr. Reinwein released claimant to return to work in February of 1981 with restrictions against heavy lifting (over 35 pounds), prolonged standing, stooping, and climbing. (Reinwein Dep., pp. 12-14) Claimant testified that despite being released to return to work, she could not actually return because she remained disabled. She stated that her motion was restricted to the point that she could not make her bed or move a chair. Claimant also indicated that she was unable to straighten back up if she stooped. (Tr., pp. 48-49)

Claimant returned to Dr. Reinwein on June 24, 1981 with complaints of leg pain and was treated with a nerve block injection. She next visited Dr. Reinwein on September 23, 1981, at which time her mobility appeared severely limited and the degree of pain was beyond that which could be treated with nerve blocks. (Reinwein Dep., pp. 13-15) Dr. Reinwein believed claimant to be suffering from stenosis postlaminectomy, which is a narrowing of a canal due to scarring following a laminectomy. A second surgery was performed on claimant on September 27, 1981. Dr. Reinwein testified that the surgery consisted of the removal of extensive laminectomy scarring, with removal of some bone to widen the nerve root canal. (Reinwein Dep., pp. 14-20)

Dr. Reinwein testified that he last saw claimant as a patient on March 3, 1982 at which time claimant complained of pain in both legs after standing for long periods. The doctor expressed a belief that claimant would have permanent restrictions concerning lifting, stooping, and climbing but refused to express his opinion in percentages of disability. (Reinwein Dep., pp. 21-23)

Dr. Reinwein was questioned as to the issue of causation of claimant's disability:

> Q. (Continuing) Doctor, do you have an opinion as to whether the history which Viola White gave to you, when you first saw her, could be the competent producing cause of the condition of ill-being for which you began to treat her on September 5th, 1980?
>
> A. Yes, I have an opinion.
>
> Q. And what is that opinion?
>
> A. That opinion is that this patient could well have the herniated disk that we found as a result from a situation in which she said she was in, while at work, when she was lifting a heavy bag and moving it in order to place it somewhere else at that time. Carrying out this type of movement, that would, in a person that is susceptible maybe to some weakness in the back, produce these types on injury. (Reinwein Dep., pp. 8-9)

Dr. Reinwein was also questioned as to what symptoms claimant would be expected to demonstrate if her back disability had been causally related to the May 23, 1978 injury:

> Q. Okay. When do you expect that Mrs. White would start exhibiting findings compatible with a fifth nerve root problem after the injury of May 23, 1978, if the protrusion was caused by that injury?
>
> A. Well, if a protrusion was caused by that, it would be immediate, the next day or even immediately.
>
> Q. So at least in 1979 and as early as May of 1978, she would already be showing findings that would suggest to an orthopedic surgeon, such as yourself, that she had a fifth nerve root problem?
>
> A. Yes, she would.
>
> Q. And what type of findings would she be exhibiting?
>
> A. She would be exhibiting symptoms consisting of probably pain, very breathtaking, knifelike, and radiating down to the buttock and the thigh, and not -- not being relieved by normally what she did about it, and I think that would be enough to alarm a patient to seek medical attention.
>
> Q. So if a physician had examined her in 1979 or as early as June of 1978, it's your opinion, then, that she would be having physical showings that would suggest a problem with the fifth nerve root?
>
> A. Yes, definitely. (Reinwein Dep., pp. 30-31)

Dr. Reinwein was then questioned as to the effectiveness of an EMG as a means of testing nerve root irritation:

> Q. Okay. Doctor, would electromyographic studies show a fifth nerve root entrapment?
>
> A. The studies are not immediate on the rostrum of our tests. We don't seem to think the EMG would at that time show that the injury is showing.
>
> Q. What about like in 1979? Do you think the EMG studies would show a fifth nerve root problem at that time?
>
> A. Oh, how many months would that be after the injury?
>
> Q. Approximately one year after the injury. Say May 3, 1979.
>
> A. Well, I think that our opinion is very divided. My own personal opinion is that the EMG is probably one of the most unreliable tests you want to take, and whether this test would, in itself, be diagnostic, it would certainly be a surprise to me, but as I stated, from the scientific point of view, the EMG should, if administered properly by the neurologist, by that I mean if the actual neurologist took time on an obese patient, especially, to position his electrodes at the accurate places -- now, that's another -- another thing that -- that many people don't think of, but a neurologist is actually sometimes at fault by his techniques of the thing. Now, you could then have a situation where he would not reveal the actual findings that another neurologist would probably be able to scan. So then you're dealing with that, too, on a patient, especially as obese as her, because you are placing electrodes at the points which are extremely difficult to locate on account of her obesity. (Reinwein Dep., pp. 31-32)

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. 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 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.

Iowa Code section 85.27 states, in part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, he should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care 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 on appeal is whether the ruptured discs for which claimant received treatment from Dr. Reinwein were causally related to her injury of May 23, 1978. Dr. Reinwein, who performed a laminectomy on claimant on September 13, 1980, testified that a trauma incident such as that which occurred on May 23, 1978 could have caused her condition. It was Dr. Reinwein's opinion that claimant would have experienced back pain radiating into the buttock and thigh immediately after the incident which caused her condition of ill-being. Claimant has testified to the onset of low back and left leg pain immediately after the May 23, 1978 incident and denies any other incident of trauma subsequent to that date which could account for any of her continuing symptoms. When Dr. Kreiter examined claimant in September of 1978 he noted that claimant had had complaints of low back pain since the May 23, 1978 incident, with discomfort extending from the low back into the left buttock, and at times to the foot and ankle. Dr. Kreiter's notes from November of 1978 indicate that claimant's condition had not improved. Dr. Russo treated claimant from May through July of 1979, noting during the initial examination that claimant complained of back pain radiating into her lower extremities, primarily into the anterior thighs. Dr. Dasso examined claimant in January of 1980, at which time he suspected a possible protruding intervertebral disc. While the existence of ruptured discs was not confirmed until the myelographic study in September of 1980, the symptoms suggesting disc problems have continually plagued claimant since May 23, 1978.

The first prong of defendants' argument is that if claimant had sustained a disc injury in May of 1978, it would have appeared during Dr. Russo's examination of claimant in 1979. This argument is severely diluted in light of the failure of Dr. Russo to perform a myelogram or to take x-rays of claimant's back despite symptoms suggesting one or more protruding discs. Instead, Dr. Russo relied solely upon an EMG study in formulating his opinion that no physical findings existed which correlated with claimant's symptoms. The testimony of Dr. Reinwein as to the unreliability of an EMG study, particularly when carried out on an obese patient without the aid of a neurologist, further detracts from Dr. Russo's opinion.

The second prong of defendants' argument is that claimant's ruptured discs actually resulted from a fall down stairs in February of 1979, as was disclosed in the history reported by Dr. Reinwein. The occurrence of such an incident in 1979 was expressly rebutted by claimant and inconsistant with histories recorded by all other practitioners who examined claimant. Of some significance is the omission for Dr. Reinwein's history of any reference to the 1975 incident in which claimant fell down stairs. In light of the fact that the overwhelming bulk of the evidence suggests that no such incident did, in fact, occur in 1979, the reference made thereto in Dr. Reinwein's history appears to be an erroneous entry. The deputy's finding that claimant's ruptured discs were causally related to her injury of May 23, 1978 is affirmed.

The second issue on appeal is whether claimant is entitled to further temporary total disability/healing period benefits beyond July 17, 1979. Because the condition for which claimant received treatment from Dr. Reinwein has been found to be causally related to the injury of May 23, 1978, claimant is entitled to healing period benefits from the date of her hospitalization on September 9, 1980 to her return to work on February 1, 1981. In addition, claimant is entitled to healing period benefits from her rehospitalization on September 27, 1981 until his treatment from Dr. Reinwein ended on March 3, 1982.

The final issue on appeal is whether the medical expenses that were ordered to be paid by defendants were authorized under section 85.27. It appears that claimant was paid temporary total disability benefits from June 2, 1978 through July 17, 1979. It is noted that the date the benefits were cut off came shortly after Dr. Russo's determination that claimant did not suffer from nerve root compression or ruptured discs. Under such circumstances, it was not unreasonable for claimant to have interpreted such action by defendants to be an unwillingness to provide further benefits of any nature, including medical treatment. As such, it was not unreasonable for claimant to enlist the services of Dr. Reinwein without first consulting with defendants. The deputy's order that defendants pay the medical bills associated with treatment rendered by Dr. Reinwein is affirmed.

FINDINGS OF FACT

1. Claimant worked as a laborer for Ralston Purina Company.

2. Claimant injured her back in a work related accident on May 23, 1978.

3. Claimant was paid temporary total disability benefits from June 2, 1978 through July 9, 1978.

4. Claimant has not experienced any incident of physical trauma subsequent to May 23, 1978.

5. Claimant has experienced low back pain radiating into the buttock, thigh, and left lower extremity since May 23, 1978.

6. Claimant entered the hospital on September 9, 1980, and underwent a laminectomy on September 13, 1980.

7. Claimant was released to return to work on February 1, 1981.

8. Claimant reentered the hospital on September 27, 1981 for additional surgery related to the earlier laminectomy.

9. Claimant remained under medical care until March 3, 1982.

10. Claimant suffered from ruptured discs in her back prior to her two surgeries.

11. The ruptured discs for which claimant received treatment were the result of the May 23, 1978 accident.

12. Claimant is 35 years old.

13. Claimant has not been able to return to her work at Ralston Purina Company.

14. Claimant has sustained an industrial disability of 40 percent of the body as a whole.

CONCLUSIONS OF LAW

Claimant has sustained the burden of proving that the treatment she received from Dr. Reinwein was causally connected to her injury of May 23, 1978.

Claimant is entitled to permanent partial disability for 200 weeks and healing period benefits for 43.142 weeks.

Claimant is entitled to payment for medical expenses incurred from treatment received by Dr. Reinwein.

THEREFORE, the decision of the deputy is affirmed.

WHEREFORE, it is ordered:

That defendants pay claimant an additional healing period of forty-three point one hundred forty-two (43.778) weeks at the weekly rate of one hundred eighty-eight and 72/100 dollars ($188.72).

It is further ordered that beginning on March 3, 1982 defendants pay the claimant a two hundred (200) week period of permanent partial disability at the weekly rate of one hundred eighty-eight and 72/100 dollars ($188.72).

It is further ordered that defendants pay the claimant the following medical expenses she has incurred as necessary to treat the industrial injury under review:

Moline Radiology Associates	$ 50.00
Anesthesiology	82.00
William D. Reinwein, M.D.	3,174.00
Moline Public Hospital	3,918.10

Costs are charged to the defendants in accordance with Rule 500-4.33 and shall include an expert witness fee of one hundred fifty dollars ($150) payable to William D. Reinwein, M.D., in accordance with the provisions of section 622.72, Code of Iowa.

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

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STEVEN A. WIELAND,	:	
Claimant,	:	File No. 604660
vs.	:	
	:	R E V I E W -
POSPISIL PAINTING,	:	
	:	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 matter came on for hearing at the Linn County Courthouse in Cedar Rapids, Iowa on September 6, 1983 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 Septemer 12, 1979. A memorandum of agreement calling for the payment of $163.18 in weekly compensation was filed October 11, 1979. A final report was filed April 3, 1981 indicating that claimant was paid 19 3/7 weeks of temporary total disability compensation. The record consists of the testimony of the claimant; claimant's exhibits 1 and 2; and defendants' exhibit A.

ISSUE

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

STATEMENT OF THE EVIDENCE

Claimant, age 24, was employed by Pospisil Painting on August 27, 1979. On that date he was cleaning a paint gun when it went off causing scarring of his right index finger, right palm, and a portion of his right wrist. He was originally treated by Martin Roach, M.D., a Cedar Rapids orthopedist. The wound required excision and drainage on at least three different occasions. Claimant was left with rather heavy scarring or the palm of the hand and index finer which was producing tightness and constracture of the index finger limiting its motion. Claimant then saw Thomas J. Pauly, M.D., a plastic surgeon. He performed surgery on April 4, 1980 in the form of an excision of the scar of the hand and revising this with multiple "z-plasties" to release the contracture. Claimant was seen by Dr. Pauly on November 29, 1982. At that time Dr. Pauly reported that claimant had had complete release of the previous contracture involving his index finger. He appeared to have 100 percent range of motion of the digit and complete return of function of his hand. The scarring remained.

On June 21, 1981 claimant reached "maximum healing capacity" (exhibit 1). A reported dated June 21, 1982 (apparently from Dr. Roach) indicated that claimant could extend his MP joint to about 5°. Claimant also noted some numbness in the ulnar side of the finger. Dr. Pauly stated that healing from surgery would be at least one year [after surgery] (exhibit 2).

Claimant testified that he returned to work full-time in May 1981 after having worked part-time earlier. Claimant testified that his condition stabilized at about the time of his last appointment in November 1982. Claimant complains of hand, wrist and arm problems. Claimant also indicated that he missed a scheduled appointment in June 1982. He testified that he was never specifically told to return to work. Claimant became employed as a food service manager and was the manager at Creighton University.

On cross-examination, claimant testified that he went to school at Luther College in Decorah in January 1980. He stated that he saw no physician for his hand from May 29, 1980 until June 21, 1982. Claimant testified that he was at college in August 1980 and started with Saga Food in Omaha in May 1981 for slightly over a year. He came back to Cedar Rapids. In November 1982 he became employed as a loan officer for a credit company. Claimant indicated that he was a part-time student at Coe College from May 1980 to August 1980. He received his degree in May 1981 from Coe College.

APPLICABLE LAW

1. Sections 85.3 and 85.20, Code of Iowa, provide this agency with jurisdiction 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., 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. Section 85.34(1), Code of Iowa, states:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of 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.

4. Section 85.34(2)(b), Code of Iowa, provides for the payment of 35 weeks of permanent partial disability compensation for the loss of an index finger. Section 85.34(2)(1), Code of Iowa, provides for the payment of 190 weeks of permanent partial disability compensation for the loss of a hand. Section 85.34(2)(m) provides for the payment of 250 weeks of permanent partial disability compensation for the loss of an arm.

5. In Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983) it was established that the loss of a scheduled member entitled claimant to recover permanent partial disability pursuant only to the terms of the statute. The elements of industrial disability are not to be considered in the recovery due.

ANALYSIS

The first issue to be determined in this case is the extent of permanent partial disability due to the claimant. It is clear to me from my own observation that claimant's injury is permanent. This observation, coupled with the medical evidence, supports such a finding. The problem is whether the permanent disability is confined to the index finger, the hand, or the arm. The law tells us we can go no further than the scheduled member. No industrial disability can be awarded. Dr. Pauly's report of December 6, 1982 indicates that claimant had a complete release of the index finger contracture. However, when I observed claimant's hand, I did observe contracture of it. Claimant's scar extends from the right index finger to wrist. The permanency in this case extends past the hand and wrist into the arm. Considering my observations it will be found that claimant's impairment is permanent to the extent of five percent of the arm.

Because the injury has been found to be permanent, the next thing to be determined is the amount of healing period due claimant. The record indicates that claimant starting missing work on August 28, 1979. Dr. Pauly released claimant to return to work on May 29, 1980. When one observes the medical records submitted in the case, one notes that the active treatment ceased at that time. Healing period compensation will be awarded from August 28, 1979 through May 29, 1980.

The parties stipulated that the rate of compensation is $163.18.

FINDINGS OF FACT

1. Claimant was employed by defendant Pospisil Painting on August 27, 1979.

2. Claimant was hurt while working on August 27, 1979.

3. Defendants filed a memorandum of agreement concerning an August 27, 1979 injury.

4. The injury of August 27, 1979 caused permanent impairment.

5. The permanent impairment caused by the August 27, 1979 injury is five percent of the arm.

6. Claimant reached maximum medical recuperation on May 29, 1980.

7. The rate of compensation is one hundred sixty-three and 18/100 dollars ($163.18).

CONCLUSIONS OF LAW

1. This agency has jurisdicton of the parties and the subject matter.

2. Claimant sustained an injury arising out of and in the course of employment on August 27, 1979.

3. Defendants will be ordered to pay unto claimant thirty-nine and three-sevenths (39 3/7) weeks of healing period compensation at the rate of one hundred sixty-three and 18/100 dollars ($163.18) per week. Defendants are to receive credit for compensation already paid.

4. Defendants will be ordered to pay unto claimant twelve and one-half (12 1/2) weeks of permanent partial disability compensation at the rate of one hundred sixty-three and 18/100 dollars ($163.18) per week.

IT IS THEREFORE ORDERED that defendants pay unto claimant thirty-nine and three-sevenths (39 3/7) weeks of healing period compensation at the rate of one hundred sixty-three and 18/100 dollars ($163.18) per week.

IT IS FURTHER ORDERED that defendants pay unto claimant twelve and one-half (12 1/2) weeks of permanent partial disability compensation at the rate of one hundred sixty-three and 18/100 dollars ($163.18) per week.

Interest is to accrue on this award from the date of this decision.

Costs of this proceeding are taxed against defendants.

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

Signed and filed this 27 day of February, 1984.

JOSEPH M. BAUER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GEORGE WILLIS,	:	
Claimant,	:	File No. 712206
vs.	:	
RUAN TRANSPORT CORPORATION,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
CARRIERS INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by George Willis, claimant, against Ruan Transport Corporation, employer, and Carriers Insurance Company, insurance carrier, defendants, to recover benefits under the Iowa Workers' Compensation Act for an alleged injury of August 25, 1982. It came on for hearing on March 7, 1984 at the Cerro Gordo County Courthouse in Mason City, Iowa. It was considered fully submitted on March 9, 1984.

The industrial commissioner's file shows a first report of injury filed September 1, 1982. A denial of compensability was filed on September 15, 1982.

At the time of hearing the parties stipulated to time off work from August 26, 1982 to January 3, 1983, to the fairness of medical expenses and to claimant's entitlement in the event of an award to ten percent permanent partial disability.

The record in this matter consists of the testimony of claimant, Dixie Jane Willis, Richard Charles Gladish, Daniel Dean Hartwell, and Gene Allen LaBounty; claimant's exhibit 1, a series of medical expenses; defendants' exhibit A, a letter from S. J. Laaveg, M.D., dated January 12, 1984; defendants' exhibit B, office notes from Dr. Laaveg dated December 9, 1983; defendants' exhibit C, a letter from Dr. Laaveg dated March 9, 1983; defendants' exhibit D, office notes from Dr. Laaveg dated March 9, 1983; defendants' exhibit E, a letter from Dr. Laaveg dated December 9, 1982; defendants' exhibit F, office notes from Dr. Laaveg dated December 9, 1983; defendants' exhibit G, a letter from Dr. Laaveg dated August 18, 1983; defendants' exhibit H, office notes from Dr. Laaveg beginning November 3, 1982; defendants' exhibit I, office notes from Dr. Laaveg beginning February 23, 1983; defendants' exhibit J, office notes from Dr. Laaveg beginning May 18, 1983; defendants' exhibit K, a letter from Dr. Laaveg dated November 24, 1982; defendants' exhibit L, office notes from Dr. Adams beginning with January 27, 1977; defendants' exhibit M, a report from Donald C. Berge, M.D., dated September 9, 1982; defendants' exhibit N, a letter from Dr. Berge dated November 22, 1982 and office notes from Dr. Laaveg.

ISSUES

The issues in this matter are whether or not claimaht's injury arose out of and in the course of his employment; whether or not there is a causal relationship between claimant's injury and his present disability; and whether or not claimant is entitled to permanent partial disability or healing period benefits. Claimant has rasied the issue of entitlement to benefits under Iowa Code section 86.13.

STATEMENT OF THE CASE

Six foot one inch 45 year old married claimant, who in August of 1982 weighed 230 pounds, testified to being a truck driver for defendant employer since 1970.

He recalled the circumstances of his alleged injury of August 25, 1982 thusly: The dispatcher called him at home at 7:30 a.m. for a rush load of bulk cement to be taken from Mason City to Algona. He selected a tractor with a tri-axle trailer attached because he wished for a smoother ride. He did the servicing including checking oil, belts, lights and tires and installed his radio. He then learned he could not use the trailer; so he dropped it and selected a different one which he took to the plant for loading. The bills with the load indicated it was a double rush order with a delivery time of 9:00 a.m. He left after 8:00. He headed out Highway 18 and was at full throttle when he got to the outskirts of Clear Lake. He did not note any particular landmarks, but somewhere between Clear Lake and Ventura he hit a dip in the road, bumped his head on the truck roof and bottomed out. He felt or heard a rapid pop in his back. Pain started immediately. He shifted his weight and pressed back against the seat. He continued to Algona where he unloaded his load using a hose that was rolled up on the back of the truck. He was in misery after the incident. He drove with one foot in the vent hole, sitting on his left side with his back pressed against the seat.

When he got to the terminal, he fueled his truck. He asked the dispatcher for an accident form. The dispatcher wanted him to take another load. He got an order and went to the silo where he was third in line. His back felt worse. A co-employee suggested he should go home. He called the dispatcher and told her he was going to the doctor. A co-employee took him home. He laid on the floor. His spouse came in and called the doctor. He saw Dr. Berge and then Dr. Laaveg.

Claimant explained bottoming out by saying that when a driver's full weight hits the seat if the seat is not full of air the driver will hit the floor. Air in the seat is controlled by squeezing a trigger on the left side to get air into an air bag. Inflating the bag will make the seat solid and elevate the driver. He said that routinely he would sit in the seat, get it to a comfortable inflation and then usually he would not make further adjustment. Another seat adjustment called the foreaft bar allows movement of the back cushion to reduce back slap. He had his seat set to float. He estimated he had head clearance of six inches.

Claimant testified that the ride in the truck is terrible and that the driver is pounded. He noted that trucks set up with a fifth wheel mounted on the frame are particularly bad with the front end "coming down just like a sledgehammer."

Claimant claimed that Highway 18 "has always been a mess" with bumps and dips although there were no particular things he watched out for. He did not recall hitting any object in the road. He did not notice anything different about the highway on August 25, 1982. He suspected that he might have been injured at a spot where there had been an old culvert.

Claimant acknowledged spending more time driving bulk trucks than flatbeds. He said that he always went as fast as the governor on the truck would allow. He thought speed on the truck would range from 56 to 62 miles per hour.

Claimant reported returning to work on January 4, 1983. After a layoff until late February he was able to work regularly.

Dixie Jane Willis, claimant's spouse of 26 years, remembered the events of August 25, 1982 as follows: She took claimant to work after a routine night the evening before. He was fine. She did errands and had coffee with a friend. She was surprised to find her husband at home when she returned to the house. He looked pale. He seemed to be in pain. He had trouble getting up from the floor. He told her to call the doctor.

Richard Charles Gladish, terminal manager for defendant employer, recalled seeing claimant coming back from the silos. The witness was upset because it was a busy time. The dispatcher told him that claimant had hit a bump and injured himself. Gladish thought that something did not seem right and he contacted insurance adjustor LaBounty to investigate the claim. More specificaly he asked LaBounty to ride in the same unit down the same highway carrying the same amount of product. Hartwell, a driver, was chosen to drive the adjustor and instructed to go full out.

The witness acknowledged having another driver injured by hitting his head on the top of truck. He agreed that the trucks run rough. He admitted that his relationship with claimant had not been the best in that claimant has filed grievances and has had grievances filed on his behalf by the union.

Daniel Dean Hartwell, who has worked for defendant employer for nearly ten years testified that he was asked to make a test run. He was told which tractor and trailer to take and how the trailer was to be loaded. He was directed to pick up LaBounty at a truck stop and drive full speed to Ventura and back. Because he thought claimant might have been mistaken about where the incident occurred, he drove four or five miles past Ventura to about three miles from Garner. He thought that he had stayed on his side of the highway and had not passed any other vehicles. He did not find a bad spot. He did not notice anything about the condition of the road that was bad. He did not leave the seat.

Hartwell, who said he had been on Highway 18 on lots of occasions, characterized the road as "a little bumpy" and "just a rough road." He stated that the trucks do not "ride that great." He did not take any particular precautions when traveling Highway 18 as he did on another route.

Gene Allen LaBounty, insurance adjustor, claims investigator and branch manager at the Mason City office, recollected a call from Gladish, who routinely sent him copies of first reports of injury, asking him to check out claimant's claim.

On September 1, 1982 he was picked up by Hartwell with whom he rode past Ventura. He saw no humps, niches or ravines in the road. He described the road as clear and fairly level with little ups and downs. He observed Hartwell and saw no bad jolts or movement because of something in the road.

Earliest medical evidence shows claimant was seen by Dr. Adams on January 27, 1977 complaining of back trouble. There was pain at L5 on the right which radiated down the right leg and into the right lateral calf area. Claimant gave a prior history of a fractured scapula and skull in an accident in 1965 which also left him with swelling in the right leg. Claimant's forward bending was poor. There was decrease in his right ankle jerk. Straight leg raising was to 45° on the right and 80° on the left. The doctor thought that there might be degenerative changes at L5 on x-ray. He diagnosed a sprain in the lumbosacral joint which aggravated arthritis. Claimant was kept off work.

Claimant was seen through February and allowed to return to work on February 28, 1977.

When claimant was seen in May his lumbosacral pain was gone, but he had mild D-10 tenderness.

Claimant was seen on February 15, 1978 with a history of stepping from his truck, slipping on something, twisting and jerking, and experiencing back pain on February 6, 1978. He was stiff and sore particularly when he tried to lift a 100 pound bag on February 11. Claimant was tender on the right at L5. His right ankle jerk was absent. Dr. Adams diagnosed a lumbosacral sprain. Claimant was fitted with a lumbosacral belt.

On April 28, 1978 Dr. Adams noted the end of the sprain and claimant's recovery without additional or new permanent disability.

Donald C. Berge, M.D., first saw claimant on August 25, 1982. He diagnosed low back pain with radiculitis.

S. J. Laaveg, M.D., saw claimant on October 4, 1982 and took a history of two episodes of back pain before claimant hit his head on the ceiling of his truck. Claimant complained of mid low back pain which radiated into the posterolateral aspect of

the hip. Claimant's weight was recorded at 270 pounds. Claimant was tender to palpation at L4-5 and L5-S1. He was able to forward flex to 70°. He was tender over the posterolateral aspect of the right greater trochanter. Straight leg raising was negative. On x-ray there was mild degenerative facette disease at L4-5 and L5-S1. Dr. Laaveg's impressions were: "Low back pain with radicular pain at the posterolateral aspect of the right thigh secondary to workman's comp. injury with mild degenerative facette disease at L4 thru S1" and "[r]ight greater trochanteric bursitis." Claimant was advised to lose weight and was placed on an anti-inflammatory. He was to avoid lifting, bending or twisting or prolonged sitting.

Claimant was back the next month. He was able to forward flex to 80°. He was still tender at L4-L5, L5-S1, the right posterosuperior iliac crest and the right greater trochanter.

In December claimant's forward flexion was to 50°. Straight leg raising was negative. Claimant was to return to work for a trial period on January 4, 1983. On December 9, 1982 claimant was given a ten percent impairment rating.

Claimant was back to see the doctor on January 19, 1983 at which time he complained of discomfort while driving especially if he had to do lifting. He was tender at T12-L1, over the spinous tips and over the paraspinous muscle masses. He was neurologically intact and straight leg raising was negative.

Claimant had a CT scan which was recorded by Dr. Laaveg as showing a right L5-S1 disc herniation. When claimant was seen in late March of 1983 he was still having right-sided sciatica. Straight leg raising was positive on the right at 70°. Surgery was discussed.

Claimant was last seen by Dr. Laaveg on December 9, 1983. He told the doctor of difficulty riding particularly with bouncing up and down. He complained of aching discomfort in his back with radiation into the posterolateral aspect of the thigh and hip. He denied weakness or radiating pain into the leg and ankle. Straight leg raising was negative. He forward flexed to 40°. He was moderately tender at L4-5, L5-S1 and over the right posterior superior iliac crest. Claimant was to avoid lifting over 50 pounds and sitting in one position for longer than 60 minutes.

On March 9, 1983 Dr. Laaveg wrote: "Mr. Willis's [sic] explanation of his injury is logical and is the history that he originally gave me which I have no reason to doubt and can completely explain his persistent back pain and now the finding of a herniated disc."

APPLICABLE LAW AND ANALYSIS

The first issue to be decided is whether or not claimant's injury arose out of and in the course of his employment. In order to receive compensation for an injury, an employee must establish that the injury arose out of and in the course of employment. Both conditions must exist. Crowe v. DeSoto Consolidated School District, 246 Iowa 402, 405, 68 N.W.2d 63 (1955).

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

In addition to establishing that his injury occurred in the course of his employment, claimant must also establish the injury arose out of his employment. An injury arises out of the employment when there is a causal connection between the conditions under which the work is performed and the resulting injury. Musselman v. Central Tractor Co., 261 Iowa 352, 154 N.W.2d 128 (1967). The test for arising out of has been described as "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." Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 700, 73 N.W.2d 732, 737 (1955) citing. In re McNicol, 215 Mass. 497, 102 N.E. 697 (1913).

Claimant alleges injury when he hit his head on the roof of the truck and then bottomed out. Claimant testified to six inches of head clearance. He is six feet one inch tall and at the time of this incident weighed at least 230 pounds. Claimant, Gladish and Hartwell were in agreement that the ride in the trucks is not good. Claimant described Highway 18 as "a mess." Hartwell characterized the road as "a little bumpy" and "just a rough road."

Claimant's spouse corroborated his testimony regarding his activities after he left work on August 25, 1982. Claimant gave the doctor a history consistent with that to which he testified at hearing and the medical evidence generally is supportive of claimant's contention.

Gladish asked LaBounty to investigate claimant's claim. That probe revealed no peculiarities on the road surface. The test duplicated the route and the amount of product. It was made in the same unit. It occurred fairly close in time to claimant's alleged incident. However, even that close proximity did not rule out either repairs to the highway or changes due to late summer heat. Other variables include adjustment of the seat and the improbability of being able to drive on the exact same portion of the highway claimant traversed. The most outstanding discrepancy in testing, however, was the physical stature of the test driver compared with that of claimant. There is no evidence of any other source of injury to claimant.

The record viewed as a whole supports the finding that claimant's injury arose out of and in the course of his employment.

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

Again medical evidence supports claimant's claim. He had some prior back problems, but those healed with no permanent impairment.

At the time of hearing the parties stipulated to a healing period running from August 26, 1982 to January 3, 1983 and to a ten percent industrial disability in the event claimant's injury was found to have arisen out of and in the course of his employment. Those stipulations will be followed in the order.

The parties were unable to reach an agreement as to rate in the event of an award. Applicable wage information was submitted. Iowa Code section 85.36 provides in pertinent part:

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had he worked the customary hours for the full pay period in which he was injured, as regularly required by his employer for the work or employment for which he was employed, computed or determined as follows and then rounded to the nearest dollar:
>
> ....
>
> 6. In the case of an employee who is paid on a daily, or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of said employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury.

This agency has determined that 85.36 must be read in light of the unnumbered paragraph and that partial weeks are not to be considered. Schotanus v. Command Hydraulic, Inc., I Iowa Industrial Commissioner Report 294 (1981). Vacation periods have been ignored in selecting the thirteen weeks to be used for rate purposes. Lewis v. Aalf's Manufacturing Co, I Iowa Industrial Commissioner Report 206 (appeal decision 1980) (district court affirmed).

Ignoring weeks in which claimant received vacation pay and a partial week, claimant's earnings for the prior thirteen weeks are found to be $9,360.13 or $720.01 weekly. Claimant is married and has shown entitlement to four exemptions at the time of his injury. His rate is found to be $406.08 per week.

Claimant has raised the applicability of Iowa Code section 86.13 to his case. That section provides in pertinent part:

> 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.

An additional five percent weekly for the time of the healing period will be awarded on the basis of defendants' unreasonable delay in commencing payment of benefits.

There was seemingly some dissension between claimant and Gladish prior to this incident. Although under some circumstances that might make the investigation of claimant's claim reasonable, in this instance it does not. Gladish had another driver who was injured in the same manner by hitting his head on the roof of his truck. He knew the trucks were rough riding. His testing duplicated a number of factors but there were several ways as pointed out above in which the testing was faulty. Additionally, there was nothing to suggest claimant's injury outside his employment. Reports and letters from the doctor are consistent with claimant's statements regarding his injury.

There were no ambiguities and inconsistencies in claimant's claim. Withholding benefits was arbitrary and unreasonable. The five percent award based on Iowa Code section 86.13 will be attached to healing period only. Although the evidence presented clearly relates claimant's permanent impairment to his injury, defendants will be given the benefit of the doubt as to whether or not a failure to pay permanent disability also was unreasonable. Claimant had prior back troubles and conceivably some portion of his impairment might have been related to those difficulties or to a preexisting arthritis rather than to his injury.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That claimant is six feet one inch tall and weighed at least 230 pounds on August 25, 1982.

That claimant had approximately six inches of head clearance in his truck.

That on August 25, 1982 claimant was traveling at full speed on Highway 18.

That on August 25, 1982 claimant hit his head on the roof of his truck and bottomed out.

That claimant sought medical treatment on the date of this incident.

That claimant had a sprain in the lumbosacral joint in January of 1977 which aggravated his arthritis and kept him off work.

That claimant had a second lumbosacral sprain in February of 1978 which resulted in his being fitted with a lumbosacral belt.

That claimant has an impairment rating of ten percent.

That claimant is to avoid lifting over fifty pounds and sitting in one position for longer than an hour.

That claimant is married and was at the time of his injury entitled to four exemptions.

That claimant had earnings in the thirteen weeks prior to his injury of $9,360.13 or average weekly earnings of $720.01.

That defendants' failure to pay claimant compensation was unreasonable.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant had an injury arising out of and in the course of his employment on August 25, 1982.

That there is a causal connection between claimant's injury of August 25, 1982 and his present disability.

That claimant is entitled to healing period benefits from August 26, 1982 to January 3, 1983.

That claimant is entitled to permanent partial industrial disability of ten percent.

That claimant is entitled to an additional five percent in benefits during the time of his healing period pursuant to Iowa Code section 86.13.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant healing period benefits from August 26, 1982 to January 3, 1983 at a rate of four hundred six and 08/100 dollars ($406.08).

That defendants pay unto claimant permanant partial industrial disability for fifty (50) weeks at a rate of four hundred six and 08/100 dollars ($406.08) with payments to commence on January 4, 1983.

That defendants pay unto claimant an additional twenty and 0/100 dollars ($20.30) per week for the period from August 26, 1982 to January 3, 1983.

That defendants pay amounts due and owing in a lump sum.

That defendants pay interest pursuant to Iowa Code section 85.30.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33.

That defendants file a final report in sixty (60) days.

Signed and filed this 15th day of March, 1984.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

OMER WOOD, Claimant, vs. ARMERS COOP ELEVATOR OF AWA, IOWA, Employer, d RMLAND MUTUAL INSURANCE MPANY, Insurance Carrier, Defendants.	File No. 692307 A P P E A L D E C I S I O N

Claimant appeals from a proposed arbitration decision in ich he was denied benefits for an alleged injury arising out and in the course of employment in September of 1981. The cord on appeal consists of the pleadings; the transcript of arbitration proceeding together with claimant's exhibits 1 rough 11 and defendants' exhibits A through D; and the briefs d arguments of the parties. Appellant has requested oral gument which is denied.

ISSUES

Claimant appellant contends the deputy was in error in finding (a) that the injuries were not incurred in the course of claimant's employment and (b) that there is no relationship between the injury and claimant's disability.

REVIEW OF THE EVIDENCE

The parties stipulate that the applicable rate of compensation is $176 per week. They further agree that claimant's last day of employment with defendant employer was October 26, 1981. (Transcript, pages 2-3)

Claimant was 40 years old at the time of the hearing and has a ninth grade education. He is married and has five children at home. (Tr., pp. 9-11) His previous employment has included farming, carpentry and truck driving. (Tr., p. 12) Claimant suffered a compensable back injury in 1975 while working for another employer. He was treated for approximately one year, and a five percent permanent disability was determined. (Tr., pp. 16-17) Following claimant's release from medical treatment, he hauled crops for his father-in-law. In the spring of 1976 claimant began working for defendant employer as a truck driver and laborer. (Tr., pp. 17-23) Claimant's work duties included unloading 65 pound bags of beans from his truck. Claimant testified he suffered soreness in the muscles of his back but had no extraordinary problems in his back or legs. (Tr., pp. 24-25) Claimant stated that during harvest season he worked seven days a week. (Tr., p. 25) In September of 1981 claimant was unloading wet corn at the elevator. He testified that he was attempting to pry open a tailgate when he felt a pulling and burning sensation that ran from his lower back to his left shoulder. (Tr., pp. 28-30) Claimant continued to work that day and for the next several weeks. (Tr., pp. 30-33) Claimant stated the pain in his back became worse and he advised his employer of his injury. (Tr., pp. 31-32) On October 26, 1981 claimant visited his family doctor and did not report for work. His employment was terminated by defendant employer on that day. (Tr., p. 34-35) Claimant was treated by Robert Roth, M.D., for "tenderness in the region of the sacroiliacs [sic] and lumbar spine." (Report #1, January 19, 1982) Dr. Roth prescribed aspirin and heat application and referred claimant for a CT scan. (Report #1) Claimant testified he also consulted a chiropractor for treatment. (Tr., pp. 43-44) Claimant again visited Dr. Roth on November 24, 1981 with complaints of pain in the lower back and numbness in the left leg. Dr. Roth found evidence of spasm of the muscles of the lumbar region but no limitation of motion or loss of strength in the leg. (Report #1) Dr. Roth prescribed Butazolidin and Flexeril and ordered a CT scan, which had not yet been performed. (Report #1) The CT scan suggested a bulging of the disk between the third and fourth lumbar vertebrae. Claimant was referred to Walter Eckman, M.D., a neurosurgeon, for further evaluation. (Report #1) Dr. Eckman found indication of a possible disc herniation, L-3/4 on the left. (Defendants' Ex. B, p. 5) Claimant was admitted to the hospital on January 12, 1982 for additional testing which included an EEG and CT scan of the brain and a lumbar myelogram. (Def. Ex. B, p. 6) The EEG showed slight abnormality; the CT scan and myelogram results were normal. Following the administration of the myelogram, claimant experienced seizures. (Def. Ex. B., p. 6) Claimant was dismissed on January 14, 1982 with a discharge diagnosis of radicular and leg pain of uncertain etiology and seizures following Metrizamide myelogram. Dr. Eckman prescribed Dilantin for the seizure problem. (Report #8, Marian Health Center Records) In March claimant visited Dr. Eckman for a follow-up examination. Dr. Eckman continued claimant on Dilantin and examined claimant again in July 1982 for continuing lower back pain. A second CT scan of the lumbar spine was performed in September 1982 and yielded results of no abnormality of the osseous structures. (Cl. Ex. 1) Dr. Eckman was unable to identify a cause for claimant's pain and did not recommend surgery for disc herniation. (Def. Ex. B, pp. 12-13) Claimant was examined in January of 1983 by Dennis Nitz, M.D., a neurologist, for evaluation of continued seizure activity. (Def. Ex. A, p. 5) Dr. Nitz testified that the results of his exam were normal and claimant had full range of motion in his back. A sleep deprived EEG produced normal results. (Def Ex. A, pp. 6-7) Dr. Nitz stated that claimant reported that he had no seizure problems prior to the January 1982 myelogram, but claimant may have had underlying seizure tendency prior to the test. Dr. Nitz stated that the Amipaque dye used in the myelogram could have been the cause of claimant's initial seizures, but it was unusual for the seizures to continue. (Def. Ex. A., pp. 9-10) Dr. Nitz indicated that other causes of claimant's continued seizures could be previous heavy use of alcohol and some family history of seizures, although seizures were not usually hereditary. (Def. Ex. A, p. 10)

Claimant testified that he has not worked since he left the employ of defendant. (Tr., p. 49) He stated that his seizures continued until the spring of 1983. (Tr., p. 63) Claimant presently takes five Dilantin a day in addition to medication for his back and "nerves." (Tr., p. 62) He stated that he is able to hoe in his garden and pull weeds, but rests after activity. The Dilantin makes him sleepy and sick and he sleeps for an hour after taking it. (Tr., p. 64)

Patricia Wood, wife of claimant, testified that following the October 1981 injury, claimant could not get around well and couldn't lift anything heavy. Claimant is unable to help around the house and gets sick when he works in the garden. (Tr., pp. 97-100)

James Werling, manager for defendant employer, testified that claimant was an excellent worker but on three previous occasions had not came to work during the busy harvest season and had been threatened with job loss. Mr. Werling explained that company policy prohibited vacation time during the harvest season. (Tr., pp. 118-120) Prior to the week claimant was terminated, he had not reported for work until Tuesday. Claimant finished out the week and on the following Monday, October 26, claimant sent word that he was sick. Mr. Werling did not believe claimant and terminated him for again failing to report for work on time. (Tr., pp. 123-125) Mr. Werling testified that up until his date of termination, claimant had been carrying out his normal work duties. (Tr., pp. 119, 130)

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury in September 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).

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; i.e., the injury followed as a natural incident of the work. Musselman, 261 Iowa 352, 154 N.W.2d 128; Reddick v. Grand Union Tea Co., 230 Iowa 108; 296 N.W. 800 (1941).

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 in September 1981 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

Based upon the foregoing principles and the evidence presented, the claimant has failed to prove an injury which arose out of and in the course of his employment. The fact that claimant was suffering muscle spasms and discomfort in the fall of 1981 is undisputed by the medical evidence. It is not sufficient, however, that claimant merely demonstrate a medical condition. He must also show that such condition resulted from work activity. Evidence of this necessary causal relationship has not been offered. Claimant has pin-pointed a particular incident in September while trying to open a tail gate at work as the onset of his complaint. He offered no corroborating testimony to such injury nor did he make a report of the incident to his employer at the time it occurred. Instead, claimant continued his regular work duties of lifting and unloading and did not seek medical treatment until October 26, 1981, immediately following his employment termination. At that time, Dr. Roth found indications of "tenderness" in the lumbar region and recommended a CT scan, advise which claimant apparently did not take. Although claimant has stated that his back problem persisted and he received continuing chiropractic treatment for it, no reports as to that course of treatment have been offered, and it was not until late November that claimant again consulted Dr. Roth. There is no indication in the ensuing reports of Dr. Roth, or any of the other physicians' reports, that claimant's back condition was in any way work-related. Dr. Roth expresses uncertainty as to whether it was a continuing problem stemming from the previous injury, and Dr. Eckman reports an "uncertain etiology" of claimant's pain.

The deputy noted in his proposed decision that claimant has failed to establish a relationship between the injury and claimant's resulting disability. Results of the CT scans and the myelogram have been within normal limits and have failed to establish the presence of a condition that could arise from work activities. None of the reports of Dr. Roth or Dr. Eckman discuss claimant's injury in relation to work duties performed for defendant employer. There is no indication from Dr. Nitz that the seizures claimant suffers could be related to employment activities.

FINDINGS OF FACT

1. Claimant was 40 years old at the time of the hearing and has a ninth grade education.

2. Claimant is married and has five children.

3. Claimant suffered a compensable back injury in 1975 while working for another employer. A five percent permanent disability was determined.

4. Claimant alleges he was injured while working for defendant in September of 1981.

5. Claimant sought medical treatment for a back complaint on October 26, 1981.

6. Claimant's employment had been terminated on October 26, 1981.

7. Claimant had engaged in his usual full time work duties prior to termination.

8. Claimant's treating physicians were unable to determine a cause of claimant's back pain.

9. Expert testimony has failed to establish a causal relationship between claimant's back pain and previous work activities.

10. Expert testimony has failed to connect claimant's seizures to a work related injury.

CONCLUSION OF LAW

Claimant has failed to sustain his burden of proof that he sustained an injury arising out of and in the course of his employment.

WHEREFORE, the proposed decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered that claimant shall take nothing further from this proceeding.

That the costs are taxed to the employer pursuant to Industrial Commissioner Rule 500-4.33, except two hundred fifty dollars ($250) of Dr. Eckman's charge is assessed against the claimant for the reasons outlined in defendants' request for assessment of costs.

Signed and filed this 29th day of May, 1984.

Appealed to District Court;
Pending

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EUGENE WOODARD,	:	
	:	
Claimant,	:	
	:	FILE NO. 732632
vs.	:	
	:	A R B I T R A T I O N
ARMSTRONG TIRE & RUBBER,	:	
	:	D E C I S I O N
Employer,	:	
	:	
and	:	
	:	
LIBERTY MUTUAL,	:	
	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Eugene Woodard against Armstrong Tire & Rubber Company, employer and Liberty Mutual Insurance Company, insurance carrier, defendants.

Claimant alleges that he sustained a compensable injury to his back on September 18, 1981 and seeks weekly compensation benefits and payment of medical expenses.

The hearing commenced on January 31, 1984 in the hearing room in the industrial commissioner's office in Des Moines, Iowa at 1:00 p.m. The case was considered fully submitted upon conclusion of the hearing on that date.

The record in this proceeding consists of the testimonies of claimant, Jim G. Schwinn and James L. Vivone; claimant's exhibit 1 which consists of the medical reports identified by claimant pursuant to rule 4.18 of the commissioner's rules; claimant's exhibit 2 which is the evidentiary deposition of William Roger Boulden, M.D.; and defendants' exhibits A and B which are copies of telephone call records of the defendant employer.

ISSUES

Issues presented by the parties at the time of hearing are whether or not claimant sustained an injury arising out of and in the course of his employment, the nature and extent of any disability from which claimant suffers, whether or not any injury found to exist is the cause of any disability which is found to exist, a determination of the employer's responsibility for payment of expenses of medical treatment under section 85.27 and a determination of whether or not claimant is barred from recovery under the provision of section 85.23.

REVIEW OF THE EVIDENCE

At the commencement of the hearing, it was stipulated by the parties that the time claimant missed from work was the dates of September 22, 1981 through November 4, 1981 inclusive. It was also stipulated that in the event of an award, the correct rate of compensation would be $238.57 per week.

Claimant testified that on September 18, 1981 he was employed by Armstrong Tire & Rubber Company working in a job classification which required him to sweep floors by hand and with the machine and also to pick up pieces of cardboard from the floor. He testified that normally two persons were assigned to this job but that on Friday, September 18, the other employee was absent and no replacement had been obtained. Claimant went on to relate that he was not doing any more or different work than he would normally perform even if two workers were being utilized.

Claimant stated that on the Saturday following that Friday, he could hardly get out of bed. He related calling in to report that he would not be at work and on Tuesday, September 22, went to see Dr. Boulden. Claimant did not recall whether he arranged to see Dr. Boulden on his own or was sent there by some representative of the employer. He confirmed that he had previously seen Dr. Boulden for back problems at the direction of the employer and that such is probably the reason he chose Boulden in this instance.

Claimant did not recall precisely what he had told Dr. Boulden regarding the source of his back problems but that whatever Dr. Boulden entered in the report should be correct.

Jim G. Schwinn testified on behalf of the defense that he is the Industrial Relations Manager for the defendant employer.

He described the floor sweeper position as one in which the

orker would use a hand broom or motorized sweeper. He indicated hat the job would not involve heavy lifting and that lifting ould be limited to picking up pieces of cardboard, each weighing ess than one pound, from the floor.

Schwinn described the established procedure for reporting n-the-job injuries as requiring a report to first aid if the njury is noted while at the plant. He related that there is no eport in the first aid records of claimant making any complaints r or near September 18, 1981. He related that for injuries irst discovered after leaving the plant the employee is required o phone the plant and report it and that the person taking the all is instructed to fill out a sheet in the nature of defendants' xhibits A & B which particularly include an indication of hether the absence from work is industrial or personal.

Schwinn examined exhibit A and related that his interpretation the report relating to the claimant was that exhibit A showed laimant worked the 7 to 3 shift in department 85 and that laimant is clock number 1945. He went on to state that the cords showed that claimant indicated that he had not seen the ctor and that the problem was personal. He indicated that the rm also showed that claimant himself had made the call and at the call was made at 4:59 a.m. He went on to describe hibit B as containing essentially the same information except at claimant was going to the doctor and that the call was made 4:35 a.m.

Schwinn indicated that claimant was not scheduled to see a ctor at the plant because no industrial injury had been laimed and also related that the company received no notice om the union or otherwise that claimant was making a claim of industrial injury until the original notice which commenced is proceeding was received.

On cross-examination, Schwinn confirmed that claimant's job d involve bending over and that he was familiar with claimant's rsonnel file. Schwinn acknowledged that claimant's personnel le did include the medical report from Dr. Boulden which lated claimant's problem to excessive bending at work. hwinn related that the company does not generally accept the ctor's relation of a problem to work if other causes of the oblem are known to the medical staff. He did not offer any her explanation for claimant's problem.

James L. Vivone was called to testify on behalf of defendants. related that he is the immediate supervisor of the claimant d that in September of 1981, claimant's job included picking cardboard from the floor for about one or two hours per day d that the balance of claimant's time was spent sweeping the oors.

Vivone could not recall any claim for injury being made on ptember 18, 1981 or since except when he was given notice of is hearing.

Vivone described claimant a good worker and as one who does t complain about his physical condition. He did describe the nding which claimant had to do as excessive.

The evidence in this case also consists of the undersigned king official notice of the existence of claimant's other ses, namely file number 519788 and 535859 and the results of ose cases. Official notice is not taken, however, of the idence submitted in those cases.

Claimant's exhibit 1 consists of nine different medical ports. Of particular significance are the reports of Dr. ulden dated September 22, 1981 which relate claimant's back in to work performed the previous Friday. The other reports nsist of claimant's process of repeat calls with the doctor, a ave of absence and return from employment and the statements ncerning claimant's return to work issued by Dr. Boulden.

Claimant's exhibit 2, the evidentiary deposition of Dr. ulden, reflects his qualifications as an orthopedic surgeon d gives a history of his treatment of the claimant since cember, 1978 up to the time the deposition was taken on ptember 24, 1982. Commencing at page 13 of the deposition, Dr. ulden relates that he saw claimant on September 22, 1981 for mplaints of low back pain. The doctor diagnosed myofascial ck pain and indicated that claimant related doing a lot of nding at work the day prior to the day he woke up with back in. Dr. Boulden reported taking x-rays of claimant's lumbar ine and did not find any interval changes when compared with x-rays of December, 1978. At pages 17 and 18 of the deposi- on, Dr. Boulden expresses his opinion that claimant does not ve any functional disability. At page 20 of the deposition, Boulden expresses his opinion that the cause of claimant's sability during the period of September, 1981 through November, 81 was the bending down at work and that such was based upon history given to him by the claimant.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the dence that he received an injury on September 22, 1981 which se out of and in the course of his employment. McDowell v. n of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. tral Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The supreme court of Iowa in Almquist v. Shenandoah Nurseries, Iowa 724, 731-32, 254 N.W. 35, 38 (1934), discussed the inition of personal injury in workers' compensation cases as lows:

> 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 September 18, 1981 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).

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, 760-761 (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, 815 (1962).

The employment activity must be a proximate cause of claimant's disability but it need not be the only cause. Armstrong Tire & Rubber Company v. Kubli, 312 N.W.2d 60 (Iowa 1981).

According to the court in Robinson v. Department of Transportation, 296 N.W.2d 809, 811 (1980), the actual knowledge alternative of notice is satisfied if the employer has information which puts him on notice that the injury may be work-related. The court stated that 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. The standard to which the employer is held in suspecting the possibility of a potential compensation claim is that of a "reasonably conscientious manager".

ANALYSIS

This case contains little disputed evidence. It is the weight to be given the evidence and the inferences to be drawn from it which appear at issue.

The petition was filed in this case on June 6, 1983, a time well within two years from the date of injury, as amended at hearing. Claimant did not give actual notice of injury until commencement of this action. The only manner in which the employer could have obtained information which would constitute actual knowledge of the potential claim is the report of Dr. Boulden dated September 22, 1981 which, interestingly enough, was addressed to the defendant insurance carrier with a copy being sent to defendant employer. Schwinn testified that the report was part of claimant's personnel file. When compared with the standard set forth in Robinson, 296 N.W.2d 809, 811 (1980), it is clear that the defendant employer and its insurance carrier were both made aware of sufficient facts to alert a reasonably conscientious manager that the possibility of a potential compensation claim existed. Schwinn testified that the opinion of a doctor relating a problem to work is not generally accepted if other causes of the problem are known to the medical staff. This implies that some representative of the employer made a conscientious decision regarding whether or not the problem was work-related. If there was sufficient information to require the making of such a decision, that same information is sufficient to constitute notice of the potential for a compensation claim.

The balance of this case hinges upon the credibility and weight to be given to claimant's testimony.

Claimant's testimony is corroborated by witnesses Schwinn and Vivone as to the actual activities in which he would have been involved at work on September 18, 1981. The fact that claimant on September 22, 1981 was having back difficulties is corroborated by Dr. Boulden. Claimant's supervisor, James Vivone, expressed the opinion that claimant was a good worker and did not complain about pain or physical problems while at work. As claimant's testimony is taken as true, the opinion of Dr. Boulden, which relates the back difficulties to claimant's work activity, is reasonable and is accepted.

The stipulation of the parties establishes claimant's time off work and rate of compensation.

Dr. Boulden found no permanent impairment in claimant's back. The only evidence of permanent impairment is found in the advice for caution regarding certain activities. He particularly

states that the advice he has given claimant is the same advice he would give anyone regardless of whether or not the person had a preexisting back problem. Claimant's complaints of pain are not accompanied by clinical supportive findings. Functional impairment is one of several elements to be considered in determining industrial disability but industrial disability can generally not be found unless some degree of functional impairment exists. The evidence in this case discloses no indication of an emotional disability and this deputy will not, based upon the evidence in this case, find an industrial disability in the absence of any functional impairment.

In the absence of an offer of other medical care by the employer, particularly with Dr. Boulden being the previously authorized physician for claimant's back problems, it is found that Dr. Boulden was an authorized treating physician and that all expenses for treatment incurred with Dr. Boulden and claimant's travel expenses in receiving that treatment are compensable under section 85.27.

Although the parties stipulated that claimant's disability began September 22, 1981 the evidence clearly established that it began September 19, 1981, the day following the date of the injury. Since the stipulation is obviously incorrect as to the date disability began, it will not be followed.

FINDINGS OF FACT

On September 18, 1981, claimant sustained an injury arising out of and in the course of his employment.

Claimant sustained the injury by performing excessive bending while picking up pieces of cardboard from the floor at the employer's place of business.

Claimant was temporarily totally disabled from September 19, 1981 to November 4, 1981, inclusive.

Claimant's rate of compensation is $238.57 per week.

Claimant sustained no permanent impairment and no permanent partial disability as a result of his injury of September 18, 1981.

The distance from claimant's residence to Dr. Boulden's office is 95 miles round trip and that he traveled the same four times in obtaining treatment for the injury.

The employer and its insurance carrier both had actual knowledge of the potential for a compensation claim as a result of their receipt of the report from Dr. Boulden dated September 22, 1981, which report appears as report number two of claimant's exhibit number one.

CONCLUSIONS OF LAW

Claimant did sustain an injury arising out of and in the course of his employment on September 18, 1981 for which he is entitled to benefits under the workers' compensation laws.

Claimant is entitled to temporary disability benefits for the period commencing September 19, 1981 through November 4, 1981 inclusive at the rate of $238.57 per week.

The employer had actual knowledge of claimant's injury and that the injury had the potential to result in a compensation claim. That knowledge was obtained within 90 days from the date of the injury. Claimant's petition in this matter was therefore timely filed.

Claimant has failed to prove the existence of any industrial disability and that he is not entitled to compensation for industrial disability.

Claimant is entitled to compensation for the travel incurred in obtaining medical treatment at the rate of $.22 per mile on 380 miles for a total of $83.60.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant, in a lump sum, one thousand six hundred and 80/100 dollars ($1,600.80) representing six and five-sevenths (6 5/7) weeks of temporary total disability payments at the rate of $238.57 per week.

IT IS FURTHER ORDERED that defendants pay claimant the sum of eighty-three and 60/100 dollars ($83.60) representing travel for obtaining medical care.

IT IS FURTHER ORDERED that defendants pay interest upon the unpaid weekly compensation benefits at the rate of ten percent (10%) per annum computed from the date each payment became due with the first payment coming due on September 29, 1981.

The costs of this proceeding are assessed against the defendants pursuant to Industrial Commissioner Rule 500-4.33.

Defendant shall receive credit for amounts paid under a group plan as provided by section 85.38.

Defendants shall file a final report wichin twenty (20) days from the date of this decision.

Signed and filed this 7th day of March, 1984.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EUGENE WOODARD, Claimant, vs. ARMSTRONG TIRE AND RUBBER, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File Nos. 535859/519788 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant sustained industrial injuries to his back on December 1, 1978 and April 12, 1979, both of which resulted in payment of temporary total disability payments. While suffering no permanent impairment, claimant did transfer to a lower paying position subsequent to the second injury. Claimant appeals from a review-reopening decision wherein the deputy determined that his job transfer was unrelated to the injuries of December 1, 1978 and April 12, 1979.

The record on appeal consists of the hearing transcript which contains the testimony of claimant, Earl Seymore, and Gary Beshear; the deposition of William Roger Boulden, M.D.; claimant's exhibits A, B, C, and D; defendants' exhibits 1, 3, 4, 5, 6, 7, 13, 14, 15, and 16; and the briefs and filings of all parties on appeal.

ISSUE

Whether the cause of claimant's job transfer was proximately related to his injuries of December 1, 1978 and April 12, 1979.

REVIEW OF THE EVIDENCE

Claimant, 43 years old at the time of the hearing, has been employed with defendant since 1960 with the exception of August 1962 to July 1964 when he served in the military. Claimant performed janitorial work for three weeks before transferring to the mill room where he worked for nine years. The jobs performed by claimant in the mill room included cutting rubber, stockpiling, and operation of a banbury. All of these jobs required frequent lifting of heavy rubber items throughout a regular eight hour shift. In 1969 claimant transferred to a job building truck tires. He testified that tire department jobs were incentive jobs which required constant bending, lifting, and twisting. Claimant apparently transferred to another tire building position in 1971. (Transcript, pp. 7-15)

Claimant testified that he was in good health when he began working for defendant employer in 1960. (Tr., p. 12) According to claimant's answer to interrogatory number seven, filed April 18, 1982, his earliest back problem occurred on January 25, 1977 when he "injured [his] back at work while pushing tread book out of a hole in cememt floor." (Defendants' Exhibit 1) Records from defendants' medical department failed to make reference to such an incident, but do indicate a "Sacro-iliac lesion with musculo skeletal [sic] trauma" on January 11, 1977. The records further reflect that claimant was hospitalized from January 30, 1977 to February 25, 1977. (Def. Ex. 16) In a report dated February 7, 1977, Sidney Robinow, M.D., stated:

> This man gives a history of having had low back trouble off and on over the years. About two weeks ago, while simply pushing himself away from the table while still sitting in a chair, he developed suddenly severe pain in the low back. He saw a local osteopathic physician on a couple of occasions in an effort to rid himself of this pain, but the manipulations that were given did not help. He was admitted about one week ago by Dr. Yugend complaining of terrible pain in the low back. He denied any aggravation of the pain by sneezing, coughing or bearing down. He did notice that there was increased frequency of urination for awhile but this has cleared up. This man works as a tire builder and the last time he worked was about two weeks ago. With the low back pain, he has had right lower extremity pain off and on also in the posterior hip and posterior thigh and it travelled all the way to the knee. He doesn't feel that he's had any definite improvement with the traction and physical therapy while in the hospital.
>
> By examination, he was noted to climb in and out of bed rather guardedly and his walk was guarded also. He was clumsy with heel and toe walking and there was moderate restriction of low back motion. There was no percussion or point tenderness of the low back. Straight leg raising was negative bilaterally. The deep tendon reflexes examination showed that the knee reflexes were absent but the ankle reflexes were bilaterally active and equal. There were no apparent motor or sensory deficits.
>
> X-ray examination of the lumbosacral spine showed a transitional vertebrae between L-5 and S-1.
>
> IMPRESSION: 1. Degenerative disc disease.
>
> PLAN: In as much as the patient, from the clinical point of view, certainly doesn't appear to have a herniated disc at this time, I would continue with conservative therapy and would increase pelvic traction to 25 pounds and add intermittent pelvic traction to the physical therapy. Ultrasound should be tried also and perhaps apply anti-inflammatory medication. (Def. Ex. 14, item 5)

Upon his discharge from the hospital claimant was instructed by Dr. Robinow to use a lumbosacral support and try home traction. Claimant was released by Dr. Robinow to return to light duty work on May 2, 1977 and to regular work on May 23, 1977. (Def. Ex. 14, item 6)

Claimant's answer to interrogatory number seven also made reference to work related back injuries on November 7, 1977 and December 29, 1977. (Def. Ex. 1) He was seen by Marshall Flapan, M.D., an associate of Dr. Robinow, on January 20, 1978. At that time Dr. Flapan recorded the following in his clinical notes:

> This thirty-eight year old Caucasian male has a history of several weeks of back discomfort. He's been treated in the past by my associate, Dr. Robinow for degenerative disc disease without neurologic deficit. He was off work one time last year for a month but has recovered and went back to building tires. He got along extremely well building passenger tires but when the type of tire changed he again injured his back in throwing a tire over his shoulder and up on to a pile.
>
> He complains of discomfort in his low back with some radiation to his right hip and thigh but never below his knee. He denies any numbness, tingling or weakness. He's been on light duty at work for the past couple of weeks. (Def. Ex. 14, item 6)

Dr. Flapan anticipated that claimant would be able to return to his usual employment activities after his episode. Dr. Flapan released claimant to return to light duty work on March 6, 1978 and released him from care on April 20, 1978 after noting that claimant had had little back discomfort while on light duty. (Def. Ex. 14, item 6)

Claimant testified that he had been building passenger tires on December 1, 1978 but was sent to an upper floor to move a number of of truck tires. He recalled pulling something in his back while lifting one of the truck tires and being sent home before the end of his shift due to lower back pain. Claimant visited defendants' medical department the following Monday (December 4, 1978) at which time he was sent to William Roger Boulden, M.D., for treatment. In a December 18, 1978 letter to the insurance carrier, Dr. Boulden reported:

> Thirty nine year old gentlemen who on 12/1/78 was lifting heavy truck tires and developed low back pain. He said that he has had problems with his back in the past, but he said that it has always gotten better with rest. This pain is now located in the small of his back, with no radiation of pain. There is no increase of pain with coughing or sneezing.
>
> Physical Examination: He has decreased forward bending and decreased lateral bending, both secondary to pain and spasm. There is no sciatica notch irritation. The deep tendon reflexes of the knees and the ankles are equal and symmetrical. He has negative straight leg raising. Dorsi-flexors of the feet and ankle are equal and symmetrical.
>
> The lumbar spine films are normal.
>
> Impression: Myofascial irritation, secondary to strain of the lumbosacral ligaments.
>
> Recommendations: An intense physical therapy program and immobilization of the lumbar spine. We will re-evaluate him in two weeks. He is not to work until further notice. He was given a prescription for Naprosyn for the anti-inflammatory effect. He is to follow up with us in two weeks. (Def. Ex. 13, item 8)

Physical therapy was prescribed by Thomas W. Bower, L.P.T., who also examined claimant on December 18, 1978. (Def. Ex. 13, item 7) Claimant was released by Dr. Boulden on January 2, 1979 to return to light duty work on January 2, 1979. He was instructed to lift no more than 10 or 15 pounds for one week, whereafter he would be permitted to return to his regular work. (Def. Ex. 13, item 6)

Claimant testified that he returned to light duty work on January 7, 1979 and began building passenger tires again one week later. (Tr., pp. 18-19) Claimant testified that he injured his back again on April 12, 1979 as he was lifting rubber onto a cart. He recalled being referred to Dr. Boulden who again prescribed light duty work and physical therapy. Claimant testified that he began missing work again due to severe lower back pain on April 20, 1979. (Tr., pp. 19-21)

Claimant was examined on May 1, 1979 by Dr. Boulden who reported to the insurance company by letter:

> The patient is following up for his low back pain. The patient returned back to work and he was doing fairly well and then he developed some discomfort of his low back when he lifted an approximately 700 pound roll, resulting in low back pain. This is located in the small of his back radiating around both posterior iliac wing areas. The patient was tried with light duty, which did not relieve his symptoms and he was subsequently sent here for our evaluation once again.
>
> The patient has diffuse tenderness throughout the lumbar spine region. He has decreased forward bending, because of pain. The lateral bending to the left increases the pain worse than the right lateral bending. There is negative straight leg raising bilaterally. The deep tendon reflexes of the knees and the ankles are equal and symmetrical.
>
> Impression: Myofascial strain.
>
> Recommendations: Rest, ultra sound phonophoresis and Naprosyn.
>
> Discussion: The question arises of whether this patient is going to have difficulty in the future, since he has had so many repeated bouts of low back pain. I think strong consideration should be considered about placing this man in a different position, where his limitation of weight lifting will be decreased to a 15 to 20 pound level. I would like to see if this would be better and if he can be more productive. I will follow up with him in two weeks and I will give you a follow up at that time. (Def. Ex. 13, item 5)

Dr. Boulden released claimant to return to work on May 21, 1978 subject to a 15 to 20 pound lifting restriction. (Def. Ex. 13, item 3) Claimant testified that he was layed off work until June 25, 1979 when he was transferred to a salvage equipment and material job. Claimant recalled that he was informed of the job transfer by Joyce Kain, who works in the industrial relations department. He understood the transfer to have been negotiated on his behalf by his local union. Claimant became a floor sweeper operator in September of 1980, another job which was commensurate with his limitations and which had been negotiated by the union on his behalf. (Tr., pp. 21-24)

As of the time of the hearing claimant continued to work for defendant as a floor sweeper operator. While stating that he would like to return to a tire building position, claimant noted that he remained under a 15 to 20 pound lifting restriction imposed by Dr. Boulden. Claimant was not under the care of any doctor at the time of the hearing. He testified that while working as a tire builder he earned minimum of $405 per week. Claimant's weekly earnings as a floor sweeper are $293. (Tr., pp. 23-26)

Earl Seymore, vice-president of United Rubber Workers Local 164, testified that he was the union representative responsible for negotiating claimant's 1979 job transfer. Seymore explained that claimant's transfer was pursuant to the collective bargaining agreement in effect at that time. While admitting that Dr. Boulden had not indicated that claimant's restrictions were permanent, Seymore indicated that he understood them to be so because only persons with permanent restrictions were placed under the terms of the bargaining agreement. (Tr., pp. 46-52)

Section 39(b) of the collective bargaining agreement between defendant and United Rubber Workers Local 164 states:

> (b) An employee with fifteen (15) or more years of service and who is no longer capable of satisfactorily performing the work of his regular job because of advanced age, or health restrictions will be placed on other jobs in his established division or other divisions as deemed suitable and will replace other employees where necessary. If such employee is transferred to another division, it shall immediately become his resident division. All such transfers shall be negotiated by the Company and the Local Union. Such placements including shift preference shall be in accordance with seniority.
>
> The provisions of this paragraph shall also apply to employees who suffer a permanent medical restriction as a result of an occupational injury or illness which prevents them from performing their regular job in a satisfactory manner. (Claimant's Ex. B)

Gary Beshear, defendants' industrial relations manager, testified that claimant was transferred from his tire building job due to a lengthy history of a back related pain. He indicated, however, that should a workers' limitations be changed he has the option at any time of exercising his seniority and bidding on another job. (Tr., pp. 52-58) Beshear was questioned as to whether an employee could take the initiation to have restrictions removed and changed:

> A. I think all circumstances are different. If we had a case in which the individual's physician was emphatic about the permanency of such a restriction and our doctor agreed, then we might go along with that sort of thing, but normally we do have people who can change themselves and yes, he can have that changed if he wished to. (Tr., p. 59)

Beshear testified that one reason claimant had not resumed working as a tire builder was that his particular job had been eliminated in December of 1980. He indicated that for claimant to return to a different tire building job classification, claimant must take the initial steps in exercising his seniority. (Tr., pp. 54-60)

On cross-examination Beshear refused to state that claimant's December of 1978 and April of 1979 injuries were substantial factors in claimant's 1979 job transfer. He indicated that while those incidents may have played a part in the subsequent transfer, claimant's transfer was based upon his entire medical record as a whole. (Tr., pp. 60-61)

William Roger Boulden, M.D., testified by deposition that he examined claimant following injuries to his back in April of 1978, August of 1979, and September of 1981. Dr. Boulden testified that his diagnosis on each occasion was a myofascial strain and that in no instance was any abnormality found. The doctor stated that temporary weight restrictions were imposed following each incident but that the restrictions were never intended to be permanent. Dr. Boulden testified that he last saw claimant on October 27, 1981 at which time no permanent structural injury was found. (Boulden Deposition, pp. 3-15) Claimant was last released to return to work on November 4, 1981. Dr. Boulden testified as to the permanency of claimant's restrictions:

> Q. Were there to be any restrictions placed at that time that had not been there prior to September of 1981?
>
> A. I did not add any new restrictions, no, other than as stated, basically, proper back hygiene.

Q. You were not particularly concerned about any amounts of weight that he could lift?

A. No. I don't use weight restrictions as a permanent type of thing, temporary basis only.

Q. Have you seen Mr. Woodard since the 27th of October, 1981?

A. No, I have not, except for today.

Q. As of the 27th of October, 1981, did you at any time ever diagnose any sort of a permanent structural injury?

A. No, I have not.

Q. Was it your belief as of October 27, 1981, that Mr. Woodard should operate under any sort of permanent restrictions with regard to his job?

A. Basically, I would not want him at that point in time or ever to do repetitive bending and lifting activities.

Q. Is this the same type of recommendation that you would make for anybody?

A. The recommendation I make for every job laborer that has to do any type of work. I'm talking about with their back. Let me clarify that "with their back." I'm not saying they can't do repetitive lifting as long as they use their legs properly and use proper back support when they're lifting, but I'm talking about bending with the back, lifting with the back. Those are the things I'm talking about.

Q. As of the 27th of October, 1981, have you at any time ever assigned to Mr. Woodard any sort of a functional disability rating?

A. No, I have not.

Q. Why have you not?

A. Because I have not found any structural -- objective structural changes in his examination and/or X ray studies.

Q. It's your belief that if he just follows ordinary common sense mechanics that would apply to just about anybody, that he would not have any functional disability?

A. If he would use proper back hygiene, continue with proper exercise regimens, I feel that his back would probably not be much of a bothersome situation to him. (Boulden Dep., pp. 16-18)

Dr. Boulden stated that it is currently his feeling that weight restrictions are not important in cases such as claimants. He testified that his concern in this case was claimant employ proper back maneuver and motion when he does any lifting. (Boulden Dep., pp. 20-21) On cross-examination the following ensued:

Q. He should not, as I take it from your last visit of November of last year, he should not do heavy industrial work is about the restriction that you placed on him?

A. Unless he does it properly.

Q. By "properly" I take it that means avoiding the repetitive lifting, bending, twisting, stooping?

A. With his back, that's correct.

Q. With his back?

A. I did not say that he couldn't lift. If he lifted with his back, he could not. If he bent at his hips -- knees and hips rather than his back. (Boulden Dep., p. 27)

On redirect examination:

Q. I have a few more questions. Doctor Boulden, each time that you examined Mr. Woodard it was a result of some sort of action on his part that was abusive in nature, correct, in terms of his back?

A. Yes, you could say that.

Q. It wasn't a situation that was the result of any sort of underlying continuing back disease or permanent injury that would just flare up on its own?

A. Nothing that I could find.

Q. When you mentioned to Mr. Pratt that Mr. Woodard would be able to function in any kind of a heavy industrial situation as long as it did not involve repetitive bending or lifting or that type of thing, is that the type of recommendation you would make to just about anybody?

A. Well, yeah. Basically, yes, to answer your -- That's why they're having more and more companies that are having safety instructors or safety supervisors, things like that that are supposed to be around these jobs. The labor force is doing and making sure these jobs don't have these, you know, things that you're talking about, trying to use proper back mechanics, therefore, trying to cut down the number of back injuries. That's what we're, you know, that's why the orthopedic surgeons have been hollering at for years to have the jobs themselves made safer so the people don't have to do them.

So, like I said, the answer to your question is, yes, I think Mr. Woodard at this point in time that he could do a heavy industrial job if he didn't have to do repetitive bending with his back. Use a machine to do it if you have to or something like that. I don't think the restriction should be a hundred percent. I think it should be a hundred percent on his back.

Q. In other words, you are talking about using proper techniques for bending?

A. Exactly.

Q. How would that differ from the techniques that were actually used?

A. Basically, I'm saying that you don't lift with your back, you lift with your legs. You don't bend, you stoop at the knees and hips. (Boulden Dep., pp. 30-32)

APPLICABLE LAW

In Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980) the Iowa Supreme Court held that an employee who was transferred by his employer to a lower paying job following a work-related phlebitis attack was entitled to additional workers' compensation benefits. The court stated:

> One basis for increasing compensation is an increase in industrial disability proximately caused by the injury subsequent to the date of the original award. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455, 457 (Iowa 1969). See also Meyers v. Holiday Inn of Cedar Falls, 272 N.W.2d 24 (Iowa Ct.App. 1978) (same rule applies when increased disability results from failure of a diagnosed condition to improve to the extent anticipated). An increase in industrial disability may occur without a change in physical condition. A change in earning capacity subsequent to the original award which is proximately caused by the original injury also constitutes a change in condition under section 85.26(2) and 86.14(2). See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (Iowa 1980); 3 A. Larson, The Law of Workmen's Compensation, § 81.31, at 15-502 (1976).
>
> ....
>
> Blacksmith offered evidence through his own testimony and that of the treating physician that the 1976 hospitalization was for tendonitis of the right leg rather than thrombophlebitis of the left leg as indicated by Dr. Torruella, but the deputy found in favor of Dr. Torruella's version of that incident. This finding was upheld by the commissioner. We are bound by the finding because it has substantial support in the evidence when the record is viewed as a whole. See § 17A.19(8)(f), The Code; Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 176 (Iowa 1979).
>
> However, the deputy made an additional and more crucial finding which was also upheld by the commissioner. He found that Blacksmith's job transfer was caused by a "preexisting condition had by the claimant for thrombophlebitis" rather than the work-related April 1977 thrombophlebitis. On that basis, the deputy held Blacksmith failed to met his burden of proof and denied his claim for additional compensation. He said: "In short, this claim must fail because the claimant's lessening of remuneration from work was caused by the preexisting condition itself rather than any aggravation thereof."
>
> ....
>
> ...He is correct that when an employer's liability for an injury has previously been established the employee may obtain increased compensation in a review-reopening proceeding by proving an increased disability which was proximately caused by that injury. See DeShaw v. Energy Manufacturing Co., 192 N.W.2d 777, 780, (Iowa 1971); Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667, 670 (Iowa 1971) ("This is all claimant need prove."). Thus the commissioner was bound by the arbitrator's determination of liability for the 1977 injury.
>
> ....
>
> Because the 1977 disability was compensable in either event, it was not material in the arbitration proceeding whether it resulted from an initial injury or merely from an aggravation of a prior injury or condition. See Nicks v. Davenport Produce Co., 254 Iowa 130, 135, 115 N.W.2d 812, 815 (1962) ("While the plaintiff would not be entitled to compensation for the results of a pre-existing injury or disease, the mere existence thereof, at the time of a subsequent injury is not a defense.")
>
> ....
>
> However, it is also clear the arbitrator's decision did not depend on a finding that the phlebitis was an initial injury. The arbitration decision did not relieve Blacksmith of the burden in the review-

reopening proceeding to show his increased disability was proximately caused by the 1977 injury. Furthermore, if the initial disability resulted from aggravation of a preexisting injury or disease, the award could not be increased unless the aggravation was a proximate cause of the additional disability. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 759 (1956).

....

When evidence is undisputed and not subject to different inferences, an issue is to be decided as one of law. See Hawk v. Jim Hawk Chevrolet-Buick, Inc., 282 N.W.2d 84, 87 (Iowa 1979). A cause is proximate if it is a substantial factor in bringing about the result. See Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974). It only needs to be one cause; it does not have to be the only cause. See Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d at 670.

....

...[W]e note that Blacksmith alleges an industrial disability, as the concept is explained in McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (Iowa 1980). In accordance with the principles delineated in McSpadden, we hold that Blacksmith did incur an increased industrial disability and is not barred from recovery by failure to prove an increased functional disability of leg. See also Mich Coal Co. v. Second Injury Fund, 274 N.W.2d 300, 302 (Iowa 1979). This is the case of an employee who has no apparent functional impairment and who wants to work at the job he had before but is precluded from doing so because his employer believes the past injury disqualifies him, resulting in a palpable reduction in earning capacity. The extent of Blacksmith's industrial disability is an issue of fact for the commissioner to resolve.

ANALYSIS

The uncontroverted evidence indicates that claimant sustained industrial injuries to his back on December 1, 1978 and April 12, 1979 for which he was paid temporary total disability, and further, that claimant has no functional impairment as a result of either injury. Claimant's contention that an award of permanent partial disability is merited by his loss of earnings due to a job transfer following the forementioned injuries relies upon the applicability of Blacksmith to the facts of the instant case. The sole issue to be determined on appeal is whether the proximate cause of claimant's job transfer was his injuries of December 1, 1978 and April 12, 1979.

In Blacksmith the court looked to whether the transfer resulted from the employer's belief that the injury prevented the claimant from pursuing the same work he had been doing at the time of the injury. To hold in the instant case that defendant employer considered claimant unable to perform his tire building duties because of the two injuries upon which he bases his claim would be speculative at best.

Section 39(b) of the collective bargaining agreement under which claimant's job transfer was negotiated provides in its first paragraph for placement of employees who are no longer capable of performing their work due to age or health restrictions. The second paragraph of section 39 provides for placement of employees who suffer permanent medical restrictions as a result of an occupational injury. Gary Beshear testified that defendant perceived claimant's transfer to be within the purview of the first paragraph. While Earl Seymore testified that claimant's transfer was due to permanent medical restrictions, the union representative acknowledged that Dr. Boulden had never indicated that claimant's restrictions were to be permanent. Seymore's statement to the effect that all transfers under section 39(b) involve permanent medical restrictions ignores the import of the first paragraph of that section.

Claimant has been treated by Dr. Boulden on numerous occasions for his back problems. Normal procedure was to restrict claimant's lifting for several weeks to ease his back strains and then permit him to return to regular work. Dr. Boulden testified that the 15-20 pound lifting restriction imposed upon claimant in May 1979 was not meant to be permanent. Dr. Boulden indicated that the reason for suggesting that claimant transfer to a light duty job was a lengthy history of abusing the back due to his failure to employ proper back hygiene. The doctor testified that claimant could engage in heavy work if he would learn to use proper lifting techniques which should apply to anyone.

Gary Beshear testified to the effect that claimant may bid on any job commensurate with his seniority. Beshear noted that one reason claimant does not currently work at his former tire building job is that the position was eliminated in 1980. He testified that an employee is responsible for initiating an option to bid on different jobs. Beshear further testified that an employee who has been working under restrictions is generally permitted to unilaterally modify or remove the restrictions prior to bidding for a different job.

Based upon the foregoing it is apparent that claimant's job transfer did not result from the employer's belief that claimant's injuries of December 1978 or April 1979 prevented him from doing the same work he had been doing at the time of the injury. The transfer appears to have been negotiated due to a lengthy history of poor back hygiene on claimant's part. The subsequent failure to return claimant to his former job or to a similar job is rooted in the elimination of some jobs and the failure of claimant to take the initiative in exercising his seniority for his own benefit. Claimant has no functional disability due to injuries of December 1978 and April 1979 and appears able to bid into a preferable position at Armstrong Tire and Rubber upon the implementation of proper lifting techniques. The deputy's finding that claimant's job transfer was not related to his injuries of December 1, 1978 and April 12, 1979 is affirmed.

FINDINGS OF FACT

1. Claimant has been an employee of Armstrong Tire and Rubber since 1962.

2. Claimant began working as a tire builder in 1969.

3. Claimant has a lengthy history of back problems relating back to January 1977.

4. Claimant suffered work-related back injuries on November 7, 1977 and December 29, 1977.

5. Claimant experienced a pulling sensation in his back while lifting a tire at work on December 1, 1978.

6. Claimant was off work from December 2, 1978 until January 7, 1979 at which time he returned to light duty. He resumed regular duty work on January 15, 1979.

7. Claimant injured his back while lifting rubber onto a cart at work on April 12, 1979.

8. Claimant returned to work on June 25, 1979 as a salvage equipment worker.

9. Claimant transferred to a floor sweeper operator job in September 1980.

10. Claimant's job transfers out of the tire building department were negotiated on his behalf by the union.

11. Claimant has no functional impairment as a result of his injuries of December 1, 1978 or April 12, 1979.

12. Claimant's job transfers to salvage equipment and later to floor sweeper operator resulted from claimant's history of abusing his back and failure to use proper lifting technique.

13. Claimant is capable of performing jobs involving heavy labor if he follows proper lifting techniques.

14. Claimant's job transfers have not been proximately related to his injuries of December 1, 1978 or April 12, 1979.

CONCLUSIONS OF LAW

Claimant has failed to sustain his burden of proving that his job transfer was directly traceable to his injuries of December 1, 1978 or April 12, 1979.

Claimant is not entitled to permanent partial disability benefits.

WHEREFORE, the deputy's review-reopening decision filed March 18, 1983 is affirmed.

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

Defendants are ordered to pay the claimant the following mileage expenses:

Five round trips for physical therapy (spring 1979)	28 x 5 x $.15 = $21.00
Four round trips to Dr. Boulden (12-18-78, 1-2-79, 5-1-79 and 5-15-79)	80 x 4 x $.15 = 48.00

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

Signed and filed this 30th day of November, 1983.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARVIN J. WOOLDRIDGE,	:	
Claimant,	:	File No. 612542
vs.	:	A P P E A L
MAY CONSTRUCTION COMPANY,	:	D E C I S I O N
Employer,	:	
and	:	
UNITED FIRE & CASUALTY COMPANY,	:	
Insurance Carrier, Defendants.	:	

By order of the industrial commissioner filed July 21, 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 an adverse review-reopening decision.

The record on appeal consists of the transcript; claimant's exhibits 1, 2 and 3; and "deputy commissioner's exhibit 1" (a radiographic report), all of which evidence was considered in reaching this final agency decision.

The result of this appeal decision will be the same as that reached by the hearing deputy; however, this decision will review the action and discuss the issues on appeal.

REVIEW OF THE EVIDENCE

Claimant's original injury occurred on July 18, 1979, his first day on the job for the employer. While he was working in a ditch, a pipe was lowered and hit his right knee. The knee did not improve as quickly as the doctors hoped, and by February 1980 (or thereabout), claimant had developed back complaints. On June 10, 1980, he underwent an arthroscopy of the right knee.

Claimant was seen by a multitude of physicians and psychologists, all of whose evidence was well summarized by the hearing deputy. It should be remarked that Todd Hines, Ph.D., a psychologist, stated claimant had a pronounced pattern of somatic conversion and that claimant's psychological outlook limited his rehabilitation and recovery.

ISSUES

The hearing deputy ruled that claimant was entitled to a running healing period under §85.34(1). The hearing deputy found that there was a causal relationship between the knee injury and the subsequent low back and psychological problems. Also at issue were the healing period and benefits under §85.27, which covers medical and allied services. The decision also ruled that defendants had given adequate notice as required by Auxier v. Woodward State Hospital-Schools, 266 N.W.2d 139 (1978) and that claimant's proper compensation rate was $246.34 per week. Finally, the decision ruled that claimant was not entitled to any penalty under §86.13 for defendants failure to provide certain medical treatments.

On appeal the defendants narrow the issue to that of causal relationship and the fact that the question of causal relationship is within the domain of expert testimony. Claimant, in a letter brief, raised an issue of a penalty under §86.13 for stopping the weekly benefits (as opposed to not paying medical and allied benefits) and that defendants had not authorized certain treatment recommended by William Boulden, M.D., Robert A. Hayne, M.D., and the psychologists Edward E. Nadolny and Hines.

APPLICABLE LAW

The review-reopening decision contains a good discussion of the applicable law, and that part of the decision is incorporated herein.

ANALYSIS

The review-reopening decision held that the original knee injury caused the problems in claimant's back and his psychological difficulties. A review of the record shows emphatically that such a causal relation did exist. Specifically, Gordon Arnott, M.D., claimant's original treating physician stated that the knee injury caused claimant to alter his gait which in turn caused a strain on the low back. Likewise, Dr. Boulden, a qualified orthopedic surgeon, opined that the chronic low back strain was secondary to the knee condition. Finally, the Mercy Hospital Evaluation report also categorized the low back strain as job related. With respect to the psychological condition, Dr. Hines' reports constitutes the only specific expert evidence on claimant's condition, and, as stated above, they show an aggravation of a preexisting condition.

There is no rebuttal of this evidence of causation and no reason to disbelieve it. .

Two incidents subsequent to the injury deserve some discussion. First, claimant felt a pain in his back some months after (the exact time is unspecific) the injury when he was reaching for a cup at home. Secondly, claimant apparently checked out of the hospital in January of 1980 against medical advice, thereby losing the benefit of physical therapy to his knee. These incidents are viewed as minor and not as intervening causes which would have any substantial effect upon the progress, or lack of progress, of claimant's condition. For all the reasons stated, therefore, the award appears to be correct.

Claimant raises two issues in his letter brief filed in the appeal proceeding: (1) He raises the issue of a penalty under §86.13, and (2) that defendants have not authorized certain treatment recommended by the doctors and psychologist. These issues were not raised at the pre-trial conference or at the time of the hearing, nor were they discussed by the hearing deputy. Since these issues would make the case different from that which was a subject of the review-reopening decision they will not be ruled upon here.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

That single claimant was 38 years of age at the time of hearing.

That claimant at the time of injury had a support obligation for three children.

That claimant has an eighth grade education.

That claimant's job experience has been in heavy construction, cement work, remodeling, rural water projects, mechanics and mining.

That claimant's work has been semiskilled and heavy in nature.

That on July 18, 1979 claimant was injured at his job site when a pipe hit his right knee.

That claimant had no previous problems with his right knee.

That claimant had sharp paralyzing pain in his back when he reached for a cup.

That claimant had no prior difficulties with his back.

That claimant's current medications are Percodan and a sleeping pill.

That claimant's present difficulties are weakness and aching in his knee, limping, altered gait, decreased ability to lift, headaches, a worsening back pain, loss of motion in his back and knee and a sleep disturbance.

That claimant has trouble bending, squatting and sitting.

That claimant's social and recreational activities are limited.

That as a result of his knee, back and emtoional problems, claimant is in need of medical treatment.

That claimant is no longer able to operate heavy equipment.

That claimant has an interest in and an aptitude for electronic work.

That claimant was off work from July 19, 1979 through August 5, 1979 and from September 18, 1979 to the present.

That claimant's gross weekly earnings at the time of injury were $437.40.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant's present disability to his knee and back and his current emotional state are causally related to his injury of July 18, 1979.

That claimant has not returned to work nor is it medically indicated that significant improvement is not anticipated nor is claimant capable of returning to employment substantially similar to that in which he was engaged at the time of his injury.

That claimant is entitled to benefits under Iowa Code section 85.27 for treatment of his knee, back and emotional conditions.

That no violation of the Auxier requirement is found.

That claimant is entitled to a rate of two hundred forty-six and 34/100 dollars ($246.34) per week.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay unto claimant weekly benefits of two hundred forty-six and 34/100 dollars ($246.34) per week from July 18, 1979, accrued payments to be made in a lump sum, until the test for termination of healing period pursuant to Iowa Code section 85.34(1) is met.

That defendants offer claimant psychotherapy and provide medical treatment for claimant's knee and back.

That defendants be given credit for benefits previously paid.

That defendants pay interest at ten (10) percent per year on this award pursuant to Iowa Code section 85.30 from April 4, 1983.

That defendants pay costs pursuant to Industrial Commissioner Rule 500-4.33 including a five dollar ($5) charge for Dr. Boulden for a medical report and fifteen dollar ($15) charge from Dr. Arnott for a medical report.

Signed and filed at Des Moines, Iowa this 6th day of September, 1983.

Appealed to District Court:
Pending

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GENEVIEVE WRIGHT,

Claimant,

vs.

NORTH D.M. NURSING CORP., d/b/a RIVERVIEW MANOR NURSING HOME,

Employer,

and

GREAT AMERICAN INSURANCE COMPANIES,

Insurance Carrier, Defendants.

File No. 633027

A P P E A L

D E C I S I O N

By order of the industrial commissioner filed August 24, 983 the undersigned deputy industrial commissioner has been ppointed under the provisions of §86.3, Code of Iowa, to write he final agency decision on appeal in this matter. Defendants ppeal from an adverse arbitration decision.

The record on appeal consists of the transcript; claimant's xhibit 1; defendants' exhibits A through O, inclusive; and the eposition of G. Charles Roland, M.D., all of which evidence was onsidered in reaching this final agency decision.

The outcome of this appeal decision will be the same as that eached by the hearing deputy.

STATEMENT OF THE CASE

Claimant's application for arbitration was filed April 24, 980, and the dispute was stated as "whether injury is compen- able." At the pre-hearing conference of September 27, 1982, he issues were stated to be: (1) whether claimant received an njury which arose out of and in the course of the employment; 2) whether there was a causal relationship between the alleged njury and the disability; (3) the extent of the disability, if ny; and (4) whether claimant gave notice of the injury or the mployer had knowledge thereof as required by §85.23, The Code. n December 17, 1982, claimant amended her petition to claim a enalty for unreasonable delay in paying benefits under §86.13. he amendment was approved January 4, 1982.

The record shows clearly that claimant twisted her knee at ork on March 27, 1979. The record further shows that claimant ad a pre-existing phlebitis in that leg and a subsequent fall own some steps while visiting the home of a friend in May of 979. Her family doctor, R. J. Foley, M.D., does not mention he subsequent fall down the steps. However, a report by G. harles Roland, M.D., of February 12, 1982 and his testimony by eposition (pp. 10-11) show a causal connection between the work ncident and the subsequent fall at the home of claimant's riend and the ensuing disability. There seems to be no connection etween the knee injury and the phlebitis. Claimant's problem ith her left knee is traumatic and she may well need a knee eplacement.

ISSUES

The hearing deputy found claimant entitled to certain ealing period and permanent partial disability benefits as well payment for bills incurred for medical and allied services. entered an award accordingly. Nothing was said about the nalty issue.

Defendants did not file their brief on appeal by the limit September 13, 1983. Claimant went ahead and filed her pellee's brief by the time limit of September 28, 1983. On ptember 30, 1983, defendants asked for an extension of time in ich to file a brief. However, work had already begun on the peal decision, and that request was denied.

Claimant states the issues:

I. In the absence of a Brief, reciting employer's issues on appeal is the appealing employer entitled to any relief on appeal and must the Deputy's decision be affirmed as a matter of Law?

II. Is claimant entitled to benefits in addition to those awarded by the Deputy Commissioner?

A. Is the delay in commencement of benefits unreasonable or without probable cause pursuant to Iowa Code §86.13 (1983)?

a. Was the delay unreasonable and without probable cause from the outset i.e. when the employer was given notice of the claim on April 29, 1980 by attorney for the claimant?

b. Was the delay unreasonable and without probable cause from the date of Deputy Mueller's decision on June 28, 1983?

B. If so, how much additional penalty benefits is claimant entitled to?

III. If the Commissioner decides to hear the appeal on its merits, then the issue is whether the Deputy's decision is correct.

Regardless of whether defendants filed a brief, the matter is considered de novo.

APPLICABLE LAW

The statement of the law found in the arbitration is sufficient and will be adopted herein.

ANALYSIS

Claimant argues that, since defendants did not state their exceptions to the arbitration decision, that decision should be affirmed as a matter of law. However, as stated above, the review here is de novo, and all of the evidence has been considered in reaching this final agency decision.

Claimant also argues that defendants did not have good reason or probable cause to withold payments under the act. However, claimant's preexisting condition and the possible intervening cause were elements that could legitimately have cast doubt upon claimant's right to benefits. Therefore, defendants will not be assessed any penalty.

Finally, claimant supports the deputy's decision. One agrees with claimant that the evidence tends to show that the incident caused claimant's difficulties and that the preexisting and alleged intervening causes did not adversely affect her claim. Therefore, an award will be made in accord with the arbitration decision.

The following findings of fact, conclusions of law, and order are based upon those of the hearing deputy but are somewhat modified.

FINDINGS OF FACT

1. That this agency has jurisdiction of the parties and the subject matter.

2. That the claimant twisted her left knee at work on March 27, 1979.

3. That the claimant was suffering from thrombophlebitis and moderately severe degenerative arthritis.

4. That the claimant suffered a torn cartilage in her left knee on March 27, 1979.

5. That said condition was not discovered until July 6, 1980.

6. That as a result claimant has sustained a permanent partial disability of 16 percent of her left leg.

7. That the claimant was fully recovered from the arm injuries sustained during the "Newton fall" and has sustained no degree of permanent partial disability therewith.

8. That claimant has incurred a series of medical bills as a result of the foregoing treatment which remain unpaid.

CONCLUSIONS OF LAW

That on March 27, 1979, claimant sustained an injury which arose out of and in the course of her employment.

That said injury caused claimant to be entitled to a healing period of one hundred sixteen point four two nine (116.429) weeks at the rate of eighty-one and 26/100 dollars ($81.26) per week plus permanent partial disability to the leg of thirty-five point two (35.2) weeks at the same rate.

ORDER

THEREFORE, IT IS ORDERED that defendants pay the claimant a healing period of one hundred sixteen point four two nine (116.429) weeks at the weekly rate of eighty-one and 26/100 dollars ($81.26) in a lump sum together with statutory interest at ten (10) percent per year from the date of the injury.

It is further ordered that defendants pay the claimant a thirty-five point two (35.2) week period of permanent partial disability at a weekly rate of eighty-one and 26/100 dollars ($81.26) in a lump sum together with statutory interest at the rate of ten (10) percent per year beginning on September 2, 1981.

Defendants are ordered to pay the claimant the following medical expenses that she has incurred as necessary to treat the injury:

	Date	Amount
Iowa Lutheran Hospital	3/27/79	$1,008.60
Dr. Olivencia	3/27/79	140.00
Hilltop Clinic (Dr. Foley)	5/15/79	401.00
Skiff Memorial Hospital	5/26/79	553.35
Skiff Memorial Hospital	6/4/79	717.05
Newton Clinic (Dr. Wittenberg)	5/26/79	515.00
Orthopaedists Ltd. (Dr. Roland)	8/25/80	1,625.00
Iowa Lutheran Hospital	8/20/80	506.96
Thomas W. Bower (Therapist)	9/11/81	89.00
	Total	$5,555.95

Costs are charged to the defendants under Rule 500-4.33 and include an expert witness fee payable to G. Charles Roland, M.D., in the same of one hundred fifty dollars ($150).

Defendants are further ordered to make all the necessary statutory filings within twenty (20) days from the date below.

Signed and filed at Des Moines, Iowa this 7th day of October, 1983.

Appealed to District Court; Pending

BARRY MORANVILLE
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KATHRYN WRIGHT,	:	
Claimant,	:	File No. 682321
vs.	:	R E V I E W -
SWIFT INDEPENDENT PACKING CO.,	:	R E O P E N I N G
Employer, Self-Insured.	:	D E C I S I O N

INTRODUCTION

This is a proceeding in review-reopening brought by Kathryn Wright, the claimant, against her employer, Swift Independent Packing Co., a self-insured employer, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury she sustained on August 25, 1981.

This matter came on for hearing before the undersigned deputy industrial commissioner at the Iowa Industrial Commissioner's Office, in Des Moines, Iowa on March 2, 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 September 28, 1981. A memorandum of agreement was filed October 12, 1981. A Form 2A has been filed to reflect the amount of compensation benefits paid to claimant.

The record in this case consists of the testimony of the claimant, Cyndra Gratias, Tony Harris; claimant's exhibits 1 through 13 inclusive; and defendant's exhibits A through H inclusive.

ISSUES

The issues to be resolved in this proceeding include whether there exists a causal relationship between the claimant's work injury and her disability, as well as the length of healing period. There is an additional issue of penalty under section 86.13, The Code.

RECITATION OF THE EVIDENCE

At the time of hearing the parties stipulated that the applicable rate in the event of an award is $140.79. The parties agreed that the time period in dispute extends from August 27, 1982 through January 25, 1983 inclusive.

The claimant, Kathryn Wright, testified in these proceedings that she is married and the mother of two children. She was born in July 1949.

This witness began her employment relationship with Swift in April 1981. Prior to this position she had done primarily clerical work, and worked at Jimmy Dean in Osceola.

Her first job at Swift required the operation of a Whizzard knife to remove meat from bones. The knife is hand operated and hand held. Claimant also operated a bagging machine, inserting meat products into bags. She also worked on the production line, wrapping large cuts of meat.

The first arm and hand complaints arose in August 1981. Claimant was referred to R. W. Hoffmann, M.D., the plant physician. Diagnostic studies were conducted and bilateral carpal tunnel surgery performed. No improvement in claimant's condition was noted post surgery. Later a second bilateral carpal tunnel surgical procedure was performed by Dr. Hoffmann. Subsequently, Dr. Hoffmann referred Mrs. Wright to Robert A. Hayne, M.D. At this point in time it was claimant's understanding that Dr. Hayne was to be her treating physician.

Claimant indicated that during the period October 1981 to April 1982 some slight improvement, in terms of feeling, was noted in the right hand. No feeling was noted on the left.

In April 1982 Cyndra Gratias, of Crawford and Company, contacted claimant and advised her to return to Dr. Hoffmann for a recheck. The reexamination was conducted in April 1982. Mrs. Wright again indicated that Dr. Hoffmann referred her back to Dr. Hayne.

On May 4, 1982 Dr. Hoffmann released claimant to return to work in a position involving "no gripping." Claimant, pursuant to the release, returned to work for Swift and was assigned to the bagging machine. Operation of this device required lifting, pulling and inserting cuts of meat into bags. The first day on the job hand discomfort was noted. The second day, while continuing to operate the bagging machine, claimant's hands became very swollen and she was unable to continue working. Claimant advised her supervisor of this problem and was told to "do the best she could." Mrs. Wright also advised the company nurse of the continued hand and wrist problems. Dr. Hoffmann examined the claimant at the conclusion of this second day on the job, May 6. Claimant has not worked for Swift since May 6, 1982.

On May 14 Ms. Gratias again advised claimant to see Dr. Hoffmann. Mrs. Wright stated she was very depressed and emotionally upset at this point in time. She was experiencing crying spells, her hair was falling out, her grip was poor, and she was sick on a daily basis.

At the end of May 1982 claimant was examined by both Drs. Hayne and Flapan. At her counsel's request, she was also examined by Dr. Paul From.

Mrs. Wright testified that she received no workers' compensation payments for the period May 5 through July 21, 1982. She applied for unemployment compensation and this was also denied. In July 1982 claimant underwent what she described as a brief, two minute examination by Dr. Flapan and, according to claimant, was advised to go to Mayo Clinic. Her complaints at this time included numbness in the hands, pain in the arms and elbows, headaches and neck pain. She was also experiencing continued emotional difficulties.

In November 1982 claimant was examined and tested at the Mayo Clinic. A second Mayo visit was undertaken in December 1982. A third bilateral carpal tunnel surgery was performed at Mayo in January 1983. Graphic evidence of the surgeries was evident to the undersigned when he examined claimant's arms. Mrs. Wright was scheduled to return to Mayo in March 1983.

Claimant's compensation benefits were re-commenced on January 26, 1983 and continued to be paid as of the date of hearing.

At the time of hearing, Mrs. Wright has no feeling in the left hand. Swelling and loss of strength are noted in that appendange. Claimant is unable to detect heat or cold on the left. Pain is noted on the right and the feeling is gradually returning. She can feel hot and cold on this hand and arm.

On cross-examination, claimant indicated that her right hand is dominant. Claimant acknowledged that she felt a painful sensation while reaching at home. Claimant acknowledged that her family moved in December 1981, but stated that she did not actively participate in the move.

Mrs. Wright disputes the bag cut job description received into evidence at the time of trial. She stated that the meat to be bagged was not evenly distributed between workers, more given to her. She stated pushing and lifting were required in the position.

Mrs. Wright acknowledged she had no prior arm and wrist problems. She also had no preexisting psychological difficulties.

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

Cyndra Gratias was called to testify by the claimant. Ms. Grat is a claim supervisor with Crawford and Company, spending approximately 80 percent of her time in the workers' compensation area. She has supervised workers' compensation claims for about five years and attended many seminars on the subject.

In October 1981 Swift Independent Packing Co. became a client of Crawford & Company. National Union Fire Insurance Company is the underlying workers' compensation carrier. According to Ms. Gratias, Tony Harris is the personnel manager at Swift and must approve all payments of workers' compensation benefits. With respect to Mrs. Wright's claim, this witness acknowledged that a memorandum of agreement had been filed. Benefits had also been paid to claimant. The compensation checks were sent to Swift and claimant was required to come to the plant to receive her benefits. This witness stated claimant was examined by a physician on virtually every visit.

This witness was aware of an informal conference held between counsel for the parties and Dr. Hayne in July 1982. She confirmed that as a consequence of that meeting payments were made on July 21, 1982. After July 21 this witness indicated she received a report from Dr. Flapan, and based on this single document claimant's benefits were terminated.

After Dr. Flapan's examination and opinion letter, this witness was aware of Dr. Hayne's later examination and recommendation of further evaluation. This witness was also aware of Dr. Todd Hines' evaluation and report and knew of Dr. Hoffmann's notation regarding depression. Ms. Gratias was concerned about causal relationship between the depression and the work incident but never sought medical or psychological clarification.

On cross-examination, this witness acknowledged that the surgery at Mayo was authorized and healing period benefits would continue to be paid.

This witness relied on Dr. Flapan's opinion for terminating healing period benefits for the period August 27, 1982 through January 25, 1983.

She stated Dr. Hayne never retracted his directive that claimant could return to work. Even though she was advised by counsel on July 20, 1982 of Dr. Hayne's conclusions, she relied on Dr. Flapan's position.

This witness was aware of Dr. Hayne's comments in defendant's exhibit E that maximum healing has not taken place but stated she did not feel the letter was clear on the causation issue. Pscyhological intervention was not undertaken according to this witness because of lack of evidence as to causation.

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

Tony Harris, the personnel manager at Swift, testified on their behalf. He testified at length concerning the job descriptions of bagging and Whizzard knife use.

On cross-examination, this witness acknowledged that claimant was terminated by the employer. He conceded that the psychological evaluation was not to be authorized. This was a joint decision between this witness and Ms. Gratias. Prior to termination, claimant called into the plamt as instructed.

The balance of this witness' testimony has been considered in the final disposition of this case.

An abundance of medical data has been submitted to the undersigned in the form of exhibits. All of this data has been reviewed and considered in the final disposition of the issues in this case. The more important reports, in the opinion of the undersigned, will be highlighted.

M. D. Muenter, M.D., of the Mayo Clinic, reported to Dr. Hayne on January 18, 1983 that he had examined claimant pursuant to Dr. Hayne's referral. His letter reveals he is aware of her past medical history, treatments and limitations. Examination was conducted and diagnostic studies carried out at Dr. Muenter's direction. One impression of this physician is that claimant has "a definite persistent median neuropathy." In addition to the carpal tunnel syndrome, it is suspected that claimant has "a pronator syndrome." Additional surgery was recommended in that report. Psychological evaluation was carried out at the Mayo facility and it was noted that "the patient was primarily frustrated by her prolonged disability." No basis for prolonged psychological treatment was noted. Dr. Muenter concluded his report by indicating, "I should add that the patient's present medical problem of a bilateral carpal tunnel syndrom [sic] and a possible pronator syndrome is a continuation of the problem that arose in June of 1981 and was caused by her occupation."

Dr. Robert A. Hayne, M.D., a neurosurgeon who has treated the claimant for a considerable length of time, reported on December 21, 1982 that as of his last examination of claimant on July 26, 1982 that pain and tenderness persisted. Dr. Hayne recommended a second opinion he secured from University Hospitals in Iowa City or the Mayo Clinic. He recognizes that claimant may improve and eventually reach complete recovery. He attributes her slow recovery, post surgery, to a tendency over and above normal for vaso-constriction of the peripheral vessels. Continuing reinnervation of the musculature of the hand was noted in the last E.M.G. study in May 1982.

In Dr. Hayne's report of August 2, 1982 he reiterated the fact of her slow improvement and recommended evaluation at one of the aforementioned facilities.

In other reports of Dr. Hayne's prepared early in the summer of 1982, he indicated that she was released to return to work on June 7, 1982.

Based on Ms. Gratias' termination of benefits notice dated July 27, 1982 she relies exclusively on Dr. Flapan's single report of July 23, 1982. In that report, based on a single brief examination on July 8, 1982, which claimant described as brief, he notes:

> I reviewed the job descriptions which you enclosed and would think that Mrs. Wright would be suitable for the job description, General Worker (attend trim belt) and Bag Cuts. I do not believe she is qualified to use the Whizzard knife.

Todd Hines, PhD, reports that as of August 14, 1982, based the data he has reviewed, he is of the "opinion that a complete psychological evaluation of this patient is appropriate and necessary." He notes a reference by one examining physician the psychological problem and potential need for psychotherapeutic intervention and treatment.

APPLICABLE LAW

Section 85.34(1), of the Code, provides:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

ANALYSIS

The record is clear that by the unilateral act of filing a memorandum of agreement, the employer has acknowledged that on the date of injury claimant was their employee and she sustained a personal injury which both arose out of and in the course of employment.

Healing period benefits were paid to claimant for an extended period of time based on Dr. Hoffmann's opinions. Dr. Hoffmann referred claimant to Dr. Hayne and compensation benefits continued.

A flurry of return-to-work authorizations then appeared. One on May 4, 1982 by Dr. Hoffmann and a second on or about June 7, 1982 by Dr. Hayne. Substantial controversy then arose as to whether claimant continued in a state of healing after her attempt to return to work.

In July 1982, after a joint conference between Dr. Hayne, Attorney Hanssen and Attorney Hoffmann, and pursuant to the advice of counsel, claimant's benefits were re-commenced and brought up to date. All of this was accomplished despite the early notation of Dr. Hayne that claimant was released in early June 1982. This action of the employer coupled with Ms. Gratias' termination letter of July 27, 1982 leads the undersigned to believe that they were not concerned about Dr. Hoffmann's or Dr. Hayne's release to work opinions earlier given.

Defendant also arranged for Dr. Flapan's evaluation. Based his one time examination and opinion, Crawford and Company's termination letter of July 27, 1982 was generated and benefits ceased. Dr. Flapan never treated claimant, he only examined her. While the employer was anxious to rely on his report to terminate compensation, it is suspect why they did not continue his involvement in the case as time progressed.

Subsequent examinations or opinions from Dr. Hayne or the Mayo Clinic reveal that claimant continued in a state of healing and in the opinion of the undersigned, had not during the period August 27, 1982 through January 25, 1983 reached maximum medical recuperation. Dr. Hayne recommended a second opinion which was secured in Rochester. The Mayo Clinic recommended additional surgery to correct the ongoing physical difficulties.

Based on the record as a whole the undersigned is left with the distinct impresson that Ms. Gratias and the employer were "quick on the draw" to terminate claimant's benefits when a basis was provided from almost any source, even if that source reasonable. It was, however, an amateurish claims handling approach, based on the entire record.

FINDINGS OF FACT

That claimant was released to return to work by Dr. Hoffmann on May 4, 1982.

That claimant was released to return to work by Dr. Hayne on or about June 7, 1982.

That claimant attempted to return to work in May 1982 and was unable to perform her job.

That added healing period benefits were paid to claimant based on an informal conference with Dr. Hayne through August 27, 1982.

CONCLUSIONS OF LAW

That claimant sustained her burden of proof and established a causal relationship between the injury of August 25, 1981 and her healing period.

That claimant was in a state of healing from August 27, 1982 through January 25, 1983.

That claimant has not demonstrated any entitlement to the penalty provided for in section 86.13.

That based on the opinion of Dr. Hayne and the Mayo Clinic, claimant had not reached maximum medical recuperation during the period August 27, 1982 through January 25, 1983.

That additional carpal tunnel surgery was performed at the Mayo Clinic in January 1983 and healing period benefits have been re-commenced at that point in time and continue to be paid.

ORDER

THEREFORE, IT IS ORDERED:

That defendant shall pay unto claimant healing period benefits for the period August 25, 1982 through January 25, 1983 at the stipulated rate of one hundred forty and 79/100 dollars

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

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

Signed and filed this ____ day of August, 1983.

E. J. KELLY
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PERRY YANCEY,	:	
	:	
Claimant,	:	File No. 675207
	:	
vs.	:	R E V I E W -
	:	
CATERPILLAR TRACTOR CO.,	:	R E O P E N I N G
	:	
Employer,	:	D E C I S I O N
Self-Insured,	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in review-reopening commenced by Perry Yancey against Caterpillar Tractor Co., self-insured employer, for benefits as a result of an injury which arose out of and in the course of his employment on February 6, 1981. This action is one in review-reopening as a result of defendant's stipulation at the beginning of the hearing.

The record consists of the testimony of Perry Yancey and James C. Donahue, Jr., M.D.; claimant's exhibits 1 through 8 and 10; and defendant's exhibits A through E.

ISSUES

The issues presented by the parties at the time of the hearing are whether a causal connection exists between the injury which occurred on February 6, 1981 and the disability on which he is now basing his claim; the nature and extent of any temporary total disability resulting therefrom; and whether certain medical expenses are necessary and authorized.

EVIDENCE PRESENTED

On February 6, 1981 claimant received an injury arising out of and in the course of his employment with defendant when while using a torque wrench, the wrench slipped and struck him in the head. Claimant indicated he was dazed and had blood all over his face. Claimant was seen by James C. Donahue, Jr., M.D., is a company physician. Claimant testified he went back to work but felt weak and sore. Claimant continued to work and also continued to see the company physician. Claimant indicated he complained of headaches and dizziness. Claimant stated:

Q. Let's get down to approximately the time that you no longer worked for Caterpillar. Tell us what happened then.

A. The time I -- at the time I got terminated?

Q. Yes.

A. Okay. I was still seeing the doctor, and I told him, you know, my head is just bothering me so much, and I was dizzy and I wasn't getting any sleep, you know. And I said I couldn't -- I just didn't feel right working. So he said that day, you know, if it was all right, you know, that it was up to me if I wanted to go home, so I went home.

And some of the people at the plant came out; the general foreman.

....

Q. Did you tell anybody you were going home?

A. No. Just the doctor knew I was going home.

Q. Okay. So then somebody came to your house, you say, that same day.

A. Yes.

Q. And who was that, if you recall?

A. It was the general foreman.

Q. What was the discussion, if there was a discussion, between you and the general foreman?

A. He told me to go back to work or else I was going to be fired -- be terminated from my job, separated from my job.

Q. What did you tell him?

A. I told him the doctor said if I wanted to go home I could go home. I guess it didn't make him no difference.

Q. How were you feeling?

A. I wasn't feeling good at all.

Q. Did you tell him you weren't feeling good?

A. Yeah.

Claimant revealed that he went to Franciscan Hospital to see if he could get any relief from his headaches and dizziness.

Claimant did not go back to work and he was terminated because of not doing so. After his termination defendant did send claimant to a couple of other physicians.

Claimant testified that when he returned to work on August 24, 1981 he had to have a medical clearance which he received from one of the defendant's physicians. Claimant stated that for the total period he was off work he had headaches and dizzy spells. After returning to work in August of 1981 claimant worked regularly and steadily for defendant until he was laid off because of lack of work.

On cross-examination claimant revealed that he rubbed his head up against the windshield of his car on April 8, 1981 and did not go to work that day. Claimant stated that he stayed home because of his general head condition and not because of rubbing his head on the windshield. Claimant disclosed that th company physician said he couldn't find anything wrong with him Claimant also disclosed that prior to going to Franciscan Hospital he didn't tell defendant he wanted to see a different doctor.

James C. Donahue, Jr., M.D., testified he is defendant's physician. On April 9, 1981 Dr. Donahue saw claimant, who indicated he did not feel like working. Dr. Donahue stated tha after examination he told claimant he could find no reason why claimant couldn't work. Dr. Donahue stated that claimant calle him on June 10, 1981.

Patrick G. Campbell, M.D., who testified by way of depositio stated he specializes in psychiatry and initially saw claimant on June 30, 1981 at the request of defendant's physician. Dr. Campbell hospitalized claimant on August 21, 1981. At one point, Dr. Campbell felt that claimant had a near paranoid psychosis and that he appeared delusional. Dr. Campbell stated

Q. Did your testing or these therapeutic sessions reveal whether Mr. Yancey had any impairment of his reality perceptions?

A. Well, he didn't, but I think it was our general feeling -- also the psychological testing -- that he very definitely had a personality disorder.

Q. Were you able to label or characterize that personality disorder?

A. Well, it seemed in that particular category where we group, you know, the hysterical, the impulsive, the erratic, dramatic types. These subcategories include the hysterical narcissistic, borderline psychopathic, and those groups.

Dr. Campbell classified claimant's condition as conversion disorder. Dr. Campbell indicated that claimant's personality features existed before his injury on February 6, 1981. Dr. Campbell revealed that claimant was also having family problems.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 6, 1981 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. 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodi 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).

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, 760-761 (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.2 812, 815 (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 & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); 100 C.J.S. Workmen's Compensation §555(17)a.

ANALYSIS

There is no question but that claimant received an injury arising out of and in the course of his employment with defendant on February 6, 1981 but the parties have asked the undersigned to determine if the time claimant missed from work was related to that injury.

The greater weight of evidence does not indicate that claimant's physical or mental problems required claimant to miss work on April 9, 1981. Dr. Donahue testified that he could find no reason why claimant could not work that day.

Although claimant indicated that he felt Dr. Donahue left it up to him whether or not he should go to work, the testimony of Dr. Donahue fails to show such a causal connection. The testimony of Dr. Campbell does not help claimant in that regard in that Dr. Campbell did not say claimant could not have worked at that time. Even if Dr. Campbell had made such a statement it would have been mere speculation on his part.

The greater weight of evidence indicates that claimant's being fired greatly enhanced his psychological difficulties. Claimant did meet his burden in proving that he was entitled to temporary total disability benefits from June 30, 1981 when Dr. Campbell fist saw claimant until August 24, 1981 when claimant returned to work for defendant.

Claimant has also met his burden in proving entitlement to reimbursement for all of his medical bills. Defendant argues that some of claimant's medical bills were unauthorized. At the same time, defendant has not filed a memorandum of agreement and did not admit an injury arising out of and in the course of claimant's employment until they filed their answer. The defendant cannot deny liability and at the same time restrict claimant's medical 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 February 6, 1981 claimant was injured while working for defendant.

FINDING 2. As a result of his physical injury on February 6, 1981 claimant aggrivated a prior psychological condition.

FINDING 3. As a result of that aggravation claimant was unable to work from June 30, 1981 until August 24, 1981.

CONCLUSION A. Claimant met his burden in proving he was entitled to temporary total disability benefits from June 30, 1981 until August 24, 1981.

FINDING 4. Defendant did not file any memorandum of agreement prior to this case being filed.

FINDING 5. Defendant has not paid claimant any weekly benefits.

CONCLUSION B. Claimant's medical expenses were not unauthorized because defendant did not admit an injury arising out of and in the course of his employment prior to those expenses being incurred.

ORDER

Therefore defendants are to pay unto claimant eight (8) weeks of temporary total disability benefits at a rate of $243.22 per week.

Defendant's shall also reimburse claimant for the following medical bills.

Rock Island Franciscan Hospital	$187.50
Moline Radiology Associates	57.00
Quad Cities Neurological Associates	135.00
Rock Island Franciscan Hospital Pharmacy Services	12.80
Lutheran Hospital	85.00

Defendant is to be given credit for benefits previously paid.

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.

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 21st day of March, 1984.

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN R. ZAHN, Claimant, vs. IOWA STATE MEN'S REFORMATORY, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	File No. 608970 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 brought by John R. Zahn, claimant, against the Men's State Reformatory, employer, and the State of Iowa, defendants, to recover benefits pursuant to Iowa Code Section 85.27. It was heard by telephone on July 5, 1983. It was considered fully submitted when the exhibits were received in this office on July 11, 1983.

The industrial commissioner's file shows a first report of injury received October 12, 1979. A memorandum of agreement was received October 24, 1979. An agreement for settlement was entered on March 11, 1982 which reports an injury to claimant's back on October 3, 1979, and his treatment by William R. Finn, M.D., with subsequent referral to Dr. Robb who performed surgery. Claimant was paid healing period benefits from October 5, 1979 through February 25, 1982. The parties stipulated that claimant has a 65 percent permanent partial disability to the body as a whole related to his October 3, 1979 injury. They also agreed to a partial commutation. Paragraph eleven of the settlement agreement provides:

> 11. The claimant's right to a review-reopening remains intact as provided in section 85.26(2), The Code 1981; and the claimant's entitlement to medical benefits remains intact as provided in section 85.27, The Code 1981.

The record in this matter consists of the testimony of claimant, Doris Zahn, and Richard Andrews; claimant's exhibit 1, an estimate from Balster's of Marion; claimant's exhibit 2, an estimate from Sears; claimant's exhibit 3, estimates from Kenwood House Interiors; claimant's exhibit 4, a bill from Hall Home Furnishings; claimant's exhibit 5, materials relating to an Eastman House mattress; claimant's exhibit 6, a prescription from William R. Finn, M.D.; and claimant's exhibit 7, a letter from Andrews dated January 20, 1983.

ISSUES

The issue in this matter is whether or not an orthopedic mattress is an appliance under Iowa Code Section 85.27 and if it is an appliance whether a charge of $616.85 is excessive. Claimant has raised the possible applicability of Iowa Code Section 86.13 to this matter.

STATEMENT OF THE CASE

Claimant testified that he consulted with Dr. Finn concerning his back and was told by the doctor to obtain a "real firm mattress." He recalled that on Dr. Robb's advice he had placed a plywood board under his mattress in 1979, but that the board proved unsatisfactory when the springs in the mattress poked out. He said that the mattress which gave out was five or six years old and he reported that use of the board had helped his back.

At the time he saw Dr. Finn he asked for a prescription for his records. That prescription states: "Needs Orthopedic Firm Mattress because of back problems." He took the prescription to his spouse and they started mattress shopping. He did not consult with his attorney nor did he speak with defendants as he did not think he needed approval for what he deemed a legitimate expense.

Doris J. Zahn, claimant's spouse, testified that the couples' former mattress which was firm but not "hard firm" was three to four years old. After the board was placed under the mattress, springs started coming through and deterioration occurred.

She recalled that when her spouse got the mattress prescription, she commenced comparison shopping making four to five trips to try to get the best price. She obtained three written estimates: $539.99 and $599.99 from one company; $599.88 from a second; and $649.95, $599.95, and $599.95 from a third. She acknowledged she went some other places in addition to the three from which she obtained estimates, but as she grew weary and as she thought prices were remaining about the same, she did not get estimates from each.

Eventually the couple settled on a queen size mattress and box springs which cost $616.85 with tax. No delivery charge was made and there was a 15 year guarantee which was not pro-rated. The witness testified that the purchased mattress was the firmest one priced and that it fit claimant's back "real well." She asserted that claimant is sleeping better now.

On cross-examination she was asked whether or not a Sealy Posterpedic had been priced. She was unsure, but she thought that she had looked at one. No estimate had been recorded. She anticipated that any mattress used with a board would have broken down as their first had.

Zahn testified she was unaware of any offer by defendants to exchange the mattress. She said the couple's attorney was contacted when they learned defendants would not pay. She understood that defendants' representative, Andrews, had refused payment for the mattress on the basis that it was not an orthopedic device.

Richard L. Andrews, supervisor of the state employees' workers' compensation program testified that he first learned of the purchase of the mattress when he received that bill. He spoke with defendants' attorney and then called the hospital supply company seeking information about orthopedic mattresses and also the local Sealy distributor who gave him some general information about the types of mattresses available. He was quoted a price of slightly more than $300.00 for an orthopedic mattress, the best Sealy had. He also gathered the names of places where mattresses are available in Cedar Rapids. He agreed that he was not cognizant of the degree of firmness which claimant would require so that he would not have to use a board.

Andrews was not sure if a mattress is an orthopedic device and he wrote on January 20, 1983, "I do not consider this to be an orthopedic appliance."

APPLICABLE LAW AND ANALYSIS

Defendants' claim uncertainty as to whether or not a mattress is an orthopedic device. They apparently make reference to the portion of Iowa Code section 85.27, which provides:

> When an artificial member or orthopedic appliance, whether or not previously furnished by the employer, is damaged or made unusable by circumstances arising out of and in the course of employment

> other than through ordinary wear and tear, the employer shall repair or replace it. When any crutch, artificial member or appliance, whether or not previously furnished by the employer, either is damaged or made unusable in conjunction with a personal injury entitling the employee to disability benefits, or services as provided by this section or is damaged in connection with employee actions taken which avoid such personal injury, the employer shall repair or replace it.

This deputy industrial commissioner does not believe it is necessary to go so far in section 85.27 to find a section which could cover a mattress. The previous paragraph begins: "For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee...."

Nearly seventy years ago the attorney general's office provided an opinion (Iowa Workman's Compensation 1916) as to what it means to furnish. That opinion states: "The word 'furnish' has no legal or technical definition different from its ordinary use in commercial parlance, which is 'to supply with anything necessary or needful' as ordinarily understood it means 'to supply or to provide.'" That opinion further says: "The statute requires that such services be reasonable, but as to what is reasonable is a question of fact...."

Claimant herein consulted his doctor about his back. The doctor suggested a "real firm mattress" and provided claimant with a prescription not unlike he might have given for medication or a brace or for therapy. Claimant took the prescription to his spouse and they began comparison shopping. Defendants should be grateful for that effort. We ordinarily do not require persons getting benefits under Iowa Code section 85.27 to go to discount drug stores for the lowest prescription price or to endeavor to find the lowest room rate at the local hospital. While it behooves us all to be conscious of medical costs, we also want high quality medical care to comfort and to heal our injured workers. One does not need to have a back problem to be aware of differences in mattresses. The Zahns found a mattress which fit claimant's back. He reportedly is resting much better.

Admittedly, there could have been better communication between the parties in this matter. Perhaps claimant's asking Andrews about the mattress initially might have avoided some difficulty. On the other hand, claimant's settlement agreement maintains his entitlement to medical benefits.

Defendants argue that a mattress could have been obtained at a lower cost. Andrews, however, admitted a lack of awareness of the degree of firmness required by claimant. There is no certainty that the mattress he found would fit claimant's back and, therefore, provide the relief claimant has been able to obtain. Neither was evidence presented as to a price in the Cedar Rapids area, a delivery charge, or a guarantee.

After hearing the testimony in this matter, the undersigned believes that the orthopedic mattress is a supply reasonably necessary to treat claimant's injury and that under the circumstances in this case, the charge was reasonable.

Claimant has asked that this action be considered with an eye to whether or not the final paragraph of Iowa Code section 86.13 has been triggered. That section provides:

> If a delay in commencement or termination of benefits occurs without reasonable or probable cause of 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.

Defendants vigorously resisted consideration of this issue.

When the final paragraph of 86.13 is read with the first sentence of the section ("If an employer or insurance carrier pays weekly compensation benefits to an employee....") it becomes apparent that 86.13 has no applicability here as this matter concerns only medical benefits.

FINDINGS OF FACT

WHEREFORE, it is found:

That claimant received a compensable injury to his back on October 3, 1979.

That claimant was treated for his injuries by Doctors Finn and Robb.

That claimant was told by Dr. Robb to place a board under his mattress.

That after the board was in place, the springs in the mattress poked through.

That claimant entered an agreement for settlement in which his right to medical benefits remains intact.

That Dr. Finn provided claimant with a prescription for an "orthopedic firm mattress."

That claimant's spouse did comparison shopping to get the best buy.

That the mattress purchased cost $616.85 with tax and with no delivery charge.

That the purchased mattress has a fifteen year guarantee which is not pro-rated.

That the mattress has provided claimant with some relief from his back discomfort.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

That an orthopedic mattress is a supply reasonably necessary to treat claimant's injury.

That the cost of the orthopedic mattress in this case is reasonable.

That the provisions of the final paragraph of Iowa Code section 86.13 have not been triggered.

THEREFORE, it is ordered:

That defendants pay unto claimant the cost of an orthopedic mattress totaling six hundred sixteen dollars and eighty-five cents ($616.85).

That defendants pay costs of this action pursuant to industrial commissioner rule 500-4.33.

Signed and filed this 22 day of July, 1983.

JUDITH ANN HIGGS
DEPUTY INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOLENE ZUMBRUNNEN,	:	
	:	File No. 715103
Claimant,	:	
	:	A R B I T R A T I O N
vs.	:	
	:	D E C I S I O N
IOWA CORRECTIONAL FACILITY FOR WOMEN,	:	
	:	
Employer,	:	
	:	
and	:	
	:	
STATE OF IOWA,	:	
	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Jolene Zumbrunnen, against Iowa Correctional Facility for Women, employer, and the State of Iowa, insurance carrier, for benefits as a result of an injury on September 11, 1982. On January 27 and February 3, 1984 this case was heard by the undersigned. This case was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant, Don McKee, Marge Sexton, Susan Hunter and George Sauers; claimant's exhibits P-2, P-3B, P-11, P-12, and P-9; defendants' exhibits D-1 and D-2; and joint exhibits A through X.

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 her employment; whether there is a causal relationship between the alleged injury and the medical benefits on which she is now basing her claim; and whether claimant is entitled to medical benefits pursuant to §85.27, Code of Iowa.

EVIDENCE PRESENTED

Claimant testified she is 28 years old and the mother of two children ages eight years and six years. In July 1982 she said she was employed as a correctional officer at the Iowa Men's Reformatory at Anamosa, Iowa. While at Anamosa, claimant worked the afternoon shift.

Claimant stated that in July 1982 she took a voluntary leave of absence without pay from her job in order to move to Des Moines, Iowa with her friend who had been elected president of Council 61, American Federation of State, County and Municipal Employees. At the same time, she said she put in for a transfer to Des Moines specifying she was available for a morning or afternoon shift.

Claimant revealed that in August 1982 she received a call from Marge Sexton of the Iowa Correctional Facility for Women at Mitchellville, Iowa. Claimant made arrangements to tour the institution. Claimant said she did tour the institution and requested that she be placed on a day shift. Claimant said that she was told there would probably not be a problem getting days, but admitted she was told this could not be guaranteed. On August 13, 1982 claimant said she accepted the transfer and was told to report to work at 7:00 a.m. August 27, 1982.

Claimant said she reported as she was directed and learned later that day that she would be placed on the afternoon shift. Claimant protested.

Claimant stated that as a result of being assigned to the afternoon shift she encountered baby-sitting problems and loss of sleep. Claimant revealed she sought numerous remedies for her predicament including conferences with the warden, her supervisor and filing a grievance. Eventually claimant told her employer she would not come to work unless she had a day shift. Claimant was suspended by her employer as a result of her

efusal to work. Claimant said she considered this harassment ecause the suspension included a day she had actually worked. he admitted, however, that the employer reduced the suspension hen it was learned she had returned to work.

Claimant testified that during this period of time she began o have increasing problems with sleep and nervousness and uffered what she called panic attacks. She went to see Harold . Eklund, M.D.. He told her she needed psychiatric care. laimant said she then went to Broadlawns Hospital where she nderwent psychiatric counseling. Claimant did not testify she ncurred medical expenses.

It was claimant's feeling that her psychiatric problems were he result of harassment and abuse by her employer. Amoung the atters she felt were abuse are (1) she felt the employer misled er about getting a day shift, (2) the employer's interpretation f the union contract was different than hers, (3) she was uspended for refusing to come to work, (4) she was required to et a medical statement in order to draw sick leave, (5) the mployer wrote a letter to her doctor, and (6) the employer did ot have her check ready on the day she resigned.

Don McKee testified he was the president of Council 61, merican Federation of State, County and Municipal Employees in eptember 1982. He testified that his interpretation of the nion contract was different than the employer's and that ccording to his interpretation claimant should have been given day shift. He also stated other employees were having the ame problem as claimant.

Marge Sexton testified she was the personnel director for he employer in September 1982. She stated that she did not elieve she was at anytime abusive to claimant.

Susan Hunter testified she was the warden at Mitchellville September 1982. She recalled the meeting with claimant. She enied she harassed or abused claimant.

The testimony of George Sauer and testimony by deposition of chael Brand were fully considered.

Claimant introduced two medical reports. Harold E. Ecklund, D., stated that it was his opinion claimant's problem did not ise out of the scope of her employment and that her problem s basically iatrogenic. (See joint exhibit B)

Karl W. Northwall, M.D., stated that it was his opinion that aimant's problem did arise to some extent from her employment. rther that her work and the acts of management had some part the causation of claimant's difficulties. (See joint exhibit

APPLICABLE LAW

Claimant has the burden to prove that she sustained an jury which arose out of and in the course of her employment. ndahl v. L. O. Boggs Co., 236 Iowa 296, 18 N.W.2d 607 (1945); mquist v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. (1934). A personal injury is an impairment of health which sulted from the employee's work. Jacques v. Farmers Lumber d Supply Co., 242 Iowa 548, 47 N.W.2d 236 (1951); Lindahl, 236 wa 296, 18 N.W.2d 607; Almquist, 218 Iowa 724, 254 N.W. 35. he incident or activity need not be the sole proximate cause, the injury is directly traceable to it." Holmes v. Bruce tor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974); Langford v. llar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971). cause is proximate if it is a substantial factor in bringing out the result." Blacksmith v. All-American, Inc., 290 N.W.2d 8, 354 (Iowa 1980).

The question of whether a gradual stimulus causing a nervous jury is compensable is covered in Larson, The Law of Workmen's mpensation Law, Vol. 1B, p. 7-637 and following, §42.23(b). cording to Larson, there is no question but what a gradual imulus which causes a nervous injury is compensable; the oblem is one of proof. The polarity in cases is exemplified Swiss Colony v. Department of ILAR, 72 Wis.2d 46, 240 N.W.2d 8 (1976) and Carter v. General Motors Corporation, 261 Mich. 7 106 N.W.2d 105 (1960). Wisconsin, which represents the -called objective view, ruled that "in order for nontraumatically used mental injury to be compensable in a workmen's compensation se, the injury must have resulted from a situation of greater dimensions than the day-to-day mental stress tensions which all employees must experience." 240 N.W.2d at 130, citing 215 N.W.2d at 373. Michigan, holding with the subjective test, ruled that a claimant who had prior emotional trouble was eligible for workers' compensation where the evidence showed his inability to keep up on the assembly line and subsequent berating by his foreman made him fear losing his job and resulted in a psychosis.

Larson cites the Wisconsin rule with approval. Another case holding with the objective theory cites the "floodgates" argument that the allowance of workers' compensation on a subjective test would create a voluntary retirement program for any employee who was ready to give up active employment. Seitz v. L & R Industries, Inc., 437 A.2d 1345 (R.I., 1981)

ANALYSIS

The facts show that claimant was dissatisfied with being placed on a night shift even though she had stated she would be available on that shift. Claimant was at no time guaranteed a day shift though she was given indications it might be available. It is apparent that claimant was not the only employee who had a contract dispute with the employer over shift preferences; however, no other employees suffered a psychological injury as a result.

The record does not establish that the employer unduly harassed or abused claimant. Most of her problems seem to have arisen out of the fact that she was having difficulties getting a baby sitter and as a consequence was loosing sleep. Although Dr. Northwall attributes part of claimant's problems to her employer, Dr. Ecklund felt the problems did not arise from her employment.

Finally, claimant presented no evidence that she incurred any medical expenses as a result of the alleged injury.

FINDINGS OF FACT AND CONCLUSION OF LAW

WHEREFORE, based upon the evidence presented and the principles of law above stated, the following findings of fact and conclusion of law are made:

FINDINGS OF FACT:

1. Claimant is 28 years old and the mother of two minor children.

2. Claimant suffered an emotional disorder in September 1982.

3. Claimant's work for the employer did not cause the emotional disorder.

4. Claimant's employer did not abuse or harass her.

5. Claimant did not incur medical expenses as a result of her alleged injury.

CONCLUSION OF LAW:

Claimant did not receive an injury arising out of and in the course of her employment on September 11, 1982.

ORDER

THEREFORE, claimant shall take nothing from the proceedings.

The parties are ordered to pay the costs of producing their own witnesses and claimant is ordered to pay the costs of the shorthand reporter at the hearing.

Signed and filed this 9th day of February, 1984.

Steven E. Ort
Deputy Industrial Commissioner

DECISION INDEX

VOLUME IV

SUBJECT INDEX

Volume IV